

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	
Appellant)	BRIEF ON BEHALF OF APPELLANT
)	
v.)	Crim.App. Dkt. No. 201100188
)	
Leslie D. PORTER,)	USCA Dkt. No. 12-5003/MC
Corporal (E-4))	
U.S. Marine Corps)	
Appellee)	

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

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Issues Presented

I.

THE ENTRIES ON PAGES 54 AND 154 OF PROSECUTION EXHIBIT 15 THAT NMCCA FOUND TO BE TESTIMONIAL HEARSAY WERE NEITHER MADE WITH THE PRIMARY PURPOSE OF PROVING PAST EVENTS RELEVANT TO LATER CRIMINAL PROSECUTIONS NOR FORMALIZED. DID THE LOWER COURT ERR BY FINDING THAT THESE PAGES WERE TESTIMONIAL STATEMENTS?

II.

DID THE LOWER COURT ERR BY FINDING THAT THESE ENTRIES DEEMED TESTIMONIAL HEARSAY CONTRIBUTED TO APPELL[EE]'S CONVICTION WHERE THESE ENTRIES ONLY PROVIDED TECHNICAL DATA AND THE GOVERNMENT'S CASE WAS OTHERWISE STRONG?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellee's approved sentence included a punitive discharge. This Court has jurisdiction in this case based on Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A military judge sitting as a special court-martial convicted Appellee, contrary to his pleas, of one specification of wrongfully using marijuana and one specification of wrongfully using cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2006). Appellee was acquitted of one

specification of wrongfully using cocaine in violation of Article 112a, UCMJ, and one specification of being drunk on duty in violation of Article 112, UCMJ, 10 U.S.C. § 912 (2006). The Military Judge sentenced him to confinement for ninety days and a bad-conduct discharge. The Convening Authority approved the sentence and, with the exception of the bad-conduct discharge, ordered the sentence executed.

On April 26, 2012, the Navy-Marine Corps Court of Criminal Appeals set aside the findings and sentence—holding that testimonial hearsay was admitted in violation of Appellee's constitutional right to confrontation and that this error was not harmless—and authorized a rehearing. *United States v. Porter*, No. 201100188, 2012 CCA LEXIS 149 (N-M. Ct. Crim. App. Apr. 26, 2012). On June 6, 2012, the lower court denied the Government's Motion for Reconsideration. On June 28, 2012, the lower court *sua sponte* considered its previous opinion, set it aside, and issued a new opinion that set aside the findings and sentence and authorized a rehearing. *United States v. Porter*, No. 201100188, 2012 CCA LEXIS 233 (N-M. Ct. Crim. App. Jun. 28, 2012); (J.A. 1). On July 30, 2012, the Judge Advocate General of the Navy certified the two issues provided above for review pursuant to Article 67(a)(2), UCMJ.

Statement of Facts

On September 16, 2010, Appellee received medical attention at a civilian hospital near Marine Corps Air Station Cherry Point, following a traffic accident. (Joint Appendix (J.A.) 66.) The next morning, he went to the naval health clinic at Cherry Point for follow-up medical care. (J.A. 24.) Lieutenant Johnston, USN, treated Appellee at the clinic and testified at trial. (J.A. 11-12.) Appellee immediately caught her attention because he was "acting funny in the exam room" and his "mental status" was "altered." (J.A. 12-13.) She noted that his hospital lab results from the previous day indicated that he was "positive on the drug screens for THC or marijuana and cocaine." (J.A. 14, 66.) The testing that she performed at the clinic also indicated marijuana and cocaine in Appellee's system. (J.A. 16, 67.)

Based on these facts, Appellee's Commanding Officer authorized a probable cause search for evidence of drug use; a blood and urine sample was taken as a result. (J.A. 19-20.) The command turned over the blood and urine sample to the Criminal Investigative Division (CID), who ultimately sent the samples to the Armed Forces Institute of Pathology (AFIP) for toxicology screening. (J.A. 23, 74.)

