IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Andrew D. TEARMAN Lance Corporal (E-3) United States Marine Corps, Appellant	**APPELLANT'S REPLY BRIEF** Crim.App. No. 201100195 USCA Dkt. No. 12-0313/MC Filed on June 13, 2012

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

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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?

Appellee answers that the admission of the two pieces of testimonial hearsay at Appellant's court-martial was harmless beyond a reasonable doubt for three reasons: (1) they were only generally referred to; (2) they were cumulative with Ms. Kaminski's expert opinion; and (3) Ms. Kaminski was subject to rigorous cross-examination.[1] These arguments are without merit.

A. Ms. Kaminski did not "generally refer to" Block G. On the contrary, the trial counsel directed her attention to it.

During direct examination of Ms. Kaminski, the trial counsel directed her attention to Prosecution Exhibit 4, the NDSL report. Page-by-page, Ms. Kaminski assisted the trial counsel in explaining the NDSL report to the members. Eventually, they arrived at page 3 of the report -- DD Form 2624.[2] At this point, while referring to Appellant's sample, the trial counsel asked Ms. Kaminski "what was the result of any test that was done on that?"[3] Ms. Kaminski responded that "it was positive for THC."[4]

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[1] Appellee's Br. at 7-18.
[2] Joint Appendix (JA) at 24.
[3] JA at 24.
[4] *Id.*

Thus, it is clear that, in response to the trial counsel's question, Ms. Kaminski directly referred to Block G in the DD Form 2624. This is evident for two reasons.

First, the two questions immediately following this one directly referred to portions of the same DD Form 2624. Immediately after the testimony at issue, the trial counsel referred to Block D of the DD Form 2624. And in his next question, the trial counsel directed Ms. Kaminski to "page 4 of Prosecution Exhibit 4" and asked, "Can you please tell the members what this document is?[sic]"[5] Ms. Kaminski replied that "this is the back page of the DD 2624 form."[6] The only conclusion is that the trial counsel's previous questions directly referred to the front page of the DD Form 2624.

Second, because Ms. Kaminski did not perform or participate in any of the tests for Appellant's sample, she could not have arrived at her conclusion that his sample tested positive for THC without reference to Block G. Moreover, she did not merely refer to Block G in arriving at her conclusion. She repeated its testimonial hearsay in court.

B. The testimonial hearsay was not cumulative. It was vital to the Government's case and contributed to Appellant's conviction.

Appellee argues that Blocks G and H on the DD Form 2624 "merely restated what is contained in the remaining portions of

[5] JA at 24.
[6] *Id.*

the non-testimonial DTRs and Ms. Kaminski's testimony."[7] Not true.

The ***only*** evidence that unequivocally states Appellant's urine sample tested positive for THC is Block G. By definition, Block G is not cumulative. And, contrary to Appellee's assertion, Block G did not restate Ms. Kaminski's testimony. Conversely, Ms. Kaminski repeated what she read in Block G. This is a difference with an important distinction. If Ms. Kaminski had arrived at her conclusion that Appellant's urine sample tested positive for THC independently, then perhaps Block G would be cumulative with her conclusion. But the record belies such speculation. Ms. Kaminski relied on Block G in reaching her conclusion. Thus, Block G was important.

Similarly, Ms. Kaminski could have offered her opinion that the tests were performed correctly without relying on Block H of the DD Form 2624. But that alone does not make it cumulative. Appellee cannot demonstrate that the tests were performed correctly notwithstanding Block H. This is particularly true when, as is the case here, the defense challenges the laboratory testing procedures. Because Ms. Kaminski took no part in testing Appellant's urine sample, she had no basis to opine that the tests were performed correctly other than Block H. Therefore, as with Block G, Block H was a significant component of the Government's case against Appellant. Indeed, the trial defense counsel highlighted the past testing errors at the NDSL and the potential

[7] Appellee's Br. at 11.

for error in Appellant's case. Without Block H, the members may have agreed with the trial defense counsel.

