IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF ON BEHALF OF APPELLEE
Appellee	)	
v.	)	Crim.App. Dkt. No. 201100195
	)	
Andrew D. TEARMAN,	)	USCA Dkt. No. 12-0313/MC
Sergeant (E-5)	)	
U.S. Marine Corps	)	
Appellant	)	

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

WILLIAM C. KIRBY
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687
Bar no. 35169

KURT J. BRUBAKER
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 35434

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellant's approved sentence included a bad-conduct discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A panel of members sitting as a special court-martial convicted Appellant, contrary to his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a,

UCMJ, 10 U.S.C. § 912a (2006). The Members sentenced Appellant to reduction to pay grade E-1 and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, in accordance with the UCMJ, the Manual for Courts-Martial (MCM), and applicable regulations, ordered the sentence executed. On direct appeal, the Navy-Marine Court of Criminal Appeals affirmed the findings and sentence. This Court granted review on March 23, 2012.

Statement of Facts

A. Appellant's urine sample tested positive for marijuana after a random urinalysis.

Appellant was selected by a computer program, along with forty-four other Marines, as part of a random urinalysis on July 7, 2010. (J.A. at 19.) Appellant's sample tested positive for THC. (J.A. 24, 83.)

As part of its case, the Government submitted Prosecution Exhibit 4, which consisted of various drug laboratory documents pertaining to Appellant's sample, prepared by the Navy Drug Screening Laboratory, San Diego. (J.A. at 34-67.) These documents consisted of chain-of-custody documents, machine generated data, certification by officials, and occasional hand-written notations. (J.A. 34-67.) The Government did not introduce any "cover memorandum" or any other document that may have been prepared at the request of the prosecution. (J.A.

23.)

Trial Defense Counsel moved to exclude the entire report or in the alternative, to exclude all the non-machine generated portions. (J.A. 23, 76; Appellate Ex. XII; Appellate Ex. XIV.) The Military Judge denied the defense motions. (J.A. 74, 23, 76.) The Military Judge found that *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), was the controlling authority for this issue and that the lab documents, including the chain of custody documents and any machine generated data were not testimonial statements within the scope of the Confrontation Clause. (J.A. 23, 74, 76.) The Military Judge ruled that the testing was on a random basis, under a "non-investigative urinalysis process," and the drug lab packet contained non-testimonial material. (J.A. 23, 76.)

B. Ms. Andrea Kaminski's Testimony.

Ms. Andrea Kaminski testified for the prosecution. (R. 220-291.) Ms. Kaminski testified that she was employed as a supervisory chemist at NDSL since September 2008; that she had a bachelor of science degree in biology, minored in chemistry and forensic science, and had a master's degree in forensic science and law; that she is certified in each of the six sections of NDSL and that she maintains her certifications annually; and is in the confirmation department, overseeing its day-to-day

production. (J.A. 20, 75.) Ms. Kaminski testified that she is familiar with the Drug Lab's marijuana testing procedures. (J.A. 75.) When describing the specimen custody document, without specifically citing to the certification on Block G, Ms. Kaminski also stated that "[Specimen 082] was positive for THC." (J.A. 24.)

She then identified the actual urine sample bottle that contained the accession number, S10G0362082, that matched an identical accession number in the chain of custody documents. (R. 236.) She also identified Appellant's social security number on both the bottle and the accession number in the chain of custody documents. (R. 236.)

Ms. Kaminski then proceeded to describe the marijuana testing procedures in detail including the initial screening test, the rescreening test, and the GCMS confirmation test, and identified each of those tests in exhibits admitted into evidence. (R. 237-40; J.A. 77.) Finally, reviewing the Drug Testing Results (DTRs) for the accession number on the bottle admitted into evidence, based on the immunoassay test's raw numbers reported on pages 8 and 14 of Prosecution Exhibit 4, she opined that the bottle contained levels of THC above the DoD cutoff for THC, that is, that the bottle tested positive for Tetrahydrocannabinol (THC). (J.A. 41, 75, 77, 80, 83.)

She testified additionally that: the DTRs showed no error codes (J.A. 78); the quality control samples tested within their specifications, showing the tests' accuracy (J.A. 79); the instruments were calibrated daily (J.A. 80); wash tubes were used, showing no contamination of the machines (J.A. 81); that the autotune was functioning, showing the testing instruments were running in accordance with the manufacturer's specifications (J.A. 82); and finally, that the solvents were used, ensuring no contamination or carry over from a previous sample occurred (J.A. 83).

