IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Joshua C. Blazier, Senior Airman (E-4), United States Air Force, *Appellant.*	*AMICUS CURIAE* BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE ON SPECIFIED ISSUES Crim. App. No. 36988 USCA Dkt. No. 09-0441/AF

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May 3, 2010

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

In accordance with Rule 26 of this Court's Rules of Practice and Procedure, the National Institute of Military Justice ("NIMJ") respectfully submits this brief as *amicus curiae*. For the reasons explained below, the Court should answer both specified questions in this case in the negative.

Specified Issues

> **WHILE THE RECORD ESTABLISHES THAT THE DRUG TESTING REPORTS, AS INTRODUCED INTO EVIDENCE BY THE PROSECUTION, CONTAINED TESTIMONIAL EVIDENCE (THE COVER MEMORANDA OF AUGUST 16), AND THE DEFENSE DID NOT HAVE THE OPPORTUNITY AT TRIAL TO CROSS-EXAMINE THE DECLARANTS OF SUCH TESTIMONIAL EVIDENCE,**
>
> **(A) WAS THE CONFRONTATION CLAUSE NEVERTHELESS SATISFIED BY TESTIMONY FROM DR. PAPA? SEE, E.G., PENDERGRASS V. INDIANA, 913 N.E.2d 703, 707-08 (IND. 2009). BUT SEE, E.G., STATE V. LOCKLEAR, 681 S.E.2d 293, 304-05 (N.C. 2009); OR**

(B) IF DR. PAPA'S TESTIMONY DID NOT ITSELF SATISFY THE CONFRONTATION CLAUSE, WAS THE INTRODUCTION OF TESTIMONIAL EVIDENCE NEVERTHELESS HARMLESS BEYOND A REASONABLE DOUBT UNDER THE CIRCUMSTANCES OF THIS CASE IF HE WAS QUALIFIED AS, AND TESTIFIED AS, AN EXPERT UNDER M.R.E. 703 (NOTING THAT '[I]F OF A TYPE REASONABLY RELIED UPON BY EXPERTS IN THE PARTICULAR FIELD IN FORMING OPINIONS OR INFERENCES UPON THE SUBJECT, THE FACTS OR DATA [UPON WHICH THE EXPERT RELIED] NEED NOT BE ADMISSIBLE IN EVIDENCE IN ORDER FOR THE OPINION OR INFERENCE TO BE ADMITTED")? COMPARE, E.G., UNITED STATES V. TURNER, 591 F.3d 928, 933-34 (7th CIR. 2010), AND UNITED STATES V. MOON, 512 F.3d 359, 362 (7th CIR. 2008), WITH UNITED STATES V. MEJIA, 545 F.3d 179, 197-98 (2d CIR. 2008).

Interest of the Amicus

NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ participates actively in the military justice process through such means as the filing of *amicus* briefs, rulemaking comments, its website (www.wcl.american.edu/nimj), and its publications program, including the unofficial *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* (13th ed. 2010). A significant part of the fair administration of courts-martial is having panels which appear free from taint or unlawful influence.

Jurisdiction, Statement of the Case, and Facts

This case is properly before the Court in accordance with Article 67(a)(3), Uniform Code of Military Justice (UCMJ). Petitioner has previously submitted statements of the case and of the facts which require no comment.

Law

The Sixth Amendment to the United States Constitution guarantees defendants the right to confront the witnesses presenting "testimonial" evidence against them. Crawford v. Washington, 541 U.S. 36, 68 (2004). When an error of constitutional magnitude occurs, the conviction must be overturned, absent a finding that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); United States v. Brewster, 61 M.J. 425, 430 (C.A.A.F. 2005).

Federal Rule of Evidence (FRE) 803(6) and Military Rule of Evidence (MRE) 803(6) both set out the "business records" exception to the hearsay rule. The two rules differ in that the MRE adds language permitting the certification of evidence allowed by other U.S. criminal courts, in addition to clarifying that the armed forces are included in the definition of "business" for purposes of the rule. Finally, MRE 803(6) lists forensic laboratory reports as one type of evidence "normally

admissible" as a business record, while no such provision exists in the corresponding FRE. Military practice has long required an expert witness' testimony as a prerequisite for admitting evidence of drug use when interpreting urinalysis results. See, United States v. Murphy, 23 M.J. 310, 312 (C.M.A. 1987).

