ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellant,

vs.

LEE A. CRAGER,

Appellee.

Case No. 06-0294
Case No. 06-0298

On Remand from the United States Supreme Court

SUPPLEMENTAL REPLY BRIEF OF APPELLEE, LEE A. CRAGER

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ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW: *THE CONFRONTATION CLAUSE AND EVID.R. 703 REQUIRE THE TESTIMONY OF A DNA ANALYST BE BASED UPON FACTS PERCEIVED BY THE ANALYST OR OTHERWISE ADMITTED PROPERLY INTO EVIDENCE.*

The Nature of Expert Opinion Testimony

The opinion of an expert has two functionally distinct components. The first includes principles and theories grounded in the scientific literature, research, and studies in the expert's field. These principles and theories guide the expert's interpretation of the case-specific facts. The second part is the case-specific information drawn from sources proven to be relevant to the case at issue. Carlson, Experts as Hearsay Conduits: Confrontation Abuses In Opinion Testimony (1992), 76 Minn. L. Rev. 859, 870.

An expert's opinion testimony can be analyzed as a deductive syllogism. Imwinkelreid, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony (1988), 67 N.C. L. Rev. 1, 2. The major premise would be a principle, procedure, or explanatory theory derived from the witness's expertise. *Id.* The minor premise would be the specific facts of that particular case. The expert applies the major premise to the minor premise to arrive at a conclusion. In a valid deductive argument, the premises, *if true*, indisputably establish the truth of the conclusion.

In this case, the major premise is drawn from Mr. Wiechman's knowledge of DNA testing and analysis which is derived from materials such as books, lectures, treatises, and training. See *Id.* at 4. Mr. Wiechman had been employed at BCI for almost six years. (Tr.,p.790) Prior to that he had been a crime scene investigator in Tennessee for two and a

half years. (Tr.,p.790-791) He had a Bachelors of Science Degree in Biochemistry from the Ohio State University and he had a graduate class at the University of Kentucky in Forensic DNA analysis. (Tr.,p.791) In addition, he had job-related training involving "examining items of physical evidence, journal articles, giving lectures on specific topics such as blood, such as semen, and all of that training finally culminating in a mock trial which I successfully completed in both Tennessee as well as Ohio." (Tr.,p.791-792) Mr. Crager acknowledges that with a proper foundational basis, Mr. Wiechman's expert opinion testimony would have been admissible.

The minor premise in this case would be the test results generated by the actual "physical bench work" performed by Ms. Duvall. The bench work involved obtaining samples from various items of evidence. (Tr.,p.820) It involved performing testing on those samples and on samples known to have been obtained from Mr. Crager and Ms. Boyd. (Tr.,p.805) This testing produced charts known as electrophrerograms. From these charts, a sheet was used to determine a profile. (Tr.,p.803-804) Mr. Wiechman's involvement in this process began when the profile was generated. It consisted of reviewing "the notes she took while examining those items, the actual profiles she generated on the specific unknowns as well as the knowns, all of the conclusions, as well as the laboratory report that she generated that consisted of all the findings that she had within this case." His job was to "ma[k]e sure that the decisions or the conclusions that she came up with were consistent and were supported by her work that she did." (Tr. p. 803) In short, he reviewed and confirmed her

interpretation of the testing data. Mr. Wiechman testified he did not perform or observe any of the physical bench work, only Ms. Duvall did. She did not testify.

Because the results of Ms. Duvall's testing and her interpretation of the results were testimonial hearsay, her written reports were inadmissible. Because Mr. Wiechman had no personal knowledge of the testing, he could not testify about the testing results. Because he could not testify about the testing results and the results were not otherwise admissible, Mr. Wiechman could not testify about his expert interpretation of the testing results.

The DNA Reports Were Inadmissible

Melendez-Diaz v. Massachusetts involved a "rather straightforward application of [its] holding in *Crawford.*" The Court stated:

> "In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. 2527, 2532 (2009)

A fair reading of the opinion reveals the analyst's statements in *Melendez-Diaz* do not differ in any legally significant way from Ms. Duvall's DNA reports. Appellant's arguments otherwise were already considered and rejected in *Melendez-Diaz.*

In *Melendez-Diaz*, the Court began by considering the argument "that the analysts are not subject to confrontation because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband." *Melendez-Diaz v.*

Massachusetts, 557 U.S. ___ , 129 S.Ct. 2527, 2533 (2009) The Court rejected this argument:

