9 July 2014

**IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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| UNITED STATES,<br>*Appellant*, | ) | APPELLANT'S BRIEF IN<br>SUPPORT OF THE ISSUE<br>CERTIFIED |
| v. | ) | |
| | ) | USCA Dkt. No. 14-5008/AF |
| Airman Basic (E-1)<br>JOSHUA KATSO, USAF<br>*Appellee.* | ) | Crim. App. No. 38005 |

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**APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED**

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**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.**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this issue under Article 67(a)(2), UCMJ.

## STATEMENT OF THE CASE

On 23 March and from 3 through 6 May 2011, Appellee was tried by a general court-martial composed of officer and enlisted members at Grand Forks Air Force Base, North Dakota. (J.A. at 1.) Contrary to his pleas, Appellee was convicted of one charge and one specification of aggravated sexual assault in violation of Article 120, UCMJ, one charge and one specification of burglary in

violation of Article 129, UCMJ, and one charge and one specification of unlawful entry in violation of Article 134, UCMJ. (Id.)

Appellant was sentenced to a dishonorable discharge, confinement for 10 years, and forfeiture of all pay and allowances. (J.A. at 1-2.) On 31 August 2011, the convening authority approved the sentence as adjudged. (Id.) Pursuant to Article 66, UCMJ, Appellee appealed this case to AFCCA, and the court ultimately set aside all charges and specifications. (J.A. at 16.)

## STATEMENT OF FACTS

The following uncontroverted findings of fact by the military judge are useful for this Court's determination of this issue:

> On 22 December 2010, a charge and specification was preferred against [Appellee] alleging that he committed aggravated sexual assault against [SrA C.A.], in violation of Article 120, UCMJ . . . .
>
> The Air Force Office of Special Investigations (AFOSI) conducted an investigation into the matter. In conjunction with their investigation, Sexual Assault Forensic Evidence (SAFE) kits were collected on both SrA [C.A.] and [Appellee]. DNA was then extracted from the following swabs which were taken with the Sexual Assault Collections Kit: penile shaft swab, scrotum swabs, penile head swabs and debris collection swabs. These DNA extractions were then examined by US Army Criminal

Investigation Laboratory (USACIL) to determine that DNA mixtures from both SrA [C.A.] and [Appellee] were found on each of the swab samples collected from [Appellee's] SAFE kit. Results from this testing purport a match between [Appellee's] DNA profile with the semen retrieved from SrA [C.A.'s] SAFE kit.

[T]he testing of the evidence submitted by AFOSI was done by Mr. Robert Fisher . . . at USACIL. Until 28 Apr 2011, Mr. Fisher was a named witness on the Government's witness list and was expected to testify regarding the analysis of the evidence collected. On Tuesday, 26 Apr 2011, Mr. Fisher notified counsel that he would be unavailable to participate in a witness interview until approximately Tuesday, 3 May 11, due to a family emergency and would be out of town. In subsequent conversations with Mr. Fisher, he indicated he would be unable to travel to testify at the court-martial until Thursday, 5 May 11 at earliest. In lieu of requesting a delay in this case, the Government substituted Mr. Fisher on their witness list with Mr. David Davenport . . . . Mr. Davenport did not perform the majority of the tests in this case, but he did perform the technical review of the case prior to publication of the final report.

Mr. Davenport explained his role as technical reviewer at the motion hearing as having done reviewed [sic] the data and computer calculations of Mr. Fisher, as well as reviewing the case from beginning to end. Also, as part of the review, Mr. Davenport himself took raw data from the instrument, and analyzed it to ensure he reached the same results and conclusions as Mr. Fisher had prior to Mr. Fisher publishing the final report on 28 Jan 11.

[T]he Government seeks to call Mr. Davenport as its DNA expert in its findings case in chief to explain DNA, the reliability and

> general acceptance of DNA testing and DNA testing at USACIL. Additionally, the Government will elicit Mr. Davenport's own independent opinions concerning the DNA testing in this particular case, the findings/results in this case and the frequency statistics related to those findings. Mr. Davenport's opinions will be based on his training and experience, and his review of the entire case, to include: his review of the testing procedure, results and conclusions of Mr. Fisher (including his report), and the results of the testing and conclusions he personally reached in performing his role as the technical reviewer . . . .

