IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

Airman Basic (E-1)
JOSHUA KATSO
Appelee.

Crim. App. No. 38005

USCA Dkt. No. 14-5008/AF

APPELLEE'S ANSWER TO CERTIFIED ISSUE

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COMES NOW undersigned counsel, on behalf of Appellee, Airman Basic Joshua Katso, pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, and files this answer to the government's appeal of the decision of the United States Air Force Court of Criminal Appeals (AFCCA).

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS PROPERLY FOUND THAT 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 THE ERROR WAS NOT HARMLESS.

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. Appellee was convicted, contrary to his pleas, of three charged offenses- one charge of aggravated sexual assault in violation of Article 120, UCMJ; one charge of burglary in

violation of Article 129, UCMJ; and one charge of unlawful entry in violation of Article 134, UCMJ. *Id*.

Appellee 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*. On 11 April 2014, in a published decision, the Air Force Court of Criminal Appeals (AFCCA) set aside all charges and specifications. J.A. at 16. On 9 June 2014, TJAG certified the following issue to this court:

> **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 FACTS

SrA C.E.A. celebrated her 21st birthday on 10 December 2010. J.A. 137-38. To celebrate, she planned to go to dinner and to drink with her friends. *Id.* She eventually got so inebriated she didn't remember much of the evening. J.A. 149. She did remember waking up to "someone having sex with her." *Id.* She described low light in the room and that she could only see an outline, which "was like a black and white photo." J.A. 152. SrA C.E.A. left her room and reported the incident. J.A. 156.

Mr. Robert Fisher conducted the semen and DNA analysis of SrA C.E.A. and Appellee's sexual assault kit. J.A. 50. Mr. David Davenport was the technical reviewer for both kits. J.A. 50. The analyst, Mr. Fisher, was unable to testify on the date of the trial for personal reasons. J.A. 50-51. The Government did not offer the forensic report generated by Mr. Fisher into evidence.

The defense objected to Mr. Davenport's testimony as inadmissible testimonial hearsay. J.A. 408-40. After a hearing, the military judge found Mr. Davenport's testimony admissible. J.A. 452. The military judge ruled, "Mr. Davenport may give his independent opinion concerning the reliability of testing procedures used in this case, the findings/results in this case and the frequency statistics related to those findings/results." *Id.* He continued: "The fact that the expert is relying, in part, on work conducted by Mr. Fisher does not render Mr. Davenport's opinion testimony inadmissible, but rather is explorable during his cross-examination. But this aspect goes directly to the weight of the evidence and not to its admissibility." *Id.*

Mr. Davenport, the technical reviewer, was not present for the testing of semen or DNA for either evidence kit in this case. J.A. 65. Further, Mr. Davenport did not review the physical evidence for any damage or defects in packing or

shipping. J.A. 67. Accordingly, Mr. Davenport did not know if the package containing the kits was damaged on arrival, whether it was packaged according to relevant requirements, or whether mistakes occurred during testing, such as dropping the samples on the floor. J.A. 73. He was also unaware of any deviations from the standards unless the analyst chose to note the discrepancies or errors on the forms. J.A. 73-74. He was unable to testify about Mr. Fisher's thinking in making his determinations. J.A. 80. Defense attempted to ask Mr. Davenport if he would be aware of any contamination of the samples. J.A. 81. The government objected stating, "I think this has been asked and answered. . . . The witness, nevertheless answered the question, stating 'Of course not.'" *Id.* The military judge sustained the objection. *Id.*

Despite not being present at the time of testing, and thus having no basis for his opinions, Mr. Davenport nevertheless testified before members that: (1) all evidence was received properly and in its properly sealed condition; (2) SrA C.E.A. and Appellee's kits were tested properly according to the procedure of USACIL; (3) semen was identified on SrA C.E.A.'s vaginal, rectal, and debris collection swabs; and (4) the rectal scrotum and penile head and shaft samples contained a mixture of SrA C.E.A. and Appellee's DNA. J.A. 292-301. The Government did not call any lab witnesses who were involved in the actual

testing or who had any direct knowledge of the forensic analysis conducted in this case. Nor did the Government call any witness who collected the swabs from SrA C.E.A. to testify as to the collection process.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS PROPERLY FOUND THAT THE MILITARY JUDGE VIOLATED APPELLEE'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN HE PERMITTED AN EXPERT WITNESS WHO DID NOT CONDUCT, NOR HAD ANY PERSONAL KNOWLEDGE OF THE DNA TESTING IN THIS CASE, TO TESTIFY TO THE RELIABILITY AND RESULTS OF THE TESTING.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009). The judge's fact-finding is reviewed under the clearly-erroneous standard and conclusions of law are reviewed de novo. *Id.* However, this Court must first determine whether the evidence is constitutionally admissible as non-testimonial hearsay. *Id.* "Whether evidence constitutes testimonial hearsay is a question of law reviewed de novo." *Id.*

Law and Analysis

The Sixth Amendment provides: "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." *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010) (hereinafter *Blazier II*) (citing *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). Because witnesses are people who give testimony, the *Crawford* case held that the Confrontation Clause prohibits the prosecution from introducing out-of-court "testimonial" statements without putting the declarant on the stand. *Crawford* 541 U.S. at 54. In *Melendez-Diaz v. Massachusetts,* the U.S. Supreme Court held that forensic laboratory results that certify incriminating results are "testimonial" in nature, and thus the declarant is required. 557 U.S. 305, 310 (2009). Then, in *Bullcoming v. New Mexico*, the Court made clear that when the prosecution wishes to introduce a certified forensic report, it does not suffice to call a supervisor or other surrogate witness to stand in the place of the actual author of the report. 131 S.Ct. 2705, 2710 (2011).

