IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Andrew D. TEARMAN Machinist's Mate Lance Corporal (E-3) United States Marine Corps, Appellant	**APPELLANT'S BRIEF** Crim.App. Dkt. No. 201100195 USCA Dkt. No. 12-0313/MC

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

MICHAEL D. BERRY
Captain, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-7713
Bar Number 34828

Table of Contents

Table of Authorities....................................iv

Issues Presented

I

THE LOWER COURT HELD THAT THE ADMISSION, OVER APPELLANT'S OBJECTION, OF TWO PIECES OF TESTIMONIAL HEARSAY FOUND WITHIN THE DD FORM 2624 WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT. BUT IT MISASSPLIED THE SWEENEY FACTORS AND DID NOT CONSIDER THE BLAZIER II FACTORS IN ASSESSING PREJUDICE. DID THE LOWER COURT ERR IN HOLDING THAT THE TESTIMONIAL HEARSAY DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION? 1

II

THE LOWER COURT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING, OVER APPELLANT'S OBJECTION, THE CHAIN-OF-CUSTODY DOCUMENTS AND INTERNAL REVIEW WORKSHEETS BECAUSE THEY WERE NON-TESTIMONIAL. ARE THESE NON-MACHINE GENERATED DOCUMENTS AND WORKSHEETS TESTIMONIAL? 1

Statement of Statutory Jurisdiction.............................1

Statement of the Case..1

Statement of Facts..2

Summary of the Argument......................................4

Argument..4

I. **THE LOWER COURT HELD THAT THE ADMISSION, OVER APPELLANT'S OBJECTION, OF TWO PIECES OF TESTIMONIAL HEARSAY FOUND WITHIN THE DD FORM 2624 WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT. BUT IT MISASSPLIED THE SWEENEY FACTORS AND DID NOT CONSIDER THE BLAZIER II FACTORS IN ASSESSING PREJUDICE. DID THE LOWER COURT ERR IN HOLDING THAT THE TESTIMONIAL HEARSAY DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION? .**..4

A. **Under *Sweeney* and *Blazier II*, Blocks G and H contributed to Appellant's conviction**....................................5

(1) The testimonial certifications were critical to the Government's case because the accuracy and reliability of the NDSL testing procedures were placed directly at issue..6

(a) Block G was important to the Government's case...8

(b) Block H was important to the Government's case...9

(2) The testimonial hearsay was not cumulative............10

(3) There was no corroborating evidence...................11

(4) Appellant was not permitted to confront the witnesses against him...11

(5) The prosecution's case was weak – it was a naked urinalysis...11

B. **The lower court did not consider one of the *Blazier II* factors**...12

II. **THE LOWER COURT HELD THAT THE ADMISSION, OVER APPELLANT'S OBJECTION, OF TWO PIECES OF TESTIMONIAL HEARSAY FOUND WITHIN THE DD FORM 2624 WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT. BUT IT MISASSPLIED THE SWEENEY FACTORS AND DID NOT CONSIDER THE BLAZIER II FACTORS IN ASSESSING PREJUDICE. DID THE LOWER COURT ERR IN HOLDING THAT THE TESTIMONIAL HEARSAY DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION? .**...13

A. **The chain of custody documents are testimonial**...........14

B. **The internal review documents are testimonial**............16

Conclusion...17

Certificate of Compliance......................................18

Certificate of Filing and Service...............................18

Table of Authorities

SUPREME COURT OF THE UNITED STATES

Delaware v. Van Arsdall, 475 U.S. 673 (1986)...................5

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)....15, 16

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States v. Blazier (Blazier I), 68 M.J. 439 (C.A.A.F. 2010)..14

United States v. Blazier (Blazier II), 69 M.J. 218 (C.A.A.F. 2010)..6, 12

United States v. Gardinier, 67 M.J. 304 (C.A.A.F. 2009)........5

United States v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011)..*passim*

SERVICE COURTS OF CRIMINAL APPEALS

United States v. Tearman, 70 M.J. 640 (N-M. Ct. Crim. App. Jan. 17, 2012)..*passim*

FEDERAL STATUTES

10 U.S.C. § 866...1

10 U.S.C. § 867...1

REGULATIONS

BUMEDINST 5450.157B..16

Issues Presented

I

THE LOWER COURT HELD THAT THE ADMISSION, OVER APPELLANT'S OBJECTION, OF TWO PIECES OF TESTIMONIAL HEARSAY FOUND WITHIN THE DD FORM 2624 WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT. BUT IT MISASSPLIED THE *SWEENEY* FACTORS AND DID NOT CONSIDER THE *BLAZIER II* FACTORSS IN ASSESSING PREJUDICE. DID THE LOWER COURT ERR IN HOLDING THAT THE TESTIMONIAL HEARSAY DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION?