(J.A. at 447-48.) Additional facts necessary for disposition of this case are set forth in the argument below.

## SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion by permitting the government's DNA expert to testify about his review of the testing procedures and the conclusions he personally reached in performing his role as the technical reviewer. First, the underlying scientific data generated during the forensic analysis was not hearsay and any statements relied upon by the government's DNA expert from the original analysis were not offered to prove the truth of the matter asserted. Second, any statements derived from the underlying DNA analysis relied upon by the government's expert were not testimonial. Last, even if this Court concludes that Appellee's right to confrontation was violated through the admission of

testimonial statements, any alleged error was harmless beyond a reasonable doubt.

## ARGUMENT

**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 THE TESTIMONY OF THE GOVERNMENT'S DNA EXPERT. THE COURT FURTHER ERRED BY FINDING THAT THE EXPERT'S TESTIMONY WAS PREJUDICIAL.**

### *Standard of Review*

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005). The military judge's findings of fact are reviewed under the clearly-erroneous standard and conclusions of law are reviewed *de novo*. United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004). Whether evidence constitutes testimonial hearsay is a question of law reviewed *de novo*. United States v. Tearman, 72 M.J. 54, 58 (C.A.A.F. 2013) (citing United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010)(Blazier I)); *see also* United States v. Foerster, 65 M.J. 120, 123 (C.A.A.F. 2007).

### *Law and Analysis*

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Sixth Amendment procedurally prohibits the "testimonial statements of a witness who did not appear at

trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004). The Crawford analysis necessarily hinges on whether: (1) A statement is hearsay,[1] Williams v. Illinois, 132 S.Ct. 2221, 2234-42 (2012); and (2) a statement is testimonial or non-testimonial, United States v. Magyari, 63 M.J. 123, 126 (C.A.A.F. 2006) (citations omitted).

1. The underlying scientific data generated during the forensic analysis was not hearsay and any statements relied upon by the government's DNA expert from the original analysis were not offered to prove the truth of the matter asserted.

"[I]t is well established 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. Blazier, 69 M.J. 218, 224 (C.A.A.F. 2010) (Blazier II) (citing United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008)); *see also* United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008); United States v. Washington, 498 F.3d 225, 230–31 (4th Cir. 2007); United States v. Hamilton, 413 F.3d 1138, 1142–43 (10th Cir. 2005); United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003). "Machine-generated data and printouts such as those in this case are distinguishable from

[1] Pursuant to Mil. R. Evid. 801(c), hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. In this regard, to implicate Crawford, any "statement" must be made for the truth of the matter asserted.

human statements, as they 'involve so little intervention by humans in their generation as to leave no doubt they are wholly machine-generated for all practical purposes.'" Id. (citing Lamons, 532 F.3d at 1263 n.23). "Because machine-generated printouts of machine generated data are not hearsay, expert witnesses may rely on them, subject only to the rules of evidence generally, and M.R.E. 702 and M.R.E. 703 in particular." Id.

In this case, Mr. Davenport's testimony primarily relied upon instrument generated data resulting from scientific DNA analysis of known DNA profiles and items of evidence. Mr. Davenport described the four-step process a DNA examiner follows at USACIL to generate a DNA profile. (J.A. at 281-87.) Specifically, Mr. Davenport explained that when searching for a DNA profile he reviews peaks in scientific graphs that are produced during the DNA analysis. (J.A. at 282.) It is the numbers assigned to each of these peaks that represent an individual's unique DNA profile. (Id.) Mr. Davenport clarified that he conducted the technical review of the evidentiary items that were forensically analyzed in this case. (J.A. at 291.) He also testified that each DNA profile is generated in a computer file. (Id.) As part of his technical review, he took the computer file to his desk and entered it into a computer program where the program labeled everything in the DNA profile.