C. Appellant claimed his drug use might be due to second-hand smoke inhaled at his wedding.

Appellant's sergeant major testified that when Appellant was informed that Appellant had tested positive for THC, Appellant appeared surprised and denied using marijuana. (J.A. 16.) Sergeant Major Cherry testified that Appellant stated that he was "around" people smoking marijuana on the church steps at his wedding. (J.A. 15.)

Summary of Argument

The admission of the specimen custody's testimonial certifications in blocks G and H were harmless beyond a reasonable doubt under a *Van Ardsall* analysis. Ms. Kaminski interpreted the test results for the Members, indicating what the tests indicated on a slideshow. Based on her independent

knowledge of the drug lab's testing procedures and computer-generated test results, Ms. Kaminski's in-court expert testimony was permissible under the Rules of Evidence. Moreover, she explained the results to the Members and did not merely repeat inadmissible testimonial hearsay. In sum, the specimen custody document's testimonial certifications were cumulative with admissible testimony provided by Ms. Kaminski and the non-testimonial portions of the drug lab documents which Ms. Kaminski explained to the Members.

Except for the specimen custody document's block G and H certification, admission of the remaining urinalysis documents did not violate Appellant's Sixth Amendment rights. An objective witness would not reasonably believe that the analysts' annotations on the chain of custody and internal review documents would have later been used at a trial. Moreover, the analysts' annotations are not formal attestations, thus are not testimonial in nature.

Argument

I.

INCLUSION OF TESTIMONIAL CERTIFICATIONS FROM THE SPECIMEN CUSTODY DOCUMENT WAS HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THEY WERE ONLY ONCE GENERALLY REFERRED TO, THEY WERE WHOLLY CUMULATIVE WITH MS. KAMINSKI'S EXPERT OPINION THAT THE MACHINE-GENERATED RESULTS DEMONSTRATED THE PRESENCE OF THC, AND SHE WAS SUBJECT TO RIGOROUS CROSS-EXAMINATION BY APPELLANT.

A. Cumulative testimonial evidence is harmless beyond a reasonable doubt.

The error in admitting the testimonial hearsay certifications should be analyzed under the harmless beyond a reasonable doubt standard. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008). 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).

In Confrontation Clause cases, courts apply this test by looking to the factors set forth by the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 684 (1986), to assess whether an error is harmless beyond a reasonable doubt. *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009). The *Van Arsdall* Court stated:

> Whether an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include [1] the

> importance of the witness' testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684 (citations omitted). Finally, the Government bears the burden of establishing that a constitutional error has no causal effect upon the findings. *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004).

B. The admitted testimonial evidence was harmless beyond a reasonable doubt.

Under the *Van Arsdall* factors, the admission of the specimen chain of custody document and the urine bottle certifications without cross-examination of Mr. T. Romero was harmless error.

1. The testimonial certifications within the specimen custody documents lacked importance in the Government's case.

The testimonial hearsay from these certifications was *de minimis*, adding nothing to the Government's case. Ms. Kaminski based her testimony that Appellant's sample contained THC from her reading of non-testimonial machine-generated results to the Members and her independent knowledge of the drug lab's procedures. She only briefly discussed the specimen custody document's testimonial certifications in the beginning of her testimony. Indeed, the specimen custody certifications were

never directly quoted in the Record of Trial and never relied upon for Ms. Kaminski's reading and interpretation of the computer-generated DTRs.

The inadmissible certifications were unimportant to the Government's case, particularly when Ms. Kaminski's testimony is reviewed *in toto*. Ms. Kaminski testified predominantly and extensively over seventy pages as to the actual tests, stating the GC/MS was properly calibrated and functioning, how the samples are tested, and her expert and personal understanding of the testing procedures. (R. 222-291.) Ms. Kaminski mentioned the inadmissible certifications only once (J.A. 24), but testified across those seventy pages, at length, that: the DTRs showed no error codes (J.A. 78); the quality control samples tested within their specifications to show the tests' accuracy (J.A. 79); the instruments were calibrated daily (J.A. 80); wash tubes were used, showing no contamination of the machines (J.A. 81); that the autotune was functioning, showing the testing instrument was running according to manufacturer's specifications (J.A. 82); and finally, that the solvents were used, ensuring no contamination or carry over from a previous sample (J.A. 83). This factor favors the Government.