AFIP tested Appellee's blood and urine sample for illicit drugs. (J.A. 69-78.) The lab compiled its testing data in Prosecution Exhibit 15, which contains 169 pages of information related to Appellee's blood and urine samples. The Government offered the exhibit during the testimony of Dr. Ronald Shippee, "an expert witness for the Armed Forces Medical Examiner's office," and the Military Judge admitted it into evidence over Defense objection. (J.A. 56.) The Military Judge did not consider page one or page two, which was a cover memorandum that summarized the drug testing results. (J.A. 64.)

Dr. Shippee testified as an expert witness in the field of forensic toxicology. (J.A. 29.) He described AFIP's lab and its functions:

Our laboratory at the Armed Forces Medical Examiner's Office is responsible for postmortem, anything to do with postmortem.... We develop methodologies.... [W]e do postmortem work, investigations, current investigations[,] anything medically related to that, aircraft act [sic] or fatalities, and aircraft incidents.

(J.A. 28.) He explained various pages and the meaning of data throughout the exhibit. Dr. Shippee further testified concerning the lab's functions, its quality control mechanisms, the testing methods used in this case, the scientific procedures involved, and the fact that sample number 10-4748 tested positive for the presence of cocaine and marijuana. (J.A. 26-

63.) Based on his review of the data and based on his knowledge, training, and experience, Dr. Shippee formed an expert opinion: "[Appellee's sample] exceeded the DOD cutoff value for marijuana and cocaine in the urine." (J.A. 51.)

Summary of Argument

Sweeney's majority and dissent agreed, "there is yet room for litigation over the underlying nature of military urinalysis documents." This case does not require this Court to explore every nuance of the military urinalysis program or Confrontation's application in the military; instead, this case turns on the importance of formality and solemnity in identifying testimonial statements.

In accord with Justice Thomas's controlling *Williams* opinion and this Court's precedent in *United States v. Sweeney*, pages 54 and 154¹ of Prosecution Exhibit 15 are nontestimonial because they lack an evidentiary purpose and they do not bear sufficient indicia of formality and solemnity to qualify as testimonial. These documents were properly admitted at trial and the lower court erred by holding that the Confrontation Clause precluded their admission.

¹ For consistency, these pages will be referred to as pages 54 and 154 throughout the brief. In the Joint Appendix, these are pages 77 and 78.

Argument

I.

THOUGH CONFRONTATION JURISPRUDENCE CONTINUES TO EVOLVE, TWO CRITERIA ARE ESSENTIAL: (1) AN EVIDENTIARY PURPOSE AND (2) SUFFICIENT FORMALITY. PAGES 54 AND 154 LACKED BOTH. THE LOWER COURT ERRED BY HOLDING THAT THESE PAGES ARE TESTIMONIAL.

A. The Confrontation Clause prohibits the introduction of testimonial statements without cross-examination subject to inapplicable exceptions.

1. The Supreme Court's "testimonial" analysis remains in flux.

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"

U.S. Const. amend. VI. This Court considers whether the evidence was admissible under the Sixth Amendment's Confrontation Clause as a question of law that is reviewed *de novo*. *United States v. Blazier (Blazier I)*, 68 M.J. 439, 442 (C.A.A.F. 2010).

After considering the Confrontation Clause's history, the Supreme Court in *United States v. Crawford*, 541 U.S. 36 (2004), rejected *Ohio v. Roberts*, 448 U.S. 56 (1980), and held that Confrontation is a procedural guarantee regardless of the reliability of the evidence. *Crawford*, 541 U.S. at 51, 62. Accordingly, the Court held that the Confrontation Clause prohibits the "testimonial statements of a witness who did not

appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Id.* at 53-54; *United States v. Blazier (Blazier II)*, 69 M.J. 218, 222 (C.A.A.F. 2010).

This holding turns on the phrase “testimonial statements.” *Davis v. Washington*, 547 U.S. 813, 821 (2006). Defining the phrase in light of the right’s historical meaning and purpose, the Supreme Court defined “witnesses” as “those who ‘bear testimony.’” *Crawford*, 541 U.S. at 51 (citing 2 N. Webster, *An American Dictionary of the English Language* (1828)). “Testimony,” the Court noted, is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.*

The Court also identified examples of core testimonial statements: “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 68. But the seven-member majority decided to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* Complicating matters, the Supreme Court has left unsettled the definition of “testimonial” and the reach of *Crawford*.