(Id.) He then conducted his own independent interpretation of the computer files to determine whether he reached the same conclusion as the original analyst who performed the analysis. (Id.) This same process is repeated for all known samples and submitted items of evidence to generate DNA profiles, and then the DNA profiles are compared to determine whether an evidentiary connection can be established between the items. (J.A. at 282.)

Mr. Davenport's testimony rested on his independent interpretation of machine-generated data. As this Court has made clear, it is well settled that an expert witness may rely upon machine-generated data because the scientific instruments used to produce such data are not declarants and do not make statements; therefore, the data is not hearsay. Blazier II, 69 M.J. at 224. Following Crawford, only testimonial hearsay implicates the Confrontation Clause.

Furthermore, in Blazier II, this Court confirmed that an expert witness may review and rely upon the work of others, including laboratory testing conducted by others, so long as they reach their own opinions in conformity with evidentiary rules regarding expert opinions. Id. (citing Mil. R. Evid. 702, 703). This Court concluded that an expert witness need not necessarily have personally performed a forensic test in order to review and interpret the results and data of that test. Id.

at 225 (internal citations omitted). The fact that an expert did not personally conduct the analysis upon which his opinion is based can be explored on cross-examination, but that goes to the weight, rather than to the admissibility of that expert's opinion. Id. (citing United States v. Raya, 45 M.J. 251, 253 (C.A.A.F. 1996)). Ultimately, this Court concluded that an expert may review and rely upon inadmissible hearsay in forming "independent conclusions." Id.

The record evinces that Mr. Davenport conducted a thorough technical review of the scientific data generated by the original testing. (J.A. at 291-301.) Mr. Davenport clarified the technical review process in the hearing on the motion by explaining that he examined the underlying analysis to ensure that all steps of the testing were conducted and recorded, the positive and negative controls were tested, the lot numbers were written down, and he independently confirmed the results of the testing. (J.A. at 72.) Since he conducted a comprehensive and independent technical review of the original analysis from start to finish, no concern exists whether Mr. Davenport devoted either a minimal amount of care or autonomous thought in reaching his expert opinion. Consistent with Blazier II, Mr. Davenport offered his own independent expert opinion as to the results of the DNA analysis rather than serving as a conduit for inadmissible testimonial hearsay. The record clearly

demonstrates that Mr. Davenport dedicated the same intellectual rigor when conducting his technical review and testifying to his own independent findings as he would if he were the original analyst in this case. As such, Mr. Davenport truly expressed an independent expert opinion as to his interpretation of the scientific data rather than parroting back another analyst's notes and findings.

In Williams v. Illinois, 132 S.Ct. 2221 (2012), the Supreme Court of the United States had the occasion to confront the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence. The defendant in Williams was convicted in a bench trial of rape. Id. at 2227. There, as here, the State relied upon testimony of its DNA expert to connect the DNA recovered from the victim with the DNA from the defendant. Id. The defendant's DNA recovered from the victim was profiled by an "outside laboratory," and no one from that laboratory testified to draw a connection between the defendant's known DNA profile and the items of evidence collected from the victim. Id. at 2229-32. The defendant contended that the expert's reliance on the outside laboratory's report violated his right to confrontation. Id. at 2231-32. The Supreme Court disagreed even though no single thread of analysis commanded a majority.

Justice Alito wrote the lead opinion, in which three of his colleagues joined, and concluded that Williams' conviction should be affirmed on two independent grounds: (1) The outside laboratory's report was not received for its truth, and (2) the outside laboratory's report was not testimonial.[2] Justice Thomas concurred in the judgment, but only on the basis that the laboratory's report was not testimonial. Id. at 2255-64.