> "The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution must produce the former; the defendant may call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2534

"It is often, indeed perhaps usually, the case that an adverse witness's testimony, taken alone, will not suffice to convict." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2534 The Court held that longstanding case law did not allow such testimony to be admitted absent a defendant's opportunity to cross-examine the witness. *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2534

The Court considered the argument that "the analysts should not be subject to confrontation because they are not 'conventional' (or 'typical' or 'ordinary') witnesses of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2534. The Supreme Court rejected this argument finding that 'the purported distinctions * * * between this case and Sir Walter Raleigh's 'conventional' accusers do not survive scrutiny." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2535. The Court found that it did not matter that the analysts "observe[d] neither the crime nor any human action related to it." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2535. The Court noted:

> "For example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all

> expert witnesses—a hardly 'unconventional' class of witnesses. " *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2535.

The Supreme Court considered the argument that "there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is 'prone to distortion or manipulation,' and the testimony at issue here, which is the 'resul[t] of neutral, scientific testing.' *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2536. The Court rejected the argument:

> "This argument is little more than an invitation to return to our overruled decision in *Roberts* which held that evidence with 'particularized guarantees of trustworthiness' was admissible notwithstanding the Confrontation Clause. What we said in *Crawford* in response to that argument remains true: 'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination.'" *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2536 Internal citations deleted.

The Constitution guarantees one way to challenge or verify the results of a forensic test: confrontation. "We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available. " *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2536

The Supreme Court considered the argument that "the analysts' affidavits are admissible without confrontation because they are 'akin to the types of official and business records admissible at common law.'" The Court determined that the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2538.

The Supreme Court considered the argument that it "should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2540. The Court rejected the argument:

> "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses. " *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. 2527, 2532 (2009)at p. 2540

Finally, the Court considered the argument that the requirements of the Confrontation Clause should be relaxed "to accommodate the 'necessities of trial and the adversary process.' " *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2540. The Court sharply rejected this argument:

> "It is not clear whence we would derive the authority to do so. 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. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." *Melendez-Diaz v. Massachusetts,* 557 U.S. ___ , 129 S.Ct. at p. 2540

The *Melendez-Diaz* opinion leaves little doubt that records of scientific tests are "testimonial" under *Crawford v. Washington.*

The starting point for this Court's analysis is the premise that Ms. Duvall's DNA reports, like the certificates in *Melendez-Diaz*, are testimonial. Because Ms. Duvall did not testify and was not deposed, her written reports violated the Confrontation Clause and were not admissible.

Mr. Weichman's Testimony About the Actual Results of the DNA Testing Was Inadmissible

Mr. Wiechman never specifically testified about the actual results of the DNA testing. Instead, his testimony adopted and incorporated Ms. Duvall's reports, notes, electrophrerograms, and profiles by reference. (Tr.,p.815, 818-821, 823, 827) The data in these materials constituted the minor premise to which he applied his expertise to produce conclusions for the jury. See Imwinkelreid, 67 N.C. L. Rev. at 16. In Ohio the minor premise must be admitted into evidence via the testimony of the expert witness or some other way.

Ms. Duvall's reports, notes, electrophrerograms, and profiles were the result of the actual "physical bench work." In his testimony, Mr. Wiechman distinguished between actual "physical bench work" and interpretation of the resulting data. (Tr.,p.839-840) Mr. Wiechman neither performed nor observed the "physical bench work" on any of the samples in this case. What he knew was based on the notes and charts generated by Ms. Duvall's bench work.

Mr. Wiechman's testimony about the actual tests or the results of the tests was not based on personal knowledge and was not admissible. The Ohio Rules of Evidence prohibit witnesses from testifying about matters unless the witness possesses personal knowledge of those matters:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses." Ohio Evid.R. 602

Personal knowledge is knowledge that is "gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 320, 2002-Ohio-2220, ¶26 quoting Black's Law Dictionary (7th Ed.Rev.1999) 875. These case specific facts must have been perceived through one or more of the senses of the witness. *Id.*, quoting Weissenberger's Ohio Evidence (2002) 213, Section 602.1.

The traditional common-law view was that the expert's knowledge of the specific facts of the pending case had to take the form of personally observed facts or other independently admissible evidence. Imwinkelreid, 67 N.C. L. Rev. at 10. Ohio Evid.R. 703, consistent with the common law rule, requires the expert's opinion be based on facts or data perceived by the expert or admitted in evidence at the hearing. It provides that "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Ohio Evid.R. 703. Mr. Wiechman's testimony about the tests and test results was not based on personal knowledge; evidence of the tests and test results were not otherwise properly admitted. Mr. Weichman's testimony was impermissible under the Ohio Rules of Evidence.