In the companion cases *Davis v. Washington*, 547 U.S. 813 (2006), and *Hammon v. Indiana*, the Court introduced the “primary purpose” test in analyzing testimonial hearsay. In *Davis*, a victim made statements to a 911-operator “under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency”; thus the statement was nontestimonial. *Id.* at 822. By contrast, the victim’s statements to police in *Hammon* were testimonial because “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime” *Id.* at 830.

In both cases, the Court looked to the primary purpose as informed by its relative formality. In *Davis*, the Court compared the statements with *Crawford’s* statements and found that “the difference in the level of formality between the two interviews is striking,” which “objectively indicate[d],” among other facts, that the statement’s primary purpose was not evidentiary. *Id.* at 827-28. In *Hammon*, though *Crawford’s* testimonial statements were “more formal,” the statements were “formal enough” to indicate an evidentiary purpose. *Id.* at 830.

Justice Thomas wrote separately—concurring in the judgment in *Davis* but dissenting in *Hammon*—to explain his belief that the “plain terms of the ‘testimonial’ definition we endorsed [in

Crawford] require some degree of solemnity before a statement can be deemed 'testimonial.'" *Id.* at 835 (Thomas, J., dissenting in part, concurring in part). "Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process" and, he explained, "confessions when extracted by police in a formal manner carry sufficient indicia of solemnity to constitute formalized statements," which makes these statements testimonial. *Id.* at 836-37. But he would not extend the Confrontation Clause's reach beyond these "formalized testimonial materials." *Id.*

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court first applied *Crawford* to scientific reports. In a five-to-four decision, the majority held that a lab analyst's certificate fell within the "core class of testimonial statements" as an affidavit because it was a sworn and notarized certificate that attested to the results of testing. *Id.* at 310. Justice Thomas concurred to note his adherence to a more limited Confrontation Clause reach. *Id.* at 329 (Thomas, J., concurring). The dissent argued that scientific lab work should be exempt from *Crawford* because it was more reliable than eyewitness testimony. *Id.* at 315-17 (Kennedy, J., dissenting).

In *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011), the Supreme Court applied the "primary purpose" test and held that

the victim's statements to police "to enable police assistance to meet an ongoing emergency" were nontestimonial. "The informality suggests that the interrogators' primary purpose" was to address an emergency, and the "circumstances lacked any formality that would have alerted [the declarant] to or focused him on the possible future prosecutorial use of his statements." *Id.* at 1166. Justice Thomas concurred in the judgment, because the "questioning by police lacked sufficient formality and solemnity for his statements to be considered 'testimonial.'" *Id.* at 1167 (Thomas, J., concurring).

Justice Scalia dissented: "Today's tale ... is so transparently false that professing to believe it demeans the institution." *Id.* at 1168 (Scalia, J., dissenting). He agreed that the "declarant must intend the statement to be a solemn declaration" to be testimonial. *Id.* But he was troubled by the majority's retreat from *Crawford's* holding by tacitly re-adopting *Robert's* reliance on reliability. *Id.* at 1174. This left *Crawford's* holding and the definition of testimonial in disarray.

The Court returned to scientific testing in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). The majority held that, like *Melendez-Diaz*, the forensic lab's "certificate of analysis" fell within the core class of testimonial statements. *Id.* at

2716-17. Indicating disagreement, however, only four Justices (Ginsburg, Scalia, Sotomayor, and Kagan) joined the "primary purpose" test. *Id.* at 2714 n.6. Moreover, Justice Sotomayor and Justice Kagan did not join Part IV. *See also United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011) (Baker, J., dissenting) (discussing Justice Sotomayor's limiting concurring opinion). Nonetheless, five Justices joined Part III and found that though the certificate was not notarized, the certificate was sufficiently "formalized." *Id.* at 2717.

Crawford's tortuous path most recently led to *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (plurality). Four justices held that a DNA lab report that the expert witness relied on was not testimonial hearsay because it was not offered into evidence for the truth of the matter. *Id.* at 2228. Even if it was, moreover, they noted that testimonial is generally characterized by the primary purpose and formality and, in this light, the report was not testimonial. *Id.* at 2242.