The Court held that the outside laboratory's report, even though the report itself was not introduced, fell outside of the scope of the Confrontation Clause because it was not received for its truth. Id. at 2232-42. Justice Alito explained that, "it has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts." Id. at 2233. Under both the Military Rules of Evidence and the Federal Rules of Evidence, an expert may base an opinion on facts that are "made known to the expert at or before the hearing." Mil. R. Evid. 703; Fed. R. Evid. 703. "This feature of [military] and federal law is important because Crawford, while departing from prior Confrontation Clause precedent in other respects, took pains to reaffirm the proposition that the Confrontation Clause 'does not bar the use

[2] The second ground relied on by the Supreme Court in Williams will be explored in greater detail in Section 2 below in the government's analysis of this issue.

of testimonial statements for purposes other than establishing the truth of the matter asserted therein.'" Id. at 2235 (citing Crawford, 541 U.S. at 59-60, n.9). Thus, the Supreme Court concluded that:

> 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.

Id. at 2228.

Consistent with Williams and Blazier II, the military judge did not abuse his discretion by permitting Mr. Davenport to testify as to the rigorous technical review that he conducted of the DNA testing in this case because he formulated his own independent conclusions from the raw data and information produced by the original analyst. *See also* Moon, 512 F.3d at 362; Washington, 498 F.3d at 228-32; United States v. Darden, 656 F. Supp. 2d 560 (D. Md. 2009); Rector v. State, 681 S.E.2d 157, 160 (Ga. 2009); Smith v. State, 28 So.3d 838, 855 (Fla. 2009). Mr. Davenport independently concluded that: (1) The evidentiary items were "tested per protocol," (J.A. at 293); (2) the vaginal swabs, rectal swabs, and debris collection swabs obtained from the victim contained semen, (J.A. at 294); (3)

Appellee's DNA profile matched the DNA profile obtained from the victim's rectal swabs, (J.A. at 296); (4) male DNA was present on the victim's vaginal swabs, (J.A. at 297);[3] and (5) a mixture of DNA profiles from the victim and Appellee were obtained from the penile head swabs, penile shaft swabs, and scrotum swab. (J.A. at 298-301.) Based on his independent interpretation of this data, Mr. Davenport also calculated the probability of a random individual from the pertinent sample group submitting a DNA profile that matched the profiles obtained from the sexual assault examination. (J.A. at 296-301.) Thus, Mr. Davenport was the person who interpreted the data obtained from the testing and formulated his own conclusions that incriminated Appellee in the sexual assault. Consistent with Williams, the instrument-generated data and other statements associated with the underlying analysis were not offered for the truth of the matter asserted; they were relied upon by Mr. Davenport solely for the purpose of explaining the assumptions upon which his expert opinions rested. Because he was subject to cross-examination on his opinions and underlying assumptions, Appellee's confrontation rights were not violated. On this ground alone, Appellee's claim fails and this Court should deny his requested relief. However, Appellee's claim also fails on the additional grounds discussed in Section 2 below.

[3] There was such a high concentration of female DNA on the vaginal swabs that a match of Appellant's DNA profile could not be obtained. (J.A. at 297-98.)

2. Any statements derived from the underlying DNA analysis relied upon by the government's expert were not testimonial.

In Williams, the Supreme Court also concluded that even if the DNA report had been introduced by the government into evidence, the outside laboratory's report nevertheless was not testimonial and, therefore, would not have violated the Confrontation Clause. The Court concluded, "[The outside laboratory's] report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach." Williams, 132 S.Ct. at 2228. Justice Thomas's concurring opinion also agreed that the Confrontation Clause only reaches "'formalized testimonial materials,'" such as depositions, affidavits, and prior testimony, or statements resulting from "'formalized dialogue'" such as custodial interrogation. Id. at 2260 (citing Michigan v. Bryant, 131 S.Ct. 1143, 1167 (2011)).