II

THE LOWER COURT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING, OVER APPELLANT'S OBJECTION, THE CHAIN OF CUSTODY DOCUMENTS AND INTERNAL REVIEW WORKSHEETS BECAUSE THEY WERE NON-TESTIMONIAL. ARE THESE NON-MACHINE GENERATED DOCUMENTS AND WORKSHEETS TESTIMONIAL?

Statement of Statutory Jurisdiction

The lower court reviewed Appellant's case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On December 16, 2010, a Special Court-Martial composed of members convicted Appellant, contrary to his plea, of one specification of wrongful use of marijuana under Article 112a, UCMJ.[1] The members sentenced Appellant to reduction to pay-grade E-1 and a bad-conduct discharge.[2] On April 4, 2011, the convening authority approved the sentence and, except for the

[1] JA at 31-32.
[2] JA at 33.

bad-conduct discharge, ordered it executed.[3] On January 17, 2012, the lower court affirmed the findings and sentence.[4] On February 13, 2012, Appellant petitioned this Court to review his case, which it granted on March 23, 2012.

Statement of Facts

On July 7, 2010, Appellant had just returned from seventeen days of leave.[5] Upon his return, his command conducted a random urinalysis of forty-four Marines that included Appellant.[6] Appellant's urine tested above the Department of Defense cutoff for tetrahydrocannabinol (THC), the metabolite for marijuana.[7]

Appellant's Sergeant Major confronted him with the results of his urinalysis. Appellant's reaction was one of "shock" and "disbelief."[8] He was "adamant that he did not [use marijuana]."[9] Appellant stated that he did not know how he could have tested positive for marijuana, but offered as a possible explanation that he had been around others who may have smoked marijuana.[10] Nevertheless, the convening authority charged Appellant with wrongful marijuana use.

Appellant's court-martial was a "naked urinalysis" case — a case in which the Government's only evidence is the positive urinalysis test result and accompanying drug laboratory report.

---

[3] CAA.
[4] *United States v. Tearman*, 70 M.J. 640 (N-M. Ct. Crim. App. Jan. 17, 2012).
[5] JA at 13.
[6] *Id.* at 19.
[7] *Id.* at 24.
[8] *Id.* at 16.
[9] *Id.* at 16, 18.

During Appellant's court-martial for wrongful use of marijuana, the Government sought to introduce the report generated by the Navy Drug Screening Laboratory (NDSL), San Diego. The Government did not seek to introduce the cover sheet to the report. Appellant moved to exclude the report in its entirety and, in the alternative, the chain-of-custody documents associated with the report and all report annotations that were not machine-generated.[11] The defense argued that their admission violated Appellant's Sixth Amendment right of confrontation. The military judge denied Appellant's motions and admitted the report in its entirety.

The lower court found that the admission, over Appellant's objection, of two testimonial portions of the DD Form 2624 constituted an abuse of discretion.[12] The inadmissible portions were Block G, which indicated the official test result reported by the NDSL as "THC", and Block H, which certified "that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated."[13] The lower court held that the remaining portions of the report, including non-machine generated data and annotations, were non-testimonial.[14]

---

[10] JA at 15, 17.
[11] JA at 23.
[12] *Tearman*, 70 M.J. at 643.
[13] *Id.*
[14] *Id.* at 642-43.

When assessing the prejudice stemming from the evidence admitted erroneously, the lower court found that the evidence at issue "played no role in the Government's case."[15] It also found the evidence cumulative and corroborated by the Government's expert witness.[16] In short, it found no reasonable possibility that the evidence contributed to the verdict.[17]

Summary of Argument

The NDSL report was erroneously admitted, despite Appellant's objection. It contained two pieces of testimonial hearsay which the Government used to convict Appellant without providing him the opportunity to confront the declarants. That evidence contributed to Appellant's conviction.

