IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellant, v. Airman Basic (E-1) JOSHUA KATSO, USAF, Appellee.	)))))))))))	BRIEF OF AMICI CURIAE THE DEFENSE FORENSIC SCIENCE CENTER/UNITED STATES ARMY CRIMINAL INVESTIGATION IN SUPPORT OF APPELLANT USCA Docket No. 14-5008/AF Criminal Appeal No. 38005 Date: 10 September 2014

BRIEF OF AMICUS CURIAE DEFENSE FORENSIC SCIENCE CENTER/UNITED STATES ARMY CRIMINAL INVESTIGATION

A. Baxter White
Attorney Advisor
Defense Forensic Science Center/ U.S. Army Criminal Investigation Laboratory
4930 N. 31st Street
Forest Park, GA 30297
(404) 469-4631
Bar No. 36278

INDEX OF BRIEF

TABLE OF AUTHORITIES

SUPREME COURT CASES

U.S. COURT OF APPEALS FOR THE ARMED FORCES/ COURT OF MILITARY APPEALS

SERVICE COURTS OF CRIMINAL APPEALS

FEDERAL COURT CASES

RULES

OTHER AUTHORITIES

Transcript of John Kocak http://www.nlada.org/forensics/for_lib/Documents/1037341561.0/JohnIvanKocak.pdf.

NDAA Amicus Brief in Williams v. Illinois, citing United Sates v. Williams, 447 F.2d 1285, at 1290 (5th Cir. 1971, en banc)

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellant, v. Airman Basic (E-1) JOSHUA KATSO, USAF, Appellee.	)))))))))	BRIEF OF AMICI CURIAE THE DEFENSE FORENSIC SCIENCE CENTER/UNITED STATES ARMY CRIMINAL INVESTIGATION IN SUPPORT OF APPELLANT USCA Docket No. 14-5008/AF Criminal Appeal No. 38005

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT FOUND APPELLEE'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE MILITARY JUDGE PERMITTED OVER DEFENSE OBJECTION, THE TESTIMONY OF THE GOVERNMENT'S DNA EXPERT, AND THAT THE ERROR WAS NOT HARMLESS

Introduction

This brief is submitted by the United States Army Criminal Investigation Laboratory (USACIL), Defense Forensic Science Center (DFSC), as amicus curaie in support of the Appellant, the United States Air Force.

The Department of Defense designated the USACIL as the Defense Forensic Science Center (DFSC) in April 2013. The DFSC is comprised of the USACIL, the Forensic Expeditionary Directorate, and the Office of the Chief Scientist. All

traditional forensic testing utilized in court is conducted by the USACIL.

The USACIL serves as the forensics laboratory for the Department of Defense and its services. The USACIL conducts analysis in DNA, Drug Chemistry, Trace Evidence, Digital Evidence, Forensic Documents, Latent Prints, and Firearms and Toolmarks. There are approximately 85 testing analysts assigned to the different disciplines. The USACIL processed 3368 cases, 3116 cases, and 2977 cases in fiscal years 2011, 2012 and 2013 respectfully. The majority of cases are submitted by military and federal law enforcement agencies, although defense counsel through proper procedures may request testing of evidence at the laboratory.

As the military services have installations throughout the world, analysts are called to testify in cases both within and outside the continental United States. Analysts were requested to testify in more than 336 cases in 2013. In preparation of trial, analysts reviewed their case files, re-arranged schedules and completed travel arrangements in the Defense Travel System (DTS). Of the 336 cases in which analyst were requested, 194 cases required the presence of the analyst at trial. The other cases were resolved in an alternative manner. In the past three years approximately 11 analysts have left the laboratory as a

result of retirement, new employment, relocation, or death. It costs the US Government an estimated $4500 to obtain a former government expert for trial within the United States.

The matter before the Court is important to the Amicus because if the lower court's ruling is permitted to stand, Military Rule of Evidence 703 will be obsolete as applied to forensic testing. The lower court's ruling essentially precludes the use of a substitute forensic analyst if the original analyst is unavailable. Furthermore, the practical and operational impact of the court's ruling on the USACIL will be staggering. Should the ruling be upheld, it is guaranteed that government counsel will *preemptively* require analysts to attend Article 32 hearings or depositions, under the pretext of possible unavailability at trial. The absence of analysts from the laboratory for Article 32 hearings and depositions will impact the number of cases, especially sexual assault cases, processed in the laboratory. The proposal of re-testing as a cure for an unavailable analyst is greatly dependent upon the forensic discipline at issue. For example, it may be less complicated to have drug contraband re-submitted for testing as opposed to performing re-analysis of Trace or DNA evidence. The latter is more time consuming and depending upon the amount of identified sample remaining in DNA or Trace Evidence cases, the results may differ. Additionally, the ruling would impose upon the

government forensic analyst unimaginable restrictions on leave and provide the laboratory no ability to manage its employees where analysts would increasingly be subjected to warrants of attachment for fear of abatement of trial.