This Court's decision in United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011), also highlighted the importance of formality in its analysis. The Court held that the "formal, affidavit-like certification of results" in the cover memorandum and the "formal, affidavit-like statement of evidence" in the specimen custody document were testimonial. Id. However, the Court held that it was not plain error to admit the data review

sheets because "they are neither formalized, affidavit-like statements, nor statements made in a formal setting." Id. at 305. Although Sweeney involved a plain error analysis, this Court's attention to the solemnity of the statements emphasizes the importance of formality in the constitutional analysis. In the more recent decision of United States v. Tearman, this Court again noted that, while the "language used by the Supreme Court to describe whether and why a statement is testimonial is far from fixed," the formality of a statement is an important "factor to be considered" in determining whether the statement is testimonial. Tearman, 72 M.J. at 58 (citing Sweeney, 70 M.J. at 303); *accord* United States v. Porter, 72 M.J. 335, 338 (C.A.A.F. 2013) (indicia of formality or solemnity that would suggest an evidentiary purpose is a factor relevant to whether statements are testimonial).

Here, the statements contained in the USACIL report were not statements by a witness within the meaning of the Confrontation Clause. The report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Williams, 132 S.Ct. at 2260 (Thomas, J. concurring). Nowhere does the report attest that its statements accurately reflect the DNA processes used or the results obtained. Id. In contrast, the first page of the report provides the following disclaimer: "[T]he results [of

the report] contain the findings and opinions of the examiner." (J.A. at 443.) This statement hardly resembles the affidavit-like declaration found in the "specimen custody document" in Sweeney attesting that "the sample arrived with the package and bottle seals intact, indicating that the sample tested positive for cocaine and codeine, and certifying additional substantive information: That the 'laboratory results indicated on this form were correctly determined by proper laboratory procedures, and they are correctly annotated.'" Sweeney, 70 M.J. at 299. The DNA report prepared by Mr. Robert Fisher expressly states that the findings and opinions recorded in the report are only his findings and opinions--not a formalized certification that he followed proper protocols and reached reliable results. *See* Bryant, 131 S.Ct. at 1153 ("testimony" is a solemn declaration or affirmation made for the purpose of proving some fact).

Unlike the DNA report in Williams, the DNA report prepared by Mr. Fisher is not signed by the two reviewers--the technical reviewer and administrative reviewer--and, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogations. Williams, 132 S.Ct. at 2260 (Thomas, J. concurring); *see also* Hammon v. Indiana, 547 U.S. 813, 830 (2006) (holding that statements made during a police interrogation which took place in a formal setting rendered the

statements "inherently testimonial").

Contrary to Appellee's claim, the DNA report in this case is distinguishable from the laboratory reports that were determined testimonial in both Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). The forensic report in Bullcoming "'contain[ed] a testimonial certification, made in order to prove a fact at a criminal trial.'" Williams, 132 S.Ct. at 2233. The report in Bullcoming was signed by the non-testifying analyst who had authored it, stating "'I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct. . . .'" Id. In Melendez-Diaz, the reports in question were "'sworn to before a notary public by [the] analysts' who tested a substance for cocaine." Id. at 2260 (Thomas, J. concurring). This difference signifies a significant distinction: Mr. Fisher's DNA report certifies nothing; it simply offers findings and opinions specific to him.

As demonstrated by the record, Mr. Davenport did not solely rely upon the findings and conclusions contained in Mr. Fisher's report. He conducted a comprehensive and independent review of Mr. Fisher's entire analysis, to include analyzing and interpreting the raw data, to reach his own independent conclusions that were consistent with Mr. Fisher's conclusions. The only formalized testimony offered in relation to the DNA

analysis conducted in this case was offered by Mr. Davenport at trial where the weight of his findings and conclusions could be tested through the crucible of cross-examination.

While this Court may assign some weight to the argument that there is no majority opinion for the basis of the admission of the testimony in Williams, this Court "need not parse in any great detail the philosophical underpinnings of the various opinions in Williams because although they disagreed as to their rationale, five justices agreed at the core that the outside laboratory's report was not testimonial." State v. Deadwiller, 820 N.W.2d 149 (Wis. App. 2012). This Court has recognized that military courts "generally [are] not free to 'digress' from applicable Supreme Court precedent applying the Constitution to criminal trials." United States v. Witham, 47 M.J. 297, 300 (C.A.A.F. 1997). Consequently, this Court is bound in this case by the judgment in Williams, and the narrowest holding by the Supreme Court, albeit with different rationales, is that the DNA expert's reliance on the outside laboratory's report did not violate the defendant's right to confrontation because the report was not "testimonial" and, therefore, did not implicate the Confrontation Clause. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (holding "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as

that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"). Under the facts of this case, this Court can confidently conclude that any statements relied upon by Mr. Davenport resulting from Mr. Fisher's analysis were not testimonial.