Justice Thomas joined these four members in the judgment, producing the Court's majority. *Id.* at 2255 (Thomas, J. concurring). But his rationale was narrower: the report did not violate the Confrontation Clause "solely because" the statements lacked the "requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Id.*

(citation omitted). Finally, the dissent believed that the statements were testimonial, similar to the testimonial statements identified in *Melendez-Diaz* and *Bullcoming*. *Id.* at 2266-67 (Kagan, J., dissenting).

2. Justice Thomas's *Williams* concurrence controls under the *Marks* test.

The Court's early agreement in *Crawford* has splintered into shifting alliances and evolving rationales, leaving no unified definition of testimonial beyond the core coverage identified in *Crawford*. The definition of testimonial is imperative, however, because "It is the testimonial character of the statement that separates it from other hearsay that, while subject to the traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis*, 547 U.S. at 821.

Marks v. United States, 430 U.S. 188 (1977), dictates that when a "fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (quotation marks and citation omitted). In *Williams*, while four Justices found that the report was nontestimonial because it was not offered for the truth of the matter or, alternatively, because it lacked an evidentiary purpose and formality, Justice Thomas's concurrence hinged

solely on the lack of the requisite formality and solemnity. He provided the narrowest grounds for the holding; therefore, his concurring opinion in *Williams* serves as the controlling rationale.

To qualify as testimonial, Justice Thomas requires that a statement have both an evidentiary purpose and sufficient formality and solemnity. *Williams*, 132 S.Ct. at 2261 (Thomas, J., concurring). This framework "reaches bad-faith attempts to evade the formalized process." *Id.* But most notably—and in line with *Crawford*—this captures "depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation." *Id.* at 2260 (citation omitted).

3. This Court should analyze a statement's purpose and its formality.

To be sure, no other Supreme Court Justice has adopted this narrow of an interpretation of "testimonial," and the shifting confrontation jurisprudence leaves Justice Thomas's controlling opinion loosely anchored. Yet at one point or another, each Justice has accepted that the Court should look to a statement's purpose and, though it is not always dispositive, its formality. See, e.g., *Davis*, 547 U.S. at 830 n.5 ("We do not dispute that formality is indeed essential to testimonial utterance."). Moreover, this theme is woven through each post-*Crawford* opinion.

Accordingly, though "reasonable minds may disagree about what constitutes testimonial hearsay," *Blazier II*, 69 M.J. at 222, this Court can take safe harbor in assessing whether a statement is testimonial based on its purpose and its formality and solemnity—as this Court did in both *Blazier II* and *Sweeney*. In *Blazier II* the Court held that the "signed, certified cover memoranda—prepared at the request of the Government for use at trial, and which summarized the entirety of the laboratory analyses in the manner that most directly 'bore witness' against Appellee—are testimonial" *Id.* at 221 n.1. In *Sweeney* the Court noted, "the formality of a document generated by a forensic laboratory is a factor to be considered when determining whether a document is testimonial." *Sweeney*, 70 M.J. at 303 n.13.

Culled from Justice Thomas's controlling rationale in *Williams* and this Court's precedent, the Court should ask two questions to determine whether pages 54 and 154 were testimonial. First, were they "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[?]" *Sweeney*, 70 M.J. at 301. Second, do they bear sufficient indicia of solemnity and formality? If either answer is no, then the Court should

reverse the lower court's decision and affirm the findings and sentence.

B. Pages 54 and 154 are nontestimonial because they do not have an evidentiary purpose and they lack sufficient formality and solemnity.