2. <u>The certifications were cumulative</u>.

In the context of a *Crawford* violation, this Court may find

error harmless on the basis of cumulativeness alone. In *United States v. Rankin*, 64 M.J. 348, 349 (C.A.A.F. 2007), the court held that three of four unauthorized absence documents were properly admissible as non-testimonial hearsay. The Court found the fourth document testimonial, but concluded that its admission was harmless beyond a reasonable doubt because it contained information cumulative with the information contained in the other three testimonial documents. *Id.* at 353.

This is also close to the situation in *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008), where the report of a non-testifying chemist was introduced into evidence, concluding that the tested substance was indeed cocaine. *Id.* at 361. The court reasoned that, even with the admission of testimonial evidence contained in the report, the error was harmless given that an expert chemist took the stand, testified, and reached the same conclusion based on the raw readings taken from instruments and introduced into evidence via the report. *Id.* at 362. The Seventh Circuit conducted, essentially, a cumulativeness analysis, concluding that the erroneously-admitted former chemist's testimonial conclusions were not harmful to the defendants, even though entered into evidence, "given [the testifying chemist's] live testimony and availability for cross-examination." *Id.* *See also United States v. Turner*, 591 F.3d

928, 933 (7th Cir. 2010) (any error harmless beyond a reasonable doubt where chemist introduces arguably testimonial evidence by testifying that his opinion is the same as that of another, non-testifying chemist, as to the presence of cocaine, where testifying chemist's testimony cumulative with absent chemist's conclusion).

The reasoning in *Rankin, Moon,* and *Turner* supports a finding that Ms. Kaminski's independent expert testimony, subject to extensive cross-examination under Fed. R. Evid. 703, renders admission of the urinalysis documents harmless beyond a reasonable doubt. Mr. Kaminski testified to the contents of the urinalysis documents independently and cured any effect of the error. The inadmissible testimonial certifications on the specimen custody document merely restated what is contained in the remaining portions of the non-testimonial DTRs and Ms. Kaminski's testimony. The certifications contain no additional evidence against Appellant. When compared with Ms. Kaminski's comprehensive testimony detailing the contents of the DTRs, which was properly before the court, *Rankin*, *Moon,* and *Turner* support any error was harmless.

Accordingly, Appellant's argument that Ms. Kaminski committed irreparable harm by bolstering Mr. Romero's certification fails under the above analysis; the certification

was cumulative and this factor weighs in favor of the Government.

3. The presence or absence of evidence corroborating or contradicting the testimony of the certifications on material points.

The testimonial assertions of the certification provided a *de minimis* testimonial statement as to results of Appellant's test. Ms. Kaminski, however, *see* Section 4 *infra,* testified subject to cross-examination as to the general reliability of testing procedures for samples in the lab, as well as to the data contained in the DTRs. Her testimony tightly detailed NDSL's testing procedures, their quality control measures, and what the test results meant. (R. 220-254.) This evidence——Ms. Kaminski's detailed testimony regarding chain of custody, cut-off levels, nanogram levels, chromatograms, calibration of the GC/MS machines and to general testing reliability, as well as to the fact that the machine-generated non-testimonial results evidenced THC in Appellant's sample——amply corroborated the certifications. *cf. United States v. Israel*, 60 M.J. 485 (C.A.A.F. 2005). This factor also favors the Government.

4. Appellant’s lengthy cross-examination of Ms. Kaminski demonstrates the lack of prejudice, in that Appellant had the opportunity to cross-examine Ms. Kaminski regarding the meaning of the both the testimonial certifications and the machine-generated test results, as well as explore his “passive inhalation” theory.

Mr. T. Romero, who signed block H of the specimen custody document and the urine bottle certification, did not testify. Nonetheless, Appellant was provided a meaningful and extensive opportunity to cross-examine the merits of blocks G and H’s certifications. *United States v. Israel*, 60 M.J. 485 (C.A.A.F. 2005), remains instructive in dealing with constitutionally impermissible limits on cross-examination though predating *Bullcoming* and *Sweeney*. In *Israel*, the prosecution primarily relied upon the accused’s positive urinalysis. *Id*. at 486. The only defense raised by the appellant was an attack on the reliability of the urinalysis testing process. *Id*.