3. If this Court finds that Appellee's right to confrontation was violated through the admission of testimonial statements, any alleged error was harmless beyond a reasonable doubt.

If this Court finds that Appellee's constitutional right to confrontation was violated, any alleged error may be analyzed under the harmless beyond a reasonable doubt standard. *See* Tearman, 72 M.J. at 62; *see also* 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 United States v. Othuru, 65 M.J. 375, 377 (C.A.A.F. 2007), this Court discussed what "contribute" to the conviction means:

> To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous . . . .
>
> To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Id. (citations omitted).

In Confrontation Clause cases, courts assess harmlessness by looking to the factors set forth by the Supreme Court in Delaware v. Van Arsdall, 475 U.S. 684 (1986). United States v. Gardinier, 67 M.J. 304, 306 (C.A.A.F. 2009). The Van Arsdall Court provided:

> Whether an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684 (citations omitted).

In the case at bar, out of the thirty-five pages of detailed testimony provided by Mr. Davenport, the only portion of his testimony this Court could possibly interpret as constituting hearsay is the statement, "[the evidence] was received in a sealed condition."[4] (J.A. at 294.) If this Court finds that it was error for Mr. Davenport to comment on the

[4] In Melendez-Diaz, the Supreme Court declared that 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. Melendez-Diaz, 447 U.S. at 311. The Court determined that "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." Id. It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must be introduced live. Id.

condition of the evidence when it was received by USACIL, this comment was harmless beyond a reasonable doubt.

First, the defense did not contest the chain of custody of the evidence in this case. The following excerpt shows that instead of highlighting Mr. Davenport's lack of personal knowledge of the condition of the evidence at the time it was received at USACIL and removed from secured storage, the defense counsel elected to succinctly question Mr. Davenport to show that even though Appellee's DNA profile was obtained from items of evidence collected during the victim's sexual assault examination, Mr. Davenport's expert opinion could not explain the circumstances surrounding what transpired between the victim and Appellee when his DNA was deposited:

> Q: And at the end of the day everything that you just told us, you're saying that parts of [Appellee's] male parts were found on parts of [SrA C.A.'s] girl parts, correct?
>
> A: That's not exactly the way I phrase it, but I understand.
>
> ...
>
> Q: Okay. And on the flip side in the simplest terms, [SrA C.A.'s] girl parts were found on [Appellee's] boy parts?
>
> A: Again, I wouldn't phrase it exactly that way, but, yes.
>
> Q: Okay. So after all that analysis, that's the connection that we made there. But, you can't tell us what happened between

the two of them, can you?

A: No.

Q: Okay. You can't tell us what [SrA C.A.'s] behaviors were at that time, can you?

A: No.

Q: You can't tell us whether or not she was doing things and didn't remember, can you?

A: No.

Q: You can't tell us if sex occurred in a bathroom, can you?

A: No.

Q: You can't tell us if sex occurred in a bar?

A: Correct.

Q: You really can't tell us anything in all of that except that some sort of sexual contact occurred?

A: That's right.

(J.A. at 302-03.) The foregoing cross-examination demonstrates the defense intended to attack the underlying facts surrounding the sexual assault, but not the reliability of the DNA results. In fact, the defense conceded to the fact that Appellee's DNA matched the DNA recovered from the sexual assault exam. Thus, the isolated comment by the government's DNA expert regarding the condition of the evidence had no reasonable probability to contribute to the conviction.