MRE 703 governs opinion testimony presented by expert witnesses. This rule allows experts to rely on data that is "of a type reasonably relied on by experts in the particular field," even if the data is not itself admissible in the court-martial. "Facts or data that are otherwise inadmissible shall not be disclosed to the members," with some exceptions. MRE 703, Manual for Courts-Martial, United States (2005 ed.). MRE 705 gives further guidance on the parameters of experts' testimony, allowing the expert to disclose his reasons for reaching his opinions without the necessity of revealing the facts behind such beliefs.

Argument

Specified Issue A

DR. PAPA'S TESTIMONY REGARDING THE LAB RESULTS ADMITTED AT APPELLANT'S COURT-MARTIAL DID NOT SATISFY THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE REQUIREMENTS.

The past six years have brought significant changes to the Confrontation Clause landscape beginning with the release of Crawford, replacing the hearsay exception rule set out in Ohio

v. Roberts, 448 U.S. 56 (1980). In Roberts, the Court approved the use of hearsay statements of unavailable witnesses when the evidence had "adequate 'indicia of reliability.'" Roberts, 448 U.S. at 66. If evidence did not fit within one of the "firmly rooted" hearsay exceptions, it had to have "particularized guarantees of trustworthiness" in order to meet the "reliability" standard for admission without the opportunity for cross-examination. Id. The Court discarded this test in Crawford, replacing it with an analysis which requires determining whether hearsay evidence is "testimonial." Crawford, 541 U.S. at 59.

Although declining to clearly define the boundaries of "testimonial" evidence, the Court did provide some sample items that would fall within that category. Id. at 68. Notably, the Court listed "pretrial statements that declarants would reasonably expect to be used prosecutorially," including affidavits. Id. at 51. The list also includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 52. While there was originally some debate as to whether any part of Roberts survived Crawford, Justice Alito made clear in Whorton v. Bockting, 549 U.S. 406, 413 (2007), that Roberts has been

overruled. Justice Scalia's opinion for the Court in Massachusetts v. Melendez-Diaz, 129 S. Ct. 2527, 2529 (2009), reconfirmed this fact.

While the business records exception to the hearsay rule is recognized as a "firmly rooted exception," the Crawford line of cases throws some categories of "business records" into dispute, particularly when the "business' purpose is to create evidence for trial. Melendez-Diaz, 129 S. Ct. at 2538. To be sure, MRE 803(6) lists "forensic laboratory reports" as one type of business record that is normally admissible at a court-martial. However, it is worth noting that neither the MRE, nor the FRE, pertaining to the business records exception to the hearsay rule has been updated in response to the Crawford decision. Taking into account the phrase "normally admissible" and the failure to update the evidentiary rules post-Crawford, the inclusion of forensic laboratory reports, such as the ones admitted in Appellant's court-martial, within the business records exception is suspect, at best. Indeed, Crawford itself reminds us that constitutional principles override contrary rules of evidence. Crawford, 541 U.S. at 61.

A case with facts similar to those in the instant case, Pendergrass v. State, 913 N.E.2d 703, 708 (Ind. 2009), is currently pending before the United States Supreme Court.

http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-866.htm. Even without the Supreme Court weighing in on Pendergrass, this Court's precedent, read with Melendez-Diaz, provides the necessary analysis for this Court. The Melendez-Diaz decision signified the death of the precedent this Court set in United States v. Magyari, 63 M.J. 123 (C.A.A.F. 2006). In Magyari, this Court held that drug testing reports generated from a random urinalysis were not testimonial under Crawford, relying on the now-defunct Roberts "reliability" factor. Magyari, 63 M.J. at 124, 125. Therefore, the reports were admissible without the opportunity for the appellant to cross-examine the drug testing laboratory personnel. Id. at 127, 128. Even so, this Court noted that laboratory reports may sometimes be considered testimonial. Id. at 127. Specifically, such reports can constitute testimonial evidence that does not qualify for the business records exception when the provider of the urine sample is under investigation at the time the sample is tested and such testing is done with a view towards collecting incriminating information. Id.