The ruling will have a dire affect on the operations of the laboratory. As an example, as recently as July 2014, a drug analyst scheduled to deploy to Kuwait to manage the opening of an expeditionary laboratory was required to delay travel for three weeks due to three cases in which he served as the primary analyst. In one of the cases, the defense would not accept a witness who re-tested the evidence, demanding the presence of the original analyst. On the Friday prior to trial the case was continued.

STATEMENT OF STATUTORY JURISDICTION

Amicus Curiae adopts Appellant's Statement of Statutory Jurisdiction as set forth on page one of the Appellant's Brief.

STATEMENT OF THE CASE

Amicus Curiae adopts Appellant's Statement of the Case as set forth on page one of the Appellant's Brief.

STATEMENT OF FACTS

Amicus Curiae adopts Appellant's Statement of Facts as set forth on page two through four of the Appellant's Brief.

SUMMARY OF THE ARGUMENT

There is no violation of the 6th Amendment Right to Confrontation where a technical reviewer testifies at trial, as he testifies as a fact witness to his own actions and is subject to cross-examination. The technical reviewer does not rely on hearsay when he testifies to the actions *he* performed in a case and the underlying documents which he used to perform his technical review.

ARGUMENT

There is no Violation of the 6th Amendment Right to Confrontation Where the Substitute Witness Who also Served as the Technical Reviewer Testified at the Trial.

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403 (1965), provides that " in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him.". Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009). When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are

not offered for their truth and thus fall outside the scope of the Confrontation Clause. Williams v. Illinois, 132 S.Ct. 2221, 2228 (2013). The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the fact or data need not be admissible in evidence for the opinion or inference to be admitted. Military Rules of Evidence M.R.E. 703.

When Mr. Davenport, the technical reviewer in this case testified at trial, he testified as a witness in his own right and not merely as an expert reviewer of a case file. Unlike a surrogate expert witness who was not involved during the processing of the case, the technical reviewer's opinion is not developed expressly for the purpose of testifying. Mr. Davenport testified that he conducted the technical review of the DNA analysis in this case. (J.A. at 291.) The technical reviewer is required to be intimately involved with the case at the time it is being processed by an analyst. It is his charge to ensure that policies and procedures are followed. (J.A. at 281.)

The technical reviewer of a DNA examination is required to take the data generated by the examiner being reviewed and to

interpret the data to ensure that there are no discrepancies between his findings and the findings of the testing analyst. Mr. Davenport testified that he performed this interpretation. (J.A. at 282) It is in this position that he stands as an original witness to the report upon which he testifies as he is describing the acts he performed as a technical reviewer and not merely a surrogate expert witness. A technical reviewer ultimately testifies to his own findings at the time of the examination.

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to the rigorous testing in the context of an adversary proceeding before the trier of fact. Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157 (1990). The testimony of a technical reviewer does not limit the right to confrontation by the accused because the testifying expert is available, as Mr. Davenport was in the case at bar, to be vigorously cross examined about the extent of his knowledge of the analyzed evidence. In this capacity he could be subject to cross-examination on a number of matters in the case such as: the chain of custody, which reagent lot numbers were used, whether the lots used had expired and whether his technical review identified any discrepancies with Mr. Fisher's testing procedures. The confrontation right does not require the cross-

examiner have all the information he would like. U.S. v. Hubbard, 28 M.J. 27 (C.M.A. 1989)

Although face-to-face confrontation forms the core of the values furthered by the Confrontation Clause, the Supreme Court nevertheless has recognized that it is not the sine qua non of the confrontation right. Maryland v. Craig at 847, 3164, citing US. v. Green, 399 U.S. 149, 157, 90 S.Ct. 1934 (1970) and Delaware v. Fensteren, 575 U.S. 15, 22, 106 S. Ct. 292, 295, 88 L. Ed 15 (1985) per curium. The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose testimonial infirmities through cross-examination thereby calling to the attention of the fact finder the reasons giving scant weight to the witness's testimony. Maryland v. Craig, citing Ohio v. Roberts, 448 U.S 56, at 69, 100 S.Ct. 2531 at 2540(1980).