Second, when assessing the Van Arsdall factors, the defense counsel's complete dismissal of this evidence also demonstrates the relatively low importance of Mr. Davenport's statement that the evidence was received in a sealed condition, or any other statement by Mr. Davenport this Court may find that triggered the Confrontation Clause. Even in closing argument, trial defense counsel did not challenge the results of the DNA analysis or the fact that Appellee's "boy parts were on her girl parts." (J.A. at 358.) In the defense's view, the DNA evidence did not tell the members anything. (Id.)

The defense did not focus on whether Appellee's DNA was obtained from the victim, it solely attacked the perceived inability of the government to show the factual circumstances surrounding why Appellee's DNA was discovered in and around the victim's genitalia and anus. In trial defense counsel's own words, "[the DNA evidence] doesn't tell us whether or not she was consenting. It does not tell us whether or not she was actively engaging in intercourse. It doesn't tell us where the sex occurred . . . that didn't tell you much of anything." (J.A. at 359.) Thus, given the defense's own position on this matter, it is hard to imagine how insignificant evidence, such as the condition of the evidentiary items once removed from secured storage, can result in an error that may have contributed to Appellee's conviction.

Finally, the overwhelming strength of the prosecution's case demonstrates that any alleged error was harmless beyond a reasonable doubt. SrA C.A. testified under oath that she went out with friends to celebrate her twenty-first birthday, to include drinking a significant amount of alcohol. (J.A. at 138-48.) SrA C.A.'s testimony described the approximate times and locations of the places she celebrated the night of the sexual assault. (Id.) SrA C.A. vividly recalled the details of the sexual assault to the members, to include responding by trying to push Appellee off her and touching his glasses, the side of his face, his beanie hat, and his coat. (J.A. at 149-53.) SrA C.A. immediately sought emergency services after the attack and reported that Appellee had sexually assaulted her. (J.A. at 156.) Even though SrA C.A. was abruptly awakened during her sleep by the forceful actions of her attacker, she undoubtedly identified Appellee as the perpetrator of the offense: "[I]t was Katso." (Id.) This evidence alone could serve as the only basis for the members to have convicted Appellee of this heinous crime; however, the government introduced much more evidence.

The government offered significant circumstantial evidence demonstrating that Appellee surreptitiously sought out SrA C.A. on her birthday even though they were not close friends and she did not make plans to meet up with him, and that Appellee's location in relation to SrA C.A. provided ample time and

opportunity for the sexual assault to occur. SrA Marie Bethel testified that she was with Appellee in the beginning of the night, that she walked to the bar, Gilly's, with Appellee, and that she left the bar with Appellee around 0150 hours (J.A. at 109-14.) SrA Bethel had not been drinking, so she had a clear memory of the evening's events, to include walking home quickly from the bar in the cold and letting Appellee sit in her apartment until his friend's car warmed up. According to SrA Bethel, Appellee departed her apartment at approximately 0230 hours. (J.A. at 114-16.)

A1C Benjamin Gramke provided the remainder of the timeline of Appellee's whereabouts after he departed SrA Bethel's apartment. A1C Gramke testified that on 11 December 2010, Appellee and his friend, Airman Morrison, knocked on his door late at night to play video games in the dorms. (J.A. at 125.) A1C Gramke confirmed that Appellee played video games for approximately two hours and was wearing a black shirt, a black jacket, jeans, and a black beanie hat. (J.A. at 127.) After a couple of hours playing video games, Appellee left the group stating that "he'd be right back," but "he never came back." (Id.) Given the timeline provided by the witnesses and the proximity of Appellee to SrA C.A.'s dorm room, it is no coincidence the sexual assault occurred during the timeframe that Appellee left his friends in the dorms without explanation.