The chain of custody documents and internal review documents are also testimonial hearsay. They were prepared for the primary purpose of use at Appellant's court-martial. Their admission, over Appellant's objection, was erroneous and also contributed to his conviction.

Argument

I

THE LOWER COURT HELD THAT THE ADMISSION, OVER APPELLANT'S OBJECTION, OF TWO PIECES OF TESTIMONIAL HEARSAY FOUND WITHIN THE DD FORM 2624 WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT. BUT IT MISAPPLIED THE *SWEENEY* FACTORS AND DID NOT CONSIDER THE *BLAZIER II* FACTORS IN ASSESSING PREJUDICE. THE LOWER COURT ERRED IN HOLDING THAT THE TESTIMONIAL HEARSAY DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION.

---

[15] *Tearman*, 70 M.J. at 645.
[16] *Id.* at 644-45.
[17] *Id.* at 645.

Standard of Review:

When testimonial hearsay is admitted despite an objection, this Court must determine whether there is a reasonable possibility that the evidence complained of *might* have contributed to the conviction.[18] This determination is made on the basis of the entire record, and depends on the facts and particulars of the individual case.[19]

Discussion:

Under *Sweeney* and *Blazier II*, Blocks G and H contributed to Appellant's conviction.

In *Sweeney*, this Court adopted the five *Van Arsdall* factors the Supreme Court identified when conducting a prejudice analysis in Confrontation Clause cases:

(1) The importance of the testimonial hearsay to the Government's case;

(2) Whether the testimony was cumulative;

(3) The existence of corroborating evidence;

(4) The extent of confrontation permitted; and

(5) The strength of the prosecution's case.[20]

But neither the Supreme Court nor this Court has ever held that the list is exhaustive. On the contrary, this Court explained that the five aforementioned factors are to be considered "among

---

[18] *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009) (emphasis added). This test is not whether there is a reasonable possibility that the evidence complained of *did* contribute to the conviction, only whether it might have.

[19] *United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011).

[20] *Sweeney*, 70 M.J. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

other factors"[21] and that "this determination is made on the basis of the entire record, and its resolution will vary depending on the facts and particulars of the individual case."[22] Nevertheless, even if the *Van Arsdall* factors are dispositive, Appellant should prevail.

(1) The testimonial certifications were critical to the Government's case because the accuracy and reliability of the NDSL testing procedures were placed directly at issue.

In a contested, naked urinalysis case such as this one, evidence of the accuracy and reliability of the drug testing procedure is vital to the Government's case. Such evidence is even more essential to a conviction when, as here, the accuracy and reliability of the drug testing procedures are directly challenged by the defense. If the NDSL testing indicated Appellant did not have THC in his system, or if the members believed that the evidence was mishandled or that the testing was not performed in strict adherence to established standards, they would have acquitted Appellant. Here, the NDSL testing procedures were questioned by the defense from the outset. During his opening statement, the defense counsel pointed out the procedural flaws in the Government's case. This included that no one who handled Appellant's sample or conducted any of the tests would testify at Appellant's trial.[23] And he was correct. Indeed, the only NDSL employee who testified was Ms. Andrea

[21] *Sweeney*, 70 M.J. at 306.
[22] *United States v. Blazier* (*Blazier II*), 69 M.J. 218, 226-27 (C.A.A.F. 2010).

Kaminski. But Ms. Kaminski made it clear that she took no part in testing Appellant's sample:

- She did not perform any of the tests on Appellant's sample.[24]
- She was not present for collecting Appellant's sample.[25]
- She was not present for shipping Appellant's sample.[26]
- She was not involved in setting up the screen or re-screen.[27]
- She was not involved in the aliquots.[28]
- Her name is nowhere on the drug laboratory report.[29]
- She first reviewed the drug laboratory report in mid-November 2010; the tests were conducted in July 2010.[30]

Appellant's defense counsel also questioned the accuracy and reliability of the NDSL's procedures, citing recent human and machine errors at the NDSL in San Diego.[31] And during his closing argument, defense counsel highlighted the Confrontation Clause issue:

> [T]he Government did not put on a single witness . . . that handled the sample or conducted any of [Appellant's] tests. . . . And because the testing center . . . is run by human beings, human beings that unfortunately make mistakes, how will we ever know if there was a mistake made during the testing procedure?[32]

---

[23] JA at 14.
[24] *Id.* at 25.
[25] *Id.* at 26.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 14.
[32] *Id.* at 30.