C. Cross-examination of the surrogate witness is not a substitute for confrontation.

Appellee argues that Appellant was not prejudiced because he was able to rigorously cross-examine Ms. Kaminski. Specifically, Appellee argues that Ms. Kaminski "testified subject to cross-examination as to the general reliability of testing procedures for samples in the lab . . . ."[8] That argument circumvents the Confrontation Clause. In essence, Appellee argues that, when the Government violates the Confrontation Clause by introducing testimonial hearsay through a surrogate witness, the error is harmless as long as the surrogate is subject to cross-examination. But that is not what the Confrontation Clause requires. It guarantees the opportunity to test through cross-examine the "honesty, proficiency, and methodology" of the analysts who actually performed the tests.[9]

Accordingly, the mere fact that Appellant was able to cross-examine a surrogate witness about the "general reliability" of the NDSL testing procedures did not render harmless the denial of his confrontation right. Appellant invoked his constitutional right to cross-examine the analysts who actually performed the tests in his case and the military judge's denial of that right is not harmless beyond a reasonable doubt.

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[8] Answer at 12.

[9] *Melendez-Diaz v. Massachusetts*, 55 U.S. __, 129 S. Ct. 2527, 2536-38 (2009); *Bullcoming v. New Mexico*, 564 U.S. __, 131 S. Ct.

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? IF SO, DOES THEIR ADMISSION OVER APPELLANT'S OBJECTION CONSTITUTE AN ABUSE OF DISCRETION?

Appellee argues that the non-machine generated documents and worksheets are not testimonial because they do not contain formal attestations and they were not made under circumstances what would lead an objective witness to reasonably believe that their annotations would be available for use at a later trial.[10]

Appellee's continued insistence that statements be sworn-to or formally attested-to in order to be deemed testimonial is misguided. As the Supreme Court explained, a statement is testimonial if it is made with the "primary purpose of establishing or proving past events *potentially relevant* to later criminal prosecution."[11] Under this test, a signature or formal attestation is sufficient to establish that a statement is testimonial; but it is not necessary. Indeed, it would be perverse if the Government could circumvent the Confrontation Clause -- implemented in part to prevent trial by affidavit -- simply by making unsworn and unsigned accusations. And yet that is exactly what Appellee argues.

2705, 2710 (2011).
[10] Appellee's Br. at 19-24.
[11] *Bullcoming*, 131 S. Ct. at 2714 n. 6 (2011)(internal quotation

This Court recently held that rather than being dispositive, "[t]he formality of a document generated by a forensic laboratory *is a factor to be considered* when determining whether a document is testimonial."[12] Even so, the non-machine generated documents and worksheets in this case are no more or less formal than the documents declared testimonial in *Sweeney*.

In *Sweeney*, this Court held that the cover memorandum and the specimen custody document were formal, affidavit-like documents that were testimonial, even in the plain-error context.[13]

The NDSL prepared the *Sweeney* cover memorandum after the Government charged Sweeney with wrongful drug use and "included the formulaic language for authenticating a business record . . . ." [14] Thus, it had an evidentiary purpose. And though it was not a formal affidavit, it was "affidavit-like." The formality lay in the circumstances by which the document came into existence.

This Court reached the same conclusion with the specimen custody document. Like the cover memorandum, it was not a sworn affidavit. Nevertheless, it was formal because it "[had] no purpose but to serve as an affidavit."[15] In other words, its

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marks, brackets and citation omitted)(emphasis added).
[12] *United States v. Sweeney*, 70 M.J. 296, 303 n. 13 (C.A.A.F. 2011)(emphasis added).
[13] *Id.* at 304.
[14] *Id*.
[15] *Sweeney*, 70 M.J. at 304.

"primary purpose" was to either record facts or prove past events, which were potentially relevant to later prosecution.

In this case, the non-machine generated documents and worksheets had the primary purpose of establishing past events that were potentially relevant to Appellant's court-martial. Specifically, the chain-of-custody documents had the primary purpose of establishing a past event -- an unbroken chain of custody -- which was relevant at Appellant's court-martial. It was relevant because the military judge instructed the members that they must be satisfied beyond a reasonable doubt that Appellant's sample had an unbroken chain of custody.[16]

The review worksheets have the primary purpose of establishing the fact that the NDSL analysts performed the tests correctly. This fact was relevant to Appellant's court-martial because the military judge instructed the members that they must be satisfied that the NDSL properly analyzed the sample and produced an accurate result.[17]

The non-machine generated documents and worksheets satisfy the primary purpose test, are testimonial, and therefore subject to the Confrontation Clause.

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.

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[16] JA at 29.
[17] *Id.*

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Certificate of Filing and Service

I certify that the foregoing was hand-delivered to the Court, and that a copy was hand-delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on June 13, 2012.

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This reply complies with the page limitations of Rule 21(b) because it contains 7 pages. This supplement 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.

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