Mr. Wiechman's testimony about the tests and the test results also violate the Confrontation Clause. The U.S. Supreme Court made clear in *Davis v. Washington* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second:

> "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay

> testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it." *Davis v. Washington*, 547 U. S.813, 826, 126 S.Ct. 2266, 2276 (2006) (emphasis in original).

There can be no confrontation when statements are written in a report then recited by a coworker. It is inadequate for a witness who did not observe the conduct of the test or the handling of the substance tested to report someone else's assertions as to the chain of custody of the substance, the test performed on it, and the results of that test. *The Confrontation Blog*, Thoughts on Melendez-Diaz: chain of custody, products of a machine, who must testify, etc., November 13, 2008, Richard D. Friedman (http://confrontationright.blogspot.com/2008/11/thoughts-on-melendez-diaz-chain-of.html).The Confrontation Clause requires that testimony about the factual predicates to an expert opinion be presented by a live witness with personal knowledge.

Ms. Duvall's reports, notes, electrophrerograms, and profiles were hearsay. Mr. Wiechman should not have been allowed to repeat them or endorse them. A hearsay report, otherwise inadmissible, is not rendered admissible simply because it is read into evidence by an expert in open court. Mr. Wiechman's testimony about the DNA tests and the results of the tests violated both the Confrontation Clause and the Ohio Evidence Rules.

Mr. Weichman's Testimony About the Interpretation of the Results of the DNA Testing Was Inadmissible

Lacking a basis in his personal knowledge or facts admitted into evidence, Mr. Wiechman's opinion is not admissible. In Ohio, the case-specific facts (the minor premise)

forming the basis of an expert opinion must be *admitted into evidence*. Evid.R. 703. This differs significantly from the Federal Rule which provides:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to the expert at or before the hearing*. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Federal Evid.R. 703 (emphasis added)

Although the Federal Rule would appear to allow Mr. Wiechman's opinion testimony, the Ohio Rule clearly does not.

The State's interpretation is inconsistent with the well established case law on Evid.R. 703. In *State v. Chapin*, this Court considered "whether a psychiatrist, appearing as an expert witness, may testify about the contents of writings which he did not prepare but which aided him in formulating his opinion." *State v. Chapin* (1981), 67 Ohio St.2d 437, 442, 424 N.E. 2d 317. The Court concluded that Ohio's rule is well settled: "The hypothesis upon which an expert witness is asked to state an opinion must be based upon facts within the witness, own personal knowledge or upon facts shown by other evidence." *Id.* The report and records in question were not prepared by the witnesses nor were these documents admitted into evidence. Thus, the experts' testimony was inadmissible. *Id.* In *State v. Solomon*, the appellant contended "that the opinion of an expert witness must be based on the expert's own personal knowledge or on facts admitted in evidence and may not be based on hospital records and/or opinions of other experts." *State v. Solomon* (1991), 59 Ohio St.3d 124, 126, 570 N.E.2d 1118. This Court noted that "[w]hile in a general sense we agree with the

contentions of appellant, upon the facts of this case, we do not find appellant's arguments well-taken." *Id.* The Court compared the facts with those in *Chapin*:

> "In Chapin, there is no indication that the psychiatrists called to testify ever personally examined the defendant. Their testimony was based on reports and records not in evidence and not prepared by the witnesses. Those facts differ from the facts now before us. Both of the doctors herein, whose testimony was disallowed, had examined appellee and, thus, had based their opinions on facts or data perceived by them." *Id.*

The Court held that Evid. R. 703 was satisfied where an expert bases his opinion, in whole or in major part, on facts or data perceived by him. *Id.* It is significant to note that Mr. Wiechman's opinion testimony was not based *in any part* on facts or data perceived by him.