Accordingly, the issue of whether proper procedures were followed was directly challenged. With that evidence challenged in the member's minds, the Government bore the burden of proving that the NDSL adhered to testing procedures and protocols and reported accurate results when it tested Appellant's sample. In attempting to satisfy that burden, two pieces of testimonial hearsay were crucial to supporting the Government's sole laboratory witness.

(a) Block G was important to the Government's case.

One of the certifying officials at the NDSL, Mr. Tito Romero, Jr., certified in Block G of the DD2624 form that Appellant tested positive for the marijuana metabolite THC. But Mr. Romero did not testify at Appellant's trial, he was not deemed unavailable, and Appellant was never afforded the opportunity to cross-examine him.

Instead, Ms. Kaminski — who took no part in the tests — testified as the Government's expert witness. Ms. Kaminski's only knowledge that Appellant tested positive for marijuana came from the drug laboratory report — Block G on the DD2624. Nevertheless, she repeated Mr. Romero's hearsay in court when, referring to Block G, she unequivocally stated that Appellant's sample "was positive for THC."[33] Appellant did not admit to using marijuana, and there was no other evidence of THC in his system. Thus, Block G contributed to Ms. Kaminski's conclusion,

[33] JA at 24.

to which the members undoubtedly gave significant weight and credibility when deciding to convict Appellant.

(b) Block H was important to the Government's case.

The only evidence that the NDSL performed the tests properly and reported the results accurately came from Block H in the DD2624 of drug laboratory report. In forming her expert opinion, Ms. Kaminski relied almost exclusively on internal review worksheets within the report. Ms. Kaminski testified that she first reviewed the drug laboratory report approximately four months after the tests were performed — tests in which she took no part.[34] As such, she relied heavily on testing analysts to adhere to testing procedures and report accurate results.[35] But she had no personal knowledge of whether such procedures were followed correctly. The only means by which she could be certain of those things was by looking to Block H of the DD2624, which indicated that the "laboratory results . . . were correctly determined by proper laboratory procedures, and they are correctly annotated." Again, Ms. Kaminski did not merely rely on the report to form her opinion, but she bolstered its hearsay in court. Indeed, the military judge instructed the members that they must be satisfied that the NDSL properly analyzed the sample and produced an accurate result in order to convict.[36]

Assuming the members followed the military judge's instruction, they relied on Ms. Kaminski's expert opinion on

---

[34] JA at 26.
[35] *Id.* at 27-28.

whether the NDSL performed the tests correctly. Ms. Kaminski, in turn, relied on Mr. Romero's declaration in Block H. If Mr. Romero stated that there were discrepancies in the testing procedures, or that the results were not annotated correctly, Ms. Kaminski would have informed the members and it is reasonably likely they would have acquitted Appellant. Therefore, Mr. Romero's hearsay declaration in Block H, and Ms. Kaminski's in-court bolstering, contributed to Appellant's conviction.

(2) The testimonial hearsay was not cumulative.

The lower court incorrectly held that Blocks G and H were cumulative with Ms. Kaminski's testimony because "she offered her own conclusions to the panel as to the accuracy, reliability, and ultimate result of the tests performed."[37] To the contrary, Ms. Kaminski referred only to Block G - not any other portion of the drug laboratory report - in reaching her conclusion that Appellant's sample tested positive for THC. And the Government provided no alternate means to prove this crucial fact.

Appellant acknowledges that it is possible Ms. Kaminski could have offered her opinion that the tests were performed correctly without relying on Block H. But that alone does not make it cumulative. The Government cannot demonstrate that the tests were performed correctly notwithstanding Block H. This is particularly true where, as here, the defense calls into question the laboratory testing procedures.

---

[36] JA at 29.

Because Ms. Kaminski did not participate in testing Appellant's sample, Blocks G and H are the only evidence that the Appellant's sample tested positive for THC and that the tests were performed correctly. Indeed, if Ms. Kaminski's testimony was enough, then the government would not have sought to admit these documents. That it did shows that they were not cumulative, but instead an important piece of the government's case.

(3) There was no corroborating evidence.

The lower court incorrectly held that Ms. Kaminski independently corroborated Mr. Romero's inadmissible hearsay.[38] The opposite is true. Ms. Kaminski's testimony relied upon Mr. Romero's inadmissible hearsay. In essence, the lower court held that Ms. Kaminski's opinion, which was based on Mr. Romero's inadmissible hearsay, independently corroborated Mr. Romero's inadmissible hearsay. This circular logic should be rejected.