In her concurring opinion in New Mexico v. Bullcoming, 564 US ___ , 131 S.Ct. 2705 (2011), Justice Sotomayor listed several circumstances in which a witness could possibly substitute for the analyst who conducted the testing. These situations included: the case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue; the case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves

admitted into evidence; a case in which the State introduced only machine-generated results, such as a printout from a gas chromotograph. See Sotomayer concurring in Bullcoming at 2722.

In the case at bar, each of the situations noted by the Justice were present. The original analyst was found to be unavailable. Unlike the analyst in Williams v. Illinois, Mr. Davenport was from the laboratory in which the report was generated and was familiar not only with the laboratory processes and procedures, but also the subject case. (J.A. 278 - 294) Moreover, he took the computer generated electropherogram and interpreted the data as part of case processing. Mr. Davenport had a personal connection in the scientific report at issue.

As we explained in *Melendez-Diaz*, it is not the case "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case . . . . It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence . . . ." Bullcoming, 131 S.Ct. 2705.

In Williams v. Illinois, Justice Kagan in her dissent referenced the case of John Kocak in which a CellMark biologist realized after her testimony that the names of the accused and the victim had been interchanged. What is notable is that this

finding did not occur as the result of vigorous cross-examination or the right to confrontation as espoused by the dissent, but as a result of the biologist reviewing the notes in the case file after she was excused from the stand. Online at ttp://www.nlada.org/forensics/for_lib/Documents/1037341561.0/JohnIvanKocak.pdf.

Incompetence in testing is revealed through careful analysis of the laboratory's work product in the form of a case file. It is the documentation and not the testimony of a certain examiner that provides the basis for an effective cross-examination. A challenge to the conclusions formed by an examiner, a substitute witness or a defense expert is made possible by the consistencies and inconsistencies found in the documents used to form the opinion.

Unlike the analyst is Bullcoming v. New Mexico, Mr. Davenport took part in the preparation of the report. As part of the analysis he reviewed the underlying data of Mr. Fisher, and reached his own opinion regarding the comparison of profiles developed in the case. When the expert witness has consulted numerous sources, and uses that information together with his own professional knowledge and experience, to arrive at his

opinion, that opinion is regarded as evidence in its own right and not hearsay in disguise.[1]

As presented by Justice Kennedy in Bullcoming, the defense remains free to challenge any and all forensic evidence. It may call and examine the technician who performed a test. And it may call other expert witnesses to explain that tests are not always reliable or that the technician might have made a mistake. The jury can then decide what weight it will give to the substitute's testimony as was done in the case at bar.

The Air Force Court of Appeals Erred When It Found that the Surrogate Analyst did not have First Hand Knowledge as to Whom the DNA Sample or Its Corresponding Profile Belonged.

The controlling question in a case involving an alternative expert witness, our Supreme Court notes, is whether the analyst's testimony "was an expression of his own opinion or whether he was merely parroting" or "merely repeating the contents of the report or the opinion of the analyst who is unavailable for cross-examination." New Mexico v. Gonzales, 274 P.3d 151,(2012)citing New Mexico v. Aragon, 225 P.3d 1280 (2010). This court has held that consistent with the Confrontation Clause and the rules of evidence, an expert may (1) rely on and repeat, or interpret admissible and nonhearsay

[1] NDAA Amicus Brief in Williams v. Illinois, citing United Sates v. Williams, 447 F.2d 1285, at 1290 (5th Cir. 1971, en banc)

machine-generated printouts of machine-generated data, and/or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert arrived at his own opinion. U.S. v. Blazier, 69 M.J. 218 (C.A.A.F. 2010), citing U.S. v. Moon, 512 F.3d. at 362 (2008)and U.S. v. Washington, 498 F.3d. 225, 230-31 (4th Cir. 2007).

Mr. Davenport had an independent duty as the technical reviewer of the file to conduct his own analysis of the data generated and procedures utilized in generating the data. He had an independent duty to ensure that the names assigned to the case were consistent with the submitting agency's request. Because of his participation in this case he had an independent source of knowledge from which he could rely for the purpose of forming his opinion.