1. Pages 54 and 154 do not have an evidentiary purpose.

The Court considers whether "it would be reasonably foreseeable to an objective person that the purpose of any individual statement in a drug testing report is evidentiary." *Sweeney*, 70 M.J. at 302. This objective analysis focuses on "the purpose of the statements in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for testing." *Id.*

To consider the purpose, the Court must first identify the possible statements and declarants in these pages. Various words are sprinkled across these two pages: "Quantitation Chain of Custody"; "Toxicology"; "Benzoylecgonine"; "THC-COOH"; "Patient Sample Information"; "Final Concentration"; "Control(s) and Standard(s) with TOXNO: 10478." (J.A. 77-78.) There are also other words, abbreviations, numbers, and symbols. There are signatures at the bottom of each page next to the words "Analyzed By," "Reviewd [sic] By," "Specimens Removed from Secured Storage By," and "Specimens Returned to Secured Storage By." (J.A. 77-78.)

On page 54, Amber J. Dickson's typed name appears next to "Analyzed By" and "Date: 28 Sep 10." (J.A. 77.) And on the next line, another individual signed next to "Reviewd [sic] By" and "Date: 9/29/10." (*Id.*) Finally, an analyst signed in a block indicating that the specimens were removed from storage and returned on "28 Sep 10." (*Id.*) Page 154 contains similar words and notations from different individuals. (J.A. 78.)

Sir Walter Raleigh famously protested in vain that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face" 2 How. St. Tr. 1, 15-16 (1603); *Crawford*, 541 U.S. at 44. Whereas here one could be forgiven for asking, "Let whom, speak what?"

Even if some of the words and fragments could be considered statements, it would not be reasonably foreseeable to an objective person that the purpose of any of these words was evidentiary. Proving this point, each page has a block titled, "Purpose," with the answer, "Quantitative Analysis." This is in line with the lab's responsibilities—which are broader than the Navy Drug Screening Lab's mission noted in *Sweeney*—that include "postmortem work, investigations, current investigations[,] anything medically related to that, aircraft ... fatalities, and aircraft incidents." (J.A. 28.)

These individuals simply made notations to administratively detail the quantitative analysis. See, e.g., *United States v. Lang*, 672 F.3d 17, 22 (1st Cir. 2012). Like *Williams*, "it is likely that the sole purpose of each technician [was] simply to perform his or her task in accordance with accepted procedures." *Williams*, 132 S. Ct. at 2244 (plurality). Though their work could possibly later provide information for an expert witness, their purpose in making these individual notes was not evidentiary and did not "bear testimony."

2. The lack of formality dictates that these pages are nontestimonial.

The lack of formality and solemnity in these pages most strikingly proves this point. With the assistance of the expert witness's testimony and a criminal attorney's familiarity with this subject, one could surmise that these are internal lab documents that summarize testing. But they do not formally state this because the purpose of these pages and any individual notations therein was not evidentiary.

This is made clear by considering pages 1 and 2 of Prosecution Exhibit 15, which the Military Judge did not consider. (J.A. 69-70); see *Blazier II*, 69 M.J. at 221 ("signed, certified cover memoranda ... are testimonial"). In pages 1 and 2, a "Certifying Scientist" from the "Forensic Toxicology

Laboratory Office of the Armed Forces Medical Examiner,"

certified the results of AFIP's testing:

DRUGS: The URINE was screened The following drugs were detected:

Positive Cocaine metabolite: Benzoyllecgonine was detected in the urine by immunoassay and confirmed by gas chromatography/mass spectrometry. The blood contained 0.29 mg/L of benzoyllecgonine as quantified by gas chromatography/mass spectrometry.

(J.A. 69-70.) On official letterhead, the certifying official provided the "AFIP Diagnosis" and "Report of Toxicology Examination" to CID. (*Id.*) These formalized and solemn statements are indicative of an evidentiary purpose.

Pages 54 and 154, conversely, contain none of the pomp and circumstance. Instead, they merely record data related to the quantitative analysis. To be clear, the Government is not arguing that these pages are nontestimonial because they are "routine" and notations of "unambiguous factual matters," *Sweeney*, 70 M.J. at 302; rather, these pages are nontestimonial because the routine recording of factual matters was not with an evidentiary purpose, which is why they lack the signs of an affidavit or formal certification.²

² Nor is the Government arguing that the absence of an oath is by itself dispositive, see *Crawford*, 541 U.S. at 52, but the complete lack of formality and solemnity inherent in an affidavit, deposition, or prior deposition is dispositive. *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring).