The best evidence of the commission of the crime presented by the government came directly from Appellee. During the recorded interview with AFOSI, Appellee essentially denied knowing SrA C.A. and he responded evasively to the agent's questioning regarding whether he thought SrA C.A. was attractive by stating, "does she work at the DFAC?" or words to that effect. (J.A. at 396; Pros. Ex. 12 at 1:20:00.) Despite his claim, the evidence at trial clearly demonstrated that Appellee knew SrA C.A., to include taking a picture with her at the dining facility just a few weeks prior while he was wearing a black beanie hat similar to the one he wore the night of the sexual assault. (J.A. at 372.) Appellee also took a defensive posture with the interviewing agent at this point of the interview and immediately inquired whether he was suspected of sexually assaulting SrA C.A. even though the agent had not yet disclosed the exact identity of the victim.[5] Moreover, Appellee made a series of incriminating denials to AFOSI during the interview, such as: (1) stating that no one else from the base was at Gilly's, (J.A. at 396; Pros. Ex. 12 at 48:55), that no one was having a party or celebrating a birthday at Gilly's, (J.A. at 396; Pros. Ex. 12 at 1:17:55), and that he did not see

[5] To be clear, Appellant was advised of his rights under Article 31, UCMJ, including being told that he was suspected of aggravated sexual assault under Article 120, UCMJ, before speaking with investigators. At the outset of the interview, Appellant knowingly, voluntarily, and intelligently waived his rights. At this point of the interview, however, investigators had not yet disclosed the exact identity of the victim of the sexual assault.

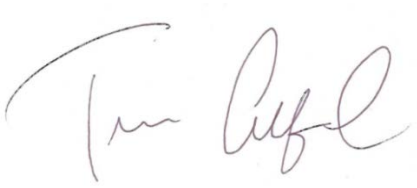
SrA C.A. at Gilly's on 11 December 2010, (J.A. at 396; Pros. Ex. 12 at approx. 3:13:00), even though the evidence demonstrated that he talked to SrA C.A. at the bar while she was celebrating her birthday; (2) Appellee denied sending SrA C.A. text messages the night of the sexual assault, (J.A. at 396; Pros. Ex. 12 at approx. 1:20:00), even though SrA C.A.'s phone records indicated otherwise, (J.A. at 375-92); and (3) Appellee denied communicating with SrA C.A. on 11 December 2010 despite the fact that he posted messages on her Facebook page and commented on her intoxicated condition at the bar the night of the sexual assault, by stating "hay [SrA C.A.]...you had a good night...u were allll fuckered up..no fuckin doubt..hope you got home safe ... thank tiff for me." (J.A. at 399-407.)

Finally, A1C Michaela Rubio testified that on 28 February 2010, approximately nine months before SrA C.A. was sexually assaulted, Appellee followed her into her dorm room when she was trying to go to bed, grabbed her butt and made comments like "[your] ass [is] so perfect," pushed her onto the bed, and then tried to grab her until she squirmed away. (J.A. at 251-56.) A1C Rubio had to ask Appellee to leave her room several times before he complied with her demands. (J.A. at 256-57.) This evidence of a similar crime was offered by the prosecution pursuant to Mil. R. Evid. 413 to demonstrate Appellee's propensity and predisposition to commit the charged offense.

Setting the entirety of the DNA evidence aside, SrA C.A.'s positive identification of Appellee as the perpetrator of the offense, eye-witness testimony demonstrating that the timing and proximity of the offense aligned perfectly to provide Appellee the opportunity to commit the sexual assault, Appellee's self-serving denials that he had any contact with SrA C.A. the night of the sexual assault despite overwhelming evidence to the contrary, and evidence of his predisposition to commit an offense of sexual assault all demonstrates that any potentially inadmissible statements offered by Mr. Davenport were harmless beyond a reasonable doubt. This Court should conclude that any alleged constitutional error associated with Mr. Davenport's testimony had no causal effect upon the member's verdict. United States v. Simmons, 59 M.J. 485, 489 (C.A.A.F. 2004).

**CONCLUSION**

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.



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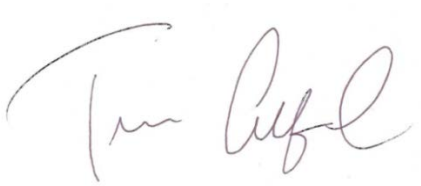
**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 July 2014 via electronic filing.



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