During his testimony Mr. Davenport explained that the entire case goes to the tech reviewer. (J.A. 291) The review is conducted before release to the submitting agency. (J.A. 287) He further testified that, "The review starts by looking at the documents that were submitted by the Agency to make sure the tag numbers are properly reflected on the report and make sure that items that were submitted are actually listed in the report." (J.A. 291-292) This is the same step that Mr. Fisher would have taken to verify that the tags on the evidence matched the

paperwork: by reviewing the submitting agency's request. Mr. Davenport then testified that the inventory of the kits was properly inventoried. (J.A. 294) Furthermore his technical review accomplished before the final report was written, confirmed that Airman Katso's kit was tested per protocol. (J.A. 293). This case, similar to most submissions presented at the USACIL, involved a standard rape kit analysis of swabs taken from the two persons. This was not a complex mixture case where three or more identifiable DNA profiles were noted in the interpretation.

Mr. Davenport was not "merely parroting" the report of Mr. Fisher, rather during a technical review, which included a review of the inventory and the submitting agency's request, he made his own conclusion to confirm that the kits that were submitted to the laboratory were properly reflected in the case file. He verified that two kits were received belonging to Airman Katso and the alleged victim.(J.A. 294) In doing, so Mr. Davenport was able to identify the Appellee, by name as he would have received Katso's name in the same manner as Mr. Fisher: by reviewing the submitting agency's documentation and inventory. As neither analyst would have personally taken the swabs, they must rely on the submitting agency's labeling to determine what evidence is being tested and from whom it was taken.

This Court found in Blazier II that an expert witness may review and rely on the work of others, to include laboratory analysis, without violating the Confrontation Clause, so long as that expert reaches his or her own opinions in compliance with Mil. R. Evid. 702 and Mil.R.Evid. 703, U.S. v. Blazier, 69 M.J. 224 (2011). A careful analysis reveals that Mr. Davenport testified as not only a surrogate witness, but as a first-hand knowledge witness to the laboratory report. It should be noted that although the report and its underlying empirical data were not admitted, USACIL reports are not "solemn declarations or affirmations made for the purpose of establishing or proving some fact". Crawford v. Washington, 541 U.S. 36 (2004). Unlike urinalysis reports, the findings of USACIL examiners are not sworn to nor certified. The report would not have been complete without Mr. Davenport's technical review verifying the procedures and findings therein. Therefore, contrary to the lower court's finding, Mr. Davenport did not "act as a conduit for repeating testimonial hearsay." U.S. v. Katso, __ M.J.__ (2014) He testified from his first-hand knowledge of his verification of documentation as part of his technical review.

Conclusion

The lower court's ruling failed to consider the unique position in which a technical reviewer resides. As an essential component of the testing process, Mr. Davenport became a first-

hand witness to certain documents within the case file from which he could identify both kits submitted to the laboratory. This case embodied the situations in which Justice Sotomayor identified as being amenable to surrogacy. The Amicus respectfully requests that this Court find that the 6th Amendment Right to Confrontation was not violated, nor did the witness testify to hearsay.

Anece Baxter White
Attorney
Defense Forensic Science Center
United States Army Criminal
Investigation Laboratory
4930 N. 31st Street
Gillem Enclave, Forest Park, GA 30297
(404)469-4631
Court Bar No.: 36278

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and the Air Force Appellate Government Division, the Air Force Appellant Defense Division, and the Army Government Appellant Division on 10 Sep 2014.

Anece Baxter-White
Attorney
Defense Forensic Science Center
United States Army Criminal
Investigation Laboratory
4930 N. 31st Street
Forest Park, GA 30297
(404)469-4631
Bar No.: 36278

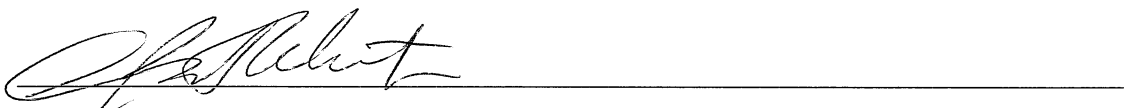
COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 24 (d) because:

[XX] This brief contains 3,135 (3,287) words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

[XX] This brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 12 point font using Courier New.



ANEGE BAXTER WHITE, Attorney Advisor
Counsel for Amici Curiae, Defense Forensic Science Center and U.S. Army Criminal Investigation Laboratory
Dated: 20 Sep 2014