The witness in *Israel* had no memory of the appellant’s individual test results, but testified only as to standard procedures. *Id.* at 487. But the *Israel* military judge allowed the defense counsel to conduct only limited cross-examination regarding errors in the testing process, and evidence the defense offered in support of the possibility of errors. Specifically, the military judge prevented the accused from cross-examining drug lab personnel regarding MacDill Air Force

Base's untestable rates, a drug laboratory report regarding an unacceptable calibrator, and a false-positive blind quality control sample. *Id.* at 488.

The *Israel* court found that "[b]y precluding any meaningful inquiry into those relevant irregularities in the process, Israel was deprived of the opportunity to confront" the quality of the testing process. *Id.* at 491. The court concluded that: "In those cases where the Government relies on the general reliability of testing procedures, evidence related to the testing process that is closely related in time and subject matter to the test at issue may be relevant and admissible to attack the general presumption of regularity in the testing process." *Id.* at 489. The error there was not harmless beyond a reasonable doubt because it was "impossible to say that the members would not have taken evidence of irregularities in the testing process and possible errors in the results into consideration." *Id.* at 491.

But this case is more like *Moon,* where despite the error in introducing the testimonial conclusions of an out-of-court scientist, "given [a different scientist's] live testimony and availability for cross-examination, [the out-of-court scientist's] inferences and conclusions were not harmful to the defendants." 512 F.3d at 362. Like *Moon* where the appellant

attacked the chain of custody and in contrast to *Israel,* Appellant here both was afforded, and used cross-examination to attack the NDSL's general testing process. (J.A. 84-85.)

Trial Defense Counsel here listed three separate instances of irregularities in the process, dating from 2007 through 2010. (J.A. 84-85.) Ms. Kaminski acknowledged each of these irregularities. And, unlike *Israel,* Appellant here questioned Ms. Kaminski on the matters that the military judge in *Israel* improperly excluded, and that the *Israel* court held would have been sufficient——specifically potential irregularities and errors in the testing process implicating reliability of the machine-generated data. Additionally, the military judge in *Israel* prevented the accused from exploring relevant lines of inquiry with those best suited to respond competently. Here, the absence of Mr. T. Romero did not prevent Appellant from fully exploring relevant lines of inquiry relating to testing irregularities, erroneously excluded in *Israel*. This factor favors the Government.

5. The overall strength of the Government's case.

As discussed above, the strength of the Government's case was virtually identical with or without the specimen custody certifications. Because the inadmissible certifications merely repeated the conclusions found in the remaining portions of the

DTRs, and because Ms. Kaminski testified independently regarding the DTRs' conclusions, the testimonial certifications were cumulative. Moreover, the Government's case also consisted of testimony from Appellant's sergeant major stating that Appellant admitted that others at Appellant's wedding were using marijuana and that Appellant offered his exposure to second hand smoke as a possible source of his sample's testing positive for THC. As Ms. Kaminski testified, Appellant's explanation was implausible and his offering of this explanation only strengthens the Government's case. (R. 252-253.) In sum, when subjected to the *Van Arsdall* factors, the admission of the specimen custody document's testimonial certifications are harmless beyond a reasonable doubt.

C. An expert witness may properly give testimony in the form of an opinion based on both admissible and inadmissible data.

A qualified expert may give testimony in the form of an opinion or otherwise:

> [I]f (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliability to the facts of the case.

Mil. R. Evid. 702. An expert witness may rely on any pertinent nontestimonial facts or data to form and testify concerning an expert opinion. *See* Mil. R. Evid. 702-03. But an expert may

also "rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own[.]" *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010); Mil. R. Evid. 703.

"[I]t is well-settled that under both the Confrontation Clause and the rules of evidence, machine-generated data and printouts are not statements and thus not hearsay——machines are not declarants——and such data is therefore not 'testimonial.'" *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011) (citing *Blazier*, 69 M.J. 218, 224); *cf. Bullcoming v. New Mexico,* 131 S. Ct. 2705, 2714 (2011) (noting that the "representations" contained in the testimonial statement at issue were "not revealed in raw, machine-produced data").

D. Ms. Kaminski properly gave testimony in the form of expert opinion based on admissible, nontestimonial data; she did not merely repeat testimonial hearsay.