If the purpose was evidentiary, declarants would have formally and expressly stated their findings and conclusions so that a judge or jury could take their statements and use them as evidence: in *Sweeney*, for example, the certifying official stated, "I certify that I am a laboratory official, that the laboratory results indicated on this form were correctly determined by the proper laboratory procedures, and they are correctly annotated." *Sweeney*, 70 M.J. at 299. Why would one make such a statement if not for an evidentiary purpose?—but here, there is nothing comparable.

Comparing the affidavit in *Melendez-Diaz* and certificate in *Bullcoming* with the pages in this case further accentuates their dissimilarity. In *Melendez-Diaz*, the "certificate of analysis" reported the weight of seized bags and reported that the bags had "been examined with the following results: The substance was found to contain: Cocaine." *Melendez-Diaz*, 550 U.S. at 307. The certificates were sworn to before a notary, and under Massachusetts law, the sole purpose of the affidavit was to provide "prima facie evidence." *Id.* at 311 (citation omitted).

In *Bullcoming*, the "certificate of analyst" recorded the defendant's blood alcohol level and affirmed that the sample was received intact, that "the statements in [the analyst's block of the report] are correct," and that he had "followed the

procedures" as required. *Bullcoming*, 131 S. Ct. at 2710. An examiner then certified that the analyst followed the correct procedures. *Id.* at 2711. Notably, the formalized certificate also contained a "legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses." *Id.* at 2717.

The delta between these statements and the notations here equates to the difference between testimonial hearsay and nontestimonial business records that are generally admissible without confrontation.⁴ Pages 54 and 154 provide only internal lab data unlike the testimonial statements in each of those cases.

C. The lower court erred by misidentifying the purpose of these pages and by discounting their informality.

The lower court erred in two ways: (1) it conflated the purpose of the drug testing with the purpose of individual notations; and, (2) it discounted the lack of formality in these pages. This holding unduly expands the Confrontation Clause's

⁴ Subject to Mil. R. Evid. 803(6), documents kept in the regular course of business may be ordinarily admitted at trial despite their hearsay status. Here, the Military Judge admitted Pros. Ex. 15 at trial (J.A. 56), and Appellee did not challenge its admissibility under Mil. R. Evid. 803(6) at the lower court, so it is now the law of the case. See, e.g., *Blazier II*, 69 M.J. at 221 n.1.

protection and leads to an unworkable standard that impacts otherwise admissible evidence.

First, instead of focusing on the purpose of individual statements, the court looked to the purpose of the entire process. The court relied on the fact that the lab tested Appellee's blood and urine "at the specific request of his commanding officer, who suspected the appell[ee] of being under the influence of alcohol and drugs." (J.A. 6.) The court then noted that criminal investigators, and not the command urinalysis coordinator, sent the sample to AFIP. (*Id.*) The court also conflated the accessioning process performed by enlisted military personnel (J.A. 30-32), with the testing by the lab's technicians and analysts (J.A. 47-48). (J.A. 6.)

These facts inform the purpose of the entire process in this case, but they do not show the purpose of notations on page 54 or 154. Granted, the broader view is relevant. *Blazier I*, 68 M.J. at 442. But it cannot create an evidentiary purpose in individual statements where there is none, *cf. Sweeney*, 70 M.J. at 302; by doing so here, the court unduly expanded the Confrontation Clause's application.

Second, the court discounted the informality in these pages. "Although there is no formal statement of certification"—which alone takes this beyond Justice Thomas's controlling opinion—

the court found that "these pages effectively serve the same purpose as the cover memorandum the military judge explicitly refused to consider." (J.A. 6.) But *Crawford* and the Confrontation Clause protect the procedure, not the substance. *Melendez-Diaz*, 557 U.S. at 317 (quoting *Crawford*, 541 U.S. at 61-62). Moreover, the paradox created from this analysis is that all admissible evidence—for instance, computer generated data—serves the "same purpose" of proving or disproving a pertinent fact that may also be found in a testimonial statement; which is why such a standard is unworkable—it would transform all otherwise admissible evidence into inadmissible testimonial hearsay.