The Appellant cites *State v. Mack* for the proposition that when a detective conducts a personal analysis of [ballistics] evidence, the fact that his colleagues in the laboratory may have confirmed, or even debated, his findings does not remove his opinion beyond the boundaries for admissible expert testimony prescribed by Evid.R. 703. However, the witness in *State v. Mack* test-fired the gun confiscated from appellant upon his arrest, compared the test shot with the bullet recovered from the victim and the spent shell casings recovered from the crime scene, and concluded that all had been discharged from appellant's gun. *State v. Mack* (1995), 73 Ohio St.3d 502, 512, 653 N.E.2d 329. The Court concluded the findings for the ballistics examination were "doubtlessly based on the witness's own observations":

> "[the witness] conducted extensive analysis upon appellant's gun, the morgue bullet recovered from the victim, and the shell casings recovered from the crime scene. The fact that his colleagues in the laboratory may have confirmed, or even debated, his findings does not remove his opinion beyond the boundaries for admissible expert testimony prescribed by Evid.R. 703." *Id.*

Here, Mr. Wiechman did not base his opinion on his own observations, but on those of Ms. Duvall.

The Appellant asserts that this Court's Decision in *State v. Eley* applied *Solomon* to uphold expert testimony about an autopsy by a coroner who did not supervise the autopsy or tell the performing pathologist what to do, even though the coroner relied on the pathologist's report to refresh his memory and that report was not introduced into evidence. Again, the case involved a witness with personal knowledge:

> "While Belinky did not perform the autopsy on Aydah's body, he was present while it was done, and it was done at his direction. * * * In this case, Belinky, as county coroner, was clearly qualified to testify as an expert when he observed the autopsy performed on the victim. His testimony was based on his personal observations, which were refreshed by the autopsy report and hospital records. Belinky's testimony regarding the entrance wound on Aydah's head was plainly based on his personal observations." *State v. Eley* (1996), 77 Ohio St.3d 174, 181

If Mr. Wiechman had observed the actual "physical bench work" performed by Ms. Duvall, *State v. Eley* would support the Appellant's argument. However, Mr. Wiechman neither observed nor performed any of the "physical bench work." He had no personal knowledge and his testimony did not comply with Evid.R. 703.

Appellant argues that Evidence Rule 703 is satisfied if Wiechman "perceived" the data by reading the reports generated by Ms. Duvall's testing. Brief of Attorney General at p. 4. This interpretation would make the words of Rules 703 and 602 meaningless. Personal knowledge of facts is not obtained by reading an account of those facts prepared by someone else. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220. Appellant's argument would mean that an expert could base an opinion on facts admitted into

evidence or facts not admitted into evidence, but which the expert read about. Such an interpretation renders the rule meaningless. Evidence Rule 703 requires more. Mr. Wiechman's opinion testimony was impermissible under Rule 703 and longstanding case law.

The Confrontation Clause would prohibit Mr. Wiechman's opinion testimony even if it was otherwise admissible under the Rules of Evidence. Appellant asserts that Mr. Wiechman's testimony was acceptable "because the defendant can cross-examine the expert about his opinions, the basis for them, and any limitations of those opinions." Brief of Attorney General, at p. 3. Appellant's assertion is partly true. While it is important that Mr. Crager was afforded the opportunity to cross examine Mr. Wiechman about the major premise and his conclusion, that is not enough. Mr. Wiechman could not be cross examined about the basis for his opinions because he had no personal knowledge of the samples, the testing, or the charts generated from them. Here, the minor premise was a phantom.

Cross examination about the case-specific facts forming the basis for the expert's opinion (the minor premise) is critical. The expert applies the major premise to the minor premise to arrive at a conclusion. In a valid deductive argument, the premises, *if true*, indisputably establish the truth of the conclusion. Appellant asserts that the truth of the minor premise is not relevant. It argues that it should be admissible because it is offered for the truth of the matters asserted. This argument ignores the nature of the expert's opinion testimony. If the minor premise was not proffered as true, it could not logically support an opinion proffered as true. One cannot accept an opinion as true without implicitly accepting

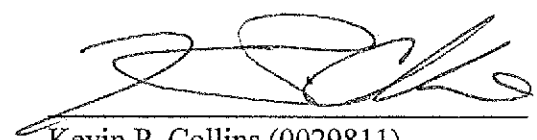
the facts upon which the expert based that opinion. Furthermore, it is not logically possible for a jury to use the hearsay statements to assess the weight of the expert's opinion other than by considering their truth.

Mr. Crager acknowledges that the Confrontation Clause is satisfied if expert testimony is based on personally perceived facts or upon facts properly admitted at the hearing. Here, Mr. Weichman did not perceive the facts or data upon which his opinions were premised. The Confrontation Clause prohibits expert opinion testimony, based upon facts or data not admitted into evidence and about which the witness has no personal knowledge.

CONCLUSION

For the reasons articulated above, the Third District Court of Appeals decision must be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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