As a Navy Drug Screening Lab (NDSL) chemist laboratory certifying official and expert witness, Ms. Kaminski properly relied on her training and experience in the field of Toxicology and her knowledge of the drug lab's testing procedures and her reading of the computer-generated test results to determine Appellant's blood contained THC. *Blazier*, 69 M.J. at 222; *Garces*, 32 M.J. at 347.

Ms. Kaminski testified regarding her knowledge of drug lab procedures and her analysis of the DTR computer-generated data regarding Appellant's urine sample. She relayed to the Members her understanding of the computer-generated DTRs. By referring to the computer-generated DTRs, she testified that Appellant's sample tested positive for THC. (J.A. 77, 80, 83.) While testifying regarding the specimen custody document, Ms. Kaminski did testify that batch 362, specimen 082, tested positive for THC. (J.A. 24.) However, she did not directly cite the specimen custody document's blocks G and H. Ms. Kaminski's testimony thereafter dove into an explanation of the computer-generated DTRs and their indications that Appellant's sample tested positive for THC. (J.A. 80, 83.)

As a result of her explanation of the computer-generated DTRs, her explanations of the DTRs and their indication that Appellant's sample tested positive for THC was admissible and the Members properly relied upon it. Without Ms. Kaminski's translation of the various nanogram and milligram levels regarding the DTRs computer-generated data, the data would have been unintelligible to the Members and the testimonial certifications meaningless, as they were unsupported by understandable evidence. Indeed, Ms. Kaminski was permitted to rely on her personal knowledge of the drug lab's testing

procedures, her expert knowledge, and the machine-generated data to explain the results of the DTRs to the Members.

Ms. Kaminski did not merely repeat testimonial hearsay or serve as a surrogate for a non-testifying witness against the accused. *See Bullcoming*, 131 U.S. at 2710. Instead, Ms. Kaminski testified about the lab's functions, its quality control mechanisms, the testing methods used in this case, the scientific procedures involved, and that the DTRs indicated Appellant's sample number tested positive for the presence of THC. All of her assertions were founded in her expert background, personal knowledge of the drug lab's testing procedures, and her reading of the DTRs computer-generated data. Accordingly, Ms. Kaminski's testimony was necessarily her own and was not merely repeating the testimonial hearsay from the exhibit.

II.

THE ADMISSION OF THE INTERNAL REVIEW DOCUMENTS AND THE CHAIN OF CUSTODY DOCUMENTS WAS PROPER AS THESE DOCUMENTS DO NOT CONTAIN FORMAL ATTESTATIONS AND WERE NOT MADE UNDER CIRCUMSTANCES THAT WOULD LEAD AN OBJECTIVE WITNESS TO REASONABLY BELIEVE THAT THEIR ANNOTATIONS WOULD BE AVAILABLE FOR USE AT A LATER TRIAL.

A. Standard of review.

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

U.S. CONST. amend. VI. Accordingly, no testimonial hearsay may be admitted against a criminal defendant unless (1) the witness is unavailable, and (2) the witness was subject to prior cross-examination. *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004).

While this Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion, *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009), the antecedent question——whether evidence that was admitted constitutes testimonial hearsay——is a question of law reviewed *de novo*. *Id.*

B. Laboratory reports are testimonial only if they contain formalized statements made for use at a later trial.

A statement is testimonial if "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *United States v. Sweeney,* 70 M.J. 296, 301 (C.A.A.F. 2011) (quoting *United States v. Blazier (Blazier I)*, 69 M.J. 218, 222 (C.A.A.F. 2010)). The focus of determining whether evidence is testimonial "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." 70 M.J. at 302.

Although adherence to strict formality is not expressly

required in order to find a statement to be testimonial, the *Sweeney* court nonetheless noted that the "formality of a document generated by a forensic laboratory is a factor to be considered when determining whether a document is testimonial." *Id*. at 303 n.13 (citing *United States v. Bullcoming*, 131 S. Ct. 2705, 2717 (2011)). The consideration of a document's formality is necessary because a majority of the Supreme Court has not agreed on a precise definition of testimonial. *See People v. Davis,* 199 Cal. App. 4th 1254, 1267 (Cal. Ct. App. 2011) (noting the Supreme Court's plurality opinions and the importance of the formality of a document under Supreme Court precedent).