This Court later decided United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008), which involved a Confrontation Clause challenge to laboratory reports generated as the result of the appellant's arrest on drug and other charges. In Harcrow, the

Court reiterated the Magyari factors regarding an ongoing investigation and the evidentiary purpose of the testing in determining that the test results did constitute testimonial evidence in that case. Harcrow at 158, 159. Given the fact that Blazier was already under investigation at the time the evidence stemming from the July 2006 urinalysis was assembled, we need not wait for the United States Supreme Court to act on Pendergrass in order to apply Magyari and find that the laboratory reports from the July 2006 test were testimonial, and, thus, required the production of the witnesses whose work is reflected in the reports.

The plurality opinion in Melendez-Diaz establishes that the drug testing report for the earlier urinalysis also constituted testimonial evidence. The Court noted that considering laboratories as oases immune to shortcomings in training or ethics which can plague other evidentiary matters is no longer the right analysis. Melendez-Diaz, 129 S. Ct. at 2537-2538. This is particularly true when the laboratory is constituted for the purpose of creating evidence. Id. at 2538. Equally important, whether evidence is "reliable" no longer provides the means for admitting hearsay that would otherwise require the opportunity for cross-examination. Id. at 2537, fn. 6.

It is clear that the Air Force Drug Testing Laboratory,

generically, is not the witness testifying through the laboratory reports. Rather, the witnesses are those individuals who performed the tests detailed in the reports. See United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008), cert. denied, 129 S. Ct. 40 (2008); State v. Locklear, 681 S.E. 2d 293, 304-305 (N.C. 2009). Only those witnesses can satisfy the Confrontation Clause requirements; substitute experts do not suffice, as they are incompetent to answer the questions to be posed under cross-examination. Moon, 512 F.3d at 362. These questions include ascertaining the specimen testers' normal habits, as well as any potential distractions or deficiencies on the day that Appellant's sample was tested. Melendez-Diaz, 129 S. Ct. at 2536-2538. Determining the potential biases and demeanors of the individuals who performed the testing--important components for establishing credibility--is simply impossible through the testimony of a substitute witness. See United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

Specified Issue B

M.R.E. 703 DOES NOT CURE THE CONSTITUTIONAL ERROR INTRODUCED VIA THE ERRONEOUSLY ADMITTED LAB RESULTS AND DR. PAPA'S TESTIMONY.

Military Rule of Evidence 703 must be read in conjunction with MRE 705. Neither rule allows experts to gut hearsay rules by testifying to their "opinions" about laboratory testing

reports, thereby putting the stamp of approval on the testing done by others which is the entirety of the evidence against an accused. See United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009). This goes to the heart of the requirement that testimonial evidence be admitted only when the defense has the opportunity to cross-examine the witness providing the evidence against the accused. Clearly, the lab reports at issue in this case, not just the cover affidavits, fit within the examples of "testimonial" evidence found in Crawford, and any attempt to fit the reports into MRE 703 or MRE 705 fails to meet the constitutionally required confrontation rules.

While Melendez-Diaz makes clear that that decision does not stand for the proposition that every individual in the chain of custody must be brought to the witness stand, it does require the opportunity for the accused to cross-examine those individuals "testifying" against him. See Melendez-Diaz, 129 S. Ct. at 2533, fn. 1. It is not enough, for constitutional purposes, for the government to bring in a random forensic toxicologist, with no actual knowledge of the testing of an accused's sample, to say "In my opinion, the accused's urine sample contained illegal drug metabolites." See Commonwealth v. Avila, 912 N.E.2d 1014 (Mass. 2009). That is like having a witness testify in a case involving a car wreck that the witness

did not observe herself and admitting the otherwise inadmissible accident report through her testimony simply because she is recognized as an expert in car safety. If experts could qualify all testimony as forming the basis of their opinions, a trial counsel could get any kind of evidence in front of a court-martial panel simply by enlisting the aid of an expert, rather than the individuals with personal knowledge of the evidence admitted. Such a framework would make the MREs superfluous.

