

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, : Case Nos. 2006-0294
 : 2006-0298
Appellant, :
 : On Appeal from the Marion County
v. : Court of Appeals
 :
Lee Crager, : Court of Appeals Case No. 9-04-54
 :
Appellee. :

**REPLY SUPPLEMENTAL BRIEF OF AMICUS CURIAE
THE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE LEE CRAGER**

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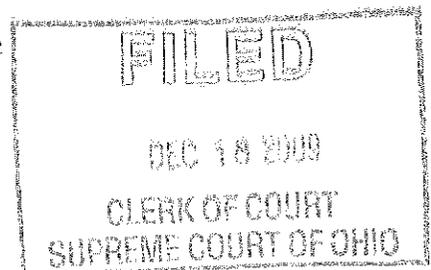


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PROPOSITION OF LAW OF AMICUS CURIAE

A DNA analyst's report regarding the testing that analyst conducted and which was prepared for use at the accused's trial, is testimonial under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, and the testing analyst is a witness against the accused for Sixth Amendment purposes. Absent proof that the testing analyst was unavailable to testify at trial and that the accused had a prior opportunity to cross-examine that analyst, the accused is entitled to confront the testing analyst at trial. *Melendez-Diaz* (2009), 557 U.S. ___, 129 S.Ct. 2527, 2532, 2540, 174 L.Ed.2d 314, applied. 1

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REPLY ARGUMENT

QUESTION UPON RECONSIDERATION

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PROPOSITION OF LAW OF AMICUS CURIAE

A DNA analyst's report regarding the testing that analyst conducted and which was prepared for use at the accused's trial, is testimonial under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, and the testing analyst is a witness against the accused for Sixth Amendment purposes. Absent proof that the testing analyst was unavailable to testify at trial and that the accused had a prior opportunity to cross-examine that analyst, the accused is entitled to confront the testing analyst at trial. *Melendez-Diaz* (2009), 557 U.S. ___, 129 S.Ct. 2527, 2532, 2540, 174 L.Ed.2d 314, applied.

The State's attempts to convince this Court that *Melendez-Diaz* should not control here, primarily because no "live" forensic testimony was adduced in that case, are unavailing. At Mr. Crager's trial, the inculcating reports of the DNA analyst were admitted into evidence during the testimony of the analyst's supervisor, who "played no role in developing the DNA analysis." *State v. Crager*, 116 Ohio St.3d 369, at ¶73. This scenario was precisely what occurred in the 2004 California trial of Antonio Barba. See *People v. Barba*, 2007 Cal. App. Unpub. LEXIS 9390, *3-4, 20 (Cal. App. 2d Dist. Nov. 21, 2007) (unpublished). The state appellate court in *Barba* concluded that the state's DNA "evidence was trustworthy" because "there was evidence that an established laboratory followed established practices in analyzing the DNA." *Id.*, *22. The United States Supreme Court, however, granted Barba a writ of certiorari and vacated his first-degree murder conviction, citing *Melendez-Diaz* as the sole basis for its action. *Barba v. California*, ___ U.S. ___, 129 S.Ct 2857 (June 29, 2009).

The introduction of testimonial hearsay against both Barba and Crager was, arguably, proper under *Ohio v. Roberts* (1980) 448 U.S. 56, 66, which sanctioned introduction of hearsay statements that bore “adequate indicia of reliability,” which the state could establish by demonstrating that the evidence came with “particularized guarantees of trustworthiness.” But, of course, *Crawford v. Washington* (2004), 541 U.S. 36, explicitly found that this approach did not satisfy the requirements of the Sixth Amendment, and held that defendants have an inviolable right to the in-court confrontation of testimonial hearsay declarants. Then, in *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. ___, 129 S.Ct. 2527, the Court applied *Crawford* to forensic testing and analysis, holding that the right to confront forensic analysts stands on even footing with the right to confront lay witnesses.

Yet, despite this clear, bright-line shift in the United States Supreme Court’s interpretation of the Confrontation Clause—which that Court has held applies *in this case*—the State argues that a return to pre-*Crawford* and pre-*Melendez-Diaz* practices is appropriate. But the practice for which the State advocates here, introduction of forensic evidence through an analyst’s supervisor, is not even contemplated as a possibility by *any* of the opinions in *Melendez-Diaz*. The reason for that is simple: despite the obvious practical benefits of permitting such a practice, particularly where the trial attendance of the analyst may be difficult to procure, the Confrontation Clause guarantees the right to confront the analyst, not the supervisor. Thus, this Court’s ruling in *State v. Crager*, 123 Ohio St.3d 1210, 2009-Ohio-4760 (*Crager II*), is correct, and Mr. Crager is entitled to the new trial ordered therein.

Because controlling United States Supreme Court precedent dictated this Court’s ruling in *Crager II*, it is, arguably, unnecessary to address the policy considerations raised by the State and by the Attorney General. But the Ohio Public Defender would respectfully con-

tend that any objectively performed policy analysis would tilt in favor of confrontation. The State and the Attorney General cite the “hardships” that would result from application of *Crawford* and *Melendez-Diaz*. It should first be noted that Justice Scalia acknowledged that enforcing the requirements of the Constitution will not always be the easiest approach, but observed that the Confrontation Clause “is binding, and we may not disregard it at our convenience.” *Melendez-Diaz*, 129 S.Ct. at 2540. (“The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination.”)

And as for the critical importance of confronting the individuals who actually perform the testing, Justice Scalia cites to a study identifying “cases of documented ‘drylabbing’ where forensic analysts report results of tests that were never performed,” and observes that the “fraudulent analyst” may “alter his testimony when forced to confront the defendant.” *Id.* at 2536. Succinctly stated, a primary value flowing from confrontation of forensic analysts is that “the analyst who provides false results may, under oath in open court, reconsider his false testimony.” *Id.* at 2537. The State’s suggestion that it is satisfactory to merely permit the analyst’s supervisor to be cross-examined—in lieu of confrontation of the analyst—provides the jury with no means whatsoever of assessing the integrity of the analyst who performed the actual testing. As that practice does not meet the Confrontation Clause’s requirement that “reliability be assessed . . . by testing in the crucible of cross-examination,” it must be rejected as unconstitutional. *Crawford*, 541 U.S. at 61.

CONCLUSION

For the foregoing reasons, the Office of the Ohio Public Defender requests that this Court deny reconsideration, and remand the case for retrial.

Respectfully submitted,

Office of the Ohio Public Defender



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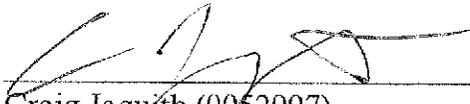
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Supplemental Brief of Amicus Curiae the Office of the Ohio Public Defender in Support of Appellee Lee Crager was sent by regular U.S. Mail, postage prepaid, this 18th day of December, 2009, to Benjamin Mizer, Solicitor General, Ohio Attorney General's Office, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, Brent W. Yager, Marion County Prosecutor, Marion County Prosecutor's Office, 134 E. Center Street Marion, Ohio 43302, and to Kevin P. Collins, Collins & Lowther, 132 South Main Street, Marion, Ohio 43302.



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