Instead, evidentiary purpose and formality identify testimonial hearsay. In accord with Justice Thomas's opinion in *Williams*, see *supra* Section A.2 at 12-13, and this Court's precedent in *Sweeney*, and contrary to the lower court's holding, these pages were not testimonial. First, any statement in pages 54 and 154 did not have an evidentiary purpose; and second, these pages do not bear sufficient indicia of formality and solemnity to qualify as testimonial. These pages are therefore not within the core class of testimonial statements and are not otherwise precluded by the Confrontation Clause or *Crawford*.

II.

ANY ERROR IN ADMITTING PAGES 54 AND 154 WAS HARMLESS BEYOND A REASONABLE DOUBT. THE INFORMATION CONTAINED THEREIN WAS CUMULATIVE AND INDEPENDENTLY UNINFORMATIVE. APPELLEE WAS CONVICTED BECAUSE THE EVIDENCE WAS OVERWHELMING: THE CIVILIAN HOSPITAL, THE NAVAL MEDICAL CLINIC, AND AFIP—AS EXPLAINED BY DR. SHIPPEE—FOUND EVIDENCE THAT APPELLEE USED COCAINE AND MARIJUANA.

- A. The Court applies the *Van Arsdall* factors to consider whether a constitutional error was harmless beyond a reasonable doubt.

The Court considers whether a constitutional error is harmless beyond a reasonable doubt *de novo*. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). The Court grants relief for "Confrontation Clause errors only where they are not harmless beyond a reasonable doubt," which is a burden borne by the Government. *Sweeney*, 70 M.J. at 304, 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). In this analysis, the Court considers the importance of unconfuted testimony in the prosecution's case, whether that testimony was cumulative, the existence of corroborating evidence, the extent of confrontation permitted, and the strength of the prosecution's case. *Van Arsdall*, 475 U.S. at 684. The "question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (citation omitted).

B. Applying the Van Arsdall factors, there is no reasonable probability that the evidence complained of might have contributed to Appellee's conviction.

As the dissenting opinion noted below, the evidence stacked against Appellee was damning. (J.A. 9-10.) The civilian hospital screened Appellee for illicit drugs and found that he was "positive on the drug screens for THC or marijuana and cocaine." (J.A. 14, 66.) At the naval health clinic the next day, Appellee immediately attracted attention because he was "acting funny in the exam room" and his "mental status" was "altered." (J.A. 12-13.) The drug screening at the clinic explained why: he had THC and cocaine in his system. (J.A. 16, 67.) The evidence from the hospital and the clinic independently corroborated Dr. Shippee's expert opinion that Appellee had illicit drugs in his body: "[Appellee's sample] exceeded the DOD cutoff value for marijuana and cocaine in the urine." (J.A. 51.) The Military Judge convicted Appellee for using marijuana and cocaine because the evidence was overwhelming.

Particularly in light of this evidence, the technical data and notations in pages 54 and 154 were not important to the Government's case. They appear as two of 169 pages of technical data and scientific jargon that contain bits and pieces of evidence that are meaningless in the abstract. Based on the

nature of these documents—and for many of the same reasons the Government contends that these pages are not testimonial—these pages did not contribute to Appellee's conviction.

Moreover, the data and information in pages 54 and 154 is cumulative with many of the remaining pages in Prosecution Exhibit 15. In fact, they were merely regurgitated computer-generated data. (J.A. 47-48.) These pages were certainly not "the most important evidence in the Government's case." (J.A. 8.) These pages simply fed information to Dr. Shippee from which he could form his expert opinion.

Further, the fact that this information was useful to the expert witness is not the same as being useful to the trier of fact. As an expert witness, Dr. Shippee could permissibly rely on these pages regardless of their testimonial status as long as long as he did not repeat their contents. *Blazier II*, 69 M.J. at 222. Here, he did not repeat any statements. (J.A. 47-51.)

Applying the *Van Arsdall* factors, there is no reasonable probability that the evidence complained of might have contributed to Appellee's conviction. Pages 54 and 154 were relatively insignificant and cumulative, and the Government's case was otherwise overwhelming. Therefore, any error was harmless beyond a reasonable doubt.