(4) Appellant was not permitted to confront the witnesses against him.

The lower court correctly held that Appellant was not provided the opportunity to cross-examine Mr. Romero or any of the NDSL employees other than Ms. Kaminski.[39]

(5) The prosecution's case was weak — it was a naked urinalysis.

The lower court incorrectly characterized Appellant's adamant denial of marijuana use and his "somewhat dubious explanation" to

---

[37] *Tearman*, 70 M.J. at 644.
[38] *Id.* at 645.
[39] *Id.*

his Sergeant Major as an "admission" constituting circumstantial evidence of knowing use.[40] Appellant never admitted using marijuana. And his explanation that he was around people who were using marijuana was not evidence of knowing use. Rather, it was a statement that supported the defense of innocent ingestion. Such a statement, as a matter of law, cannot be an admission.

The lower court also claimed that there were no defects in the collection process evidence or the chain of custody evidence offered at trial. Of course, this is not surprising since Appellant was denied the opportunity establish such defects by confronting the witnesses who prepared the chain of custody documents. In essence, the lower court used the error complained of to find that Appellant was not prejudiced by that error. Surely this is wrong.

The lower court did not consider one of the *Blazier II* factors.

In *Blazier II*, one of the "other" factors this Court identified is whether the expert witness repeated the inadmissible hearsay in arriving at an expert opinion.[41] When this occurs, there is irreparable harm in that the in-court expert witness bolsters the testimony of the out-of-court declarant without the opportunity for confrontation. That is what happened here.

Although the lower court identified the fact that Ms. Kaminski repeated Mr. Romero's hearsay, it disregarded it and found that she only presented her independent conclusions. This

---

[40] *Tearman*, 70 M.J. at 645.
[41] *Blazier II*, 69 M.J. at 226-27.

is inconsistent with *Blazier II*. Mr. Romero stated in Block G that Appellant tested positive for THC. Ms. Kaminski then repeated Mr. Romero's inadmissible hearsay in court when she stated that the result of Appellant's drug test was that "it was positive for THC."[42] As stated above, she stated this in reference to Block G of the DD2624 form. She did not derive this information from elsewhere in the laboratory report, and the Government offered no alternative source. In short, Ms. Kaminski bolstered Mr. Romero's inadmissible testimonial hearsay.

The lower court erroneously disregarded this impermissible repetition of inadmissible hearsay without the opportunity for cross-examination when conducting its prejudice analysis. Instead, it limited its analysis to the *Van Arsdall* factors.

Even if the *Van Arsdall* factors are sufficient to conduct a prejudice analysis in this case, they are insufficient to sustain Appellant's conviction. There is a reasonable possibility that the testimonial hearsay in this case contributed to Appellant's conviction. Therefore, Appellant respectfully requests this Court reverse the decision of the lower court and set aside his conviction for wrongful marijuana use.

II

THE LOWER COURT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING, OVER APPELLANT'S OBJECTION, THE CHAIN-OF-CUSTODY DOCUMENTS AND INTERNAL REVIEW WORKSHEETS BECAUSE THEY WERE NON-TESTIMONIAL. THIS COURT SHOULD REVERSE BECAUSE THE NON-MACHINE GENERATED DOCUMENTS AND WORKSHEETS ARE TESTIMONIAL HEARSAY.

[42] JA at 235.

Standard of Review:

Whether evidence contains testimonial hearsay is a matter of law this Court reviews *de novo*.[43] In urinalysis cases, "the focus has to be 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.[44]

Discussion:

In *Sweeney*, this Court held that it was not plain error to admit chain-of-custody documents and internal review worksheets in urinalysis cases where there was no objection to their admission.[45] Nevertheless, this Court acknowledged that "there is yet room for litigation over the underlying nature of military urinalysis documents" in cases where there is an objection at trial followed by more extensive development of the evidence and argument.[46] This case provides an opportunity for this Court to settle this issue under an abuse-of-discretion analysis.

The lower court found the chain-of-custody documents and internal review worksheets to be non-testimonial, finding that neither were made for the primary purpose of later use at trial.[47] This is incorrect.

The chain of custody documents are testimonial.