In *Melendez-Diaz*, the Supreme Court, in a five-to-four decision, held that sworn affidavits by three state drug lab analysts were testimonial. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Justice Thomas, the crucial fifth vote, joined the opinion on the narrow grounds that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.* at 2543 (Thomas, J., concurring).

Similarly, the Supreme Court later held that when certificates in a lab report are formalized in a signed document, "the formalities attending" the certifications were

more than adequate to qualify the certifications as testimonial. *Bullcoming,* 131 S. Ct. at 2717. Earlier in the opinion, the Court defined a testimonial statement as a statement that has a primary purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecutions." *Id.* at 2714 n.6 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). But only four Justices joined this portion of the opinion. *Bullcoming,* 131 S. Ct. at 2709. Therefore, the claim "that a testimonial statement is one made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, remains unsubstantiated to date." *Davis,* 199 Cal. App. 4th at 1267 (citations omitted). Therefore, it is important to consider not only the purpose of each statement, but also its formality. *Sweeney,* 70 M.J. at 303 n.13.

C. The Drug Lab analysts' annotations on the chain of custody and internal review documents were not formal attestations, showing they were not testimonial.

The NDSL analyst's stamps, signatures, and notations were not formal affidavits or statements, demonstrating their non-testimonial nature. This Court recognized in *Sweeney* that a statement's formality factors into determining whether a statement is testimonial. *Sweeney* 70 M.J. at 305.

Here, the chain of custody documents and internal review

sheets are strikingly different from the formal certifications in *Melendez-Diaz* and *Bullcoming*, and the certification on the DD 2624 that this Court found testimonial in *Sweeney.* The lack of an evidentiary purpose is plain in what the documents lack: they do not note a potential use at trial, they are not notarized, they are not formalized like affidavits, they do not include a legend referring to local court rules, and they are not *per se* evidence under laws, all of which distinguishes the nontestimonial documents here from both the testimonial certificate in *Melendez-Diaz* and the testimonial report in *Bullcoming*. *Melendez-Diaz*, 129 S. Ct. at 2532; *Bullcoming*, 131 S. Ct. at 2717.

There are more differences than similarities in both form and substance between these informal summaries and the affidavit-like certificates created with an eye to trial. *See United States v. Byrne,* 70 M.J. 611, 619 (C.G. Ct. Crim. App. 2011)(applying *Sweeney* and determining that documents similar to the "cocaine confirm data review" sheets in *Sweeney* were not testimonial, even with an objection at trial, because the documents were neither "formalized, affidavit-like statements . . . nor statements made in a formal setting")(ellipsis in original).

D. The analysts made their chain of custody and internal review annotations under circumstances that would not lead an objective witness to reasonably believe the analysts’ annotations would be later used at a trial.

An objective witness would not reasonably believe that the analysts’ annotations on the chain of custody and internal review documents would be available for use at a later trial. Specifically, the internal review worksheets only contain names, signatures, and dates. In *Sweeney,* this Court was particularly concerned with the confirm data review sheets. 70 M.J. at 305. Here, unlike *Sweeney,* “[n]one of the ‘comments’ portions of these worksheets contain any notations.” *United States v. Tearman*, 70 M.J. 640, 643 (N-M. Ct. Crim. App. 2012). Nor do they certify a test result, or opine as to the accuracy of the testing adherence to any testing protocol. *Id.*

Under the facts of this case, it remains clear that notations, stamps, and signatures on the confirm data sheets were not made with an eye towards trial. They contain acronyms and abbreviations which indicate they are intended for internal use within the laboratory. Accordingly, the analysts’ annotations regarding routine procedures and test results do not lead an objective witness to reasonably believe the analysts’ annotations would be used at a later trial.

Conclusion

The findings and sentence, as approved by the court below, should be affirmed.

/S/

WILLIAM C. KIRBY
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE,
Bldg. 58, Suite B01
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687
Bar no. 35169

/S/

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

/S/

KURT J. BRUBAKER
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 35434

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Michael Berry
Captain, U.S. Marine Corps
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Suite 1000
Washington, D.C. 20374-5124

on this 6th day of June 2012.

/S/

WILLIAM C. KIRBY
Major, U.S. Marine Corps.
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7428, fax (202) 685-7687
Bar no. 35169