The lab report and tests upon which Dr. Papa relied in providing his opinion were neither conducted, nor written, by Dr. Papa. It appears he did not undertake any independent analysis of the test results either, distinguishing this case from the Seventh Circuit case of Turner. Def. Br. Spec. Iss. at 3. See United States v. Turner, 591 F.3d 928, 933-34 (7th Cir. 2010); Major Daniel M. Froehlich, The Impact of *Melendez-Diaz v. Massachusetts* on Admissibility of Forensic Test Results at Courts-Martial, Army Law. 24, 38 (2010). Whereas in Moon and Locklear the courts held that third-party experts could not testify to the conclusions of absent analysts, Turner allowed the third-party analyst to testify about the testing process with which the third-party witness had been involved. Moon, 512 F.3d at 362; Locklear, 681 S.E.2d at 304-305; Turner, 591 F.3d at 933-934.

Moreover, the lab reports themselves not only formed the basis for Dr. Papa's opinions about the presence of illegal drugs, the trial counsel also admitted the reports for the truth of the matter asserted. See Major Daniel M. Froehlich, The Impact of *Melendez-Diaz v. Massachusetts* on Admissibility of Forensic Test Results at Courts-Martial, Army Law. 24, 39 (2010); David H. Kaye, David E. Bernstein, Jennifer L. Mnookin, The New Wigmore--A Treatise on Evidence: Expert Evidence § 3.10.3 at 57 (Supp. 2009). This is in contrast to the Turner case, in which the laboratory reports were not entered into evidence. Turner, 591 F.3d at 933. In fact, without the lab reports, the government would not have had a viable case against Appellant. That is how vital the reports were to the prosecution of this case. Conversely, Dr. Papa's testimony would have been marginally relevant, had he not been called to interpret the lab results.

In some ways, having a substitute expert testify could be worse than just admitting the laboratory reports with the cover memorandum listing the identity and quantity of the illegal metabolites detected in the samples. While a defense counsel could speculate endlessly about potential testing errors and ulterior motives of the laboratory technicians in a "paper" case, having a live witness--an expert who is the laboratory's

certifying official, no less--such as Dr. Papa bolsters the reports' credibility, despite the fact that Dr. Papa cannot speak to any potential flaws in the testing of the samples at issue in any particular case. See United States v. Mejia, 545 F.3d 179, 197-198 (2nd Cir. 2008).

Drug abuse cases involving urinalysis testing are already stacked against the defense with the permissive inference of knowing use of the illegal substance applying simply by virtue of the drug metabolite appearing in the appellant's urine. Military Judges' Benchbook, DA Pam 27-9; Brewster, 61 M.J. at 430. Allowing any random witness from the Air Force lab or any forensic toxicologist who had nothing to do with the testing of the urine sample to supplant the fundamental Confrontation Clause rights of an accused would be too much, even for a military system which grants lesser constitutional rights to its members than does civil society. See Parker v. Levy, 417 U.S. 733, 758-759 (1974); United States v. Scheffer, 523 U.S 303, 327 (1998).

Without Dr. Papa's testimony, the test results would not have been admissible, negating nearly all the evidence against Appellant. Therefore, Dr. Papa's testimony was not harmless beyond a reasonable doubt.

Conclusion

This Court should hold that Dr. Papa's testimony at Appellant's court-martial regarding the lab testing of Appellant's urine sample was inadmissible hearsay which was not harmless beyond a reasonable doubt and, therefore, reverse the service court's decision in this case.

Respectfully submitted,

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May 3, 2010

CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were hand-delivered to the Court on May 3, 2010, and that a copy of the foregoing was deposited in the U.S. Mail, postage prepaid, for first-class delivery to each of the counsel: Major Marla J. Gillman, Air Force Legal Operations Agency, 112 Luke Avenue Suite 343, Bolling AFB, DC 20032-8000; and Colonel Douglas P. Cordova, Chief, Air Force Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency, 112 Luke Avenue, Suite 206, Bolling AFB, DC 20032-5000.

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