In *Melendez-Diaz v. Massachusetts*, the Supreme Court

---

[43] *United States v. Blazier (Blazier I)*, 68 M.J. 439, 441-42 (C.A.A.F. 2010).
[44] *Sweeney*, 70 M.J. at 302 (emphasis omitted).
[45] *Sweeney*, 70 M.J. at 305.
[46] *Id.* at 305-06.

explained that its decision did not create the requirement "that anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person."[48] However, it did state that "what [chain of custody evidence] *is* introduced must (if the defendant objects) be introduced live."[49] And while this "requirement" appears in a footnote, its reasoning is sound and therefore should apply to military justice cases, like any other.

In *Sweeney*, this Court held that the specimen custody certification — Block H on the DD2624, certifying "that the laboratory results . . . were correctly determined by proper laboratory procedures" — was testimonial. That means it was made for the primary purpose of preserving evidence for later use at trial. That holding forms the framework for consideration of any future chain of custody issues, including in this case. Because that certification is testimonial, this Court should guard against allowing the basis of such a testimonial statement to be used to prove a matter that it asserted – that the laboratory procedures were proper – without the declarant being subjected to confrontation.

Put differently, Block H was signed *after* the chain of custody and internal review worksheets were completed and signed. This begs the question: If the certification that the proper procedures were used was made for later use at trial, what

[47] *Tearman*, 70 M.J. at 642-43.
[48] *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 n.1 (2009).

evidence exists that the underlying certifications of proper handling upon which it relies were not made for the same purpose? Accordingly, this Court should hold, as the Supreme Court noted, that chain of custody documents are testimonial and, when an accused objects as Appellant did here, they are subject to confrontation.

The internal review documents are testimonial.

In *Sweeney*, this Court explained that when an accused tests positive on at least one test, the testing analysts "must reasonably understand themselves to be assisting in the production of evidence when they perform re-screens and confirmation tests and subsequently make formal certifications."[50] Here, as in *Sweeney*, the NDSL analysts were on notice that they were assisting in evidence production.

By instruction of the Navy Bureau of Medicine, the mission of the NDSL is "to provide accurate and legally defensible drug testing and perform other tasks as directed by higher authority."[51] And the stated mission of the NDSL San Diego is "to support command readiness and force health protection by deterring illegal drug use through forensic drug testing, expert testimony, consultation, education, and methods development."[52] Thus, part of the mission of the NDSL analysts is to provide drug

---

[49] *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (emphasis in original).
[50] *Sweeney*, 70 M.J. at 302-03.
[51] BUMEDINST 5450.157B Encl(3) of 16 Oct 2008.
[52] www.med.navy.mil/sites/sandiegodruglab/Pages/default.aspx (last visited on Apr. 2, 2012).

tests that they can reasonably expect to be used in court. And Ms. Kaminski's testimony reflected this.

Ms. Kaminski testified that her laboratory regularly undergoes inspections to ensure that it produces "legally defensible drug testing results."[53] To that end, Ms. Kaminski testified that she has specialized training in forensic science and law.[54] Moreover, in addition to being a supervisor, Ms. Kaminski also held the job title of "expert witness" for which she received annual training and re-certification.[55] All of these factors indicate that the NDSL analysts assist in the production of evidence that she uses at trial as an expert witness. And here, as in *Sweeney*, the Government offered no alternate purpose for creating the documents and worksheets at issue.[56]

Therefore, as with the chain of custody documents, this Court should hold that the internal review documents are testimonial. And when, as here, an accused objects to their admission on Confrontation Clause grounds, the declarants who created them should be subject to confrontation.

Conclusion

The two pieces of testimonial hearsay within the DD2624 contributed to Appellant's conviction. And the chain of custody and internal review documents are testimonial in nature. Appellant respectfully requests this Court reverse the decision of

---

[53] JA at 21-22.
[54] *Id.* at 20.
[55] *Id.*
[56] *Sweeney*, 70 M.J. at 305 n.17.

the lower court and set aside his conviction for wrongful marijuana use.

/S/

MICHAEL D. BERRY
Captain, USMC
Appellate Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7394
Bar No. 34828

Certificate of Compliance

This brief complies with the page limitations of Rule 21(b) because it contains 18 pages consisting of 3737 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word with 12-point Courier-New font.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court, and that a copy was delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on April 23, 2012.

/S/
MICHAEL D. BERRY
Captain, USMC
Appellate Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7394
Bar No. 34828