The United States Supreme Court, more recently, has handed down an entirely fractured opinion on this issue, with no actual holding, in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). In *Williams*, the Supreme Court upheld the Illinois Supreme Court's decision that allowed the prosecution to introduce testimonial statements in a forensic report through expert witnesses who did not conduct the actual forensic exam. *Id*. However, a close

look at the *Williams* opinions exposes that that fact has no precedential value on this case.

In *Williams*, immediately following the rape of a young woman, vaginal swabs were taken from the victim. *Id.* at 2229. Investigators sent the swabs to a private laboratory for analysis. The swabs tested positive for the presence of semen. *Id.* At that time, the appellant was not a suspect. *Id*. The private lab sent the DNA profile back to the state police laboratory. *Id*. A forensic scientist with the state police then compared the DNA profile from the swab against DNA profiles in a state DNA database. Williams' DNA was in the database, having been previously collected from a prior unrelated arrest and cataloged into the database. The state scientist identified Williams' DNA profile as a "match" with the DNA profile from the swab. *Id*.

Williams was convicted at a bench trial after three experts testified on behalf of the government. *Id*. None of the witnesses called, however, worked at the private lab which conducted the DNA analysis. Id. The forensic scientist who worked for the state police, testified that the DNA profile generated by the private laboratory from the vaginal swab and the DNA profile generated by the state laboratory from the blood sample taken in Williams' prior arrest were a match. *Id.* at 2229-230.

There is no majority consensus among the Court articulating the rationale for admission of this testimony. Justice Alito, writing for the four-Justice plurality, contended that the expert's statements were not offered for the truth of the matter asserted. *Williams*, 132 S. Ct. at 2228. Five Justices, however, rejected this view. *Id.* at 2255, 2265. The plurality also found the statements in the DNA report were non-testimonial. *Id*. at 2228. Similarly, five Justices also rejected that conclusion. By implication, therefore, a majority of the Court held that the testimony was not admitted in violation of the right to confrontation. Justice Thomas joined the plurality opinion in this conclusion, but disagreed with its reasoning. *Id*. at 2255. Justice Thomas found the DNA report "statements lacked the requisite 'formality and solemnity' to be considered 'testimonial' for the purposes of the Confrontation Clause." *Id*. The remaining four dissenting justices would have held that the statements to be testimonial hearsay received in violation of the Confrontation Clause. *Id*. at 2265 (Kagan, J., with whom Scalia, J., Ginsburg, J., and Sotomayor, J., joined, dissenting). Despite its fractured nature, *Williams* did not change the rule that formal forensic reports are deemed testimonial in nature.

In the instant case, AFCCA rightly concluded that *Williams* did not alter the test of whether a statement is testimonial.

J.A. 10. That sentiment was also expressed by this Court in *United States v. Tearman*. 72 M.J. 54, 59 fn6 (C.A.A.F. 2013) (stating this Court did not view *Williams* as altering either the Supreme Court's or C.A.A.F.'s Confrontation Clause jurisprudence).

A. The statements were hearsay.

A report completed by Mr. Fisher was not admitted into evidence. However, in Mr. Fisher's absence, Mr. Davenport testified to the following: (1) all evidence was received appropriately and in its properly sealed condition; (2) semen was identified on SrA C.E.A.'s vaginal, rectal, and debris collection swabs; (3) Appellee's DNA profile matched the DNA profile obtained from the victim's rectal swabs; (4) male DNA was present on the victim's vagina swabs; (5) a mixture of DNA profiles from the victim and Appellee were obtained from the penile head swabs, penile shaft swabs, and the scrotum swab; and (6) testified as to the statistical frequency associated with the DNA profile.

Mr. Davenport's testimony was offered to the members to establish the truth of the foregoing statements. As Mr. Davenport was not present during the receipt and testing of the evidence, his statements on these issues was hearsay.

In *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), the Supreme Court addressed whether the admission of documentary

evidence in violation of the Confrontation Clause was cured by the use of a surrogate expert. *Bullcoming* held:

> Most witnesses, after all, testify to their observations of factual conditions or events, e.g., "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact . . . the address above the front door of a house or the read-out of a radar gun. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No." *See Davis v. Washington*, 547 U.S. 813, 826 (2006) (Confrontation Clause may not be "evaded by having a note-taking police [officer] recite the . . . testimony of the declarant" (emphasis deleted))[.]

Id. at 2714-715. (citation omitted).

In the present case, Mr. Davenport's testimony simply parroted back the information he read on Mr. Fisher's report, but had no other basis to develop an "independent opinion." Mr. Davenport simply recited another analyst's notes and findings. In fact, AFCCA found that the record did not establish "that Mr. Davenport had first-hand knowledge as to whom the known DNA sample or its corresponding profile belonged." J.A. 12.

The government argued that:

> 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.

Government Certification Brief at page 13.

Given the fractured opinion it is difficult to find anything "consistent" with *Williams* except that five justices disagreed with the plurality's opinion that the statements were not offered for the truth of the matter asserted. *Williams,* 132 S.Ct. at 2255. Justice Thomas's concurrence stated: "statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose." *Id.* at 2257. Justice Kagan's dissent, joined by Justices Scalia, Ginsberg, and Sotomayor, similarly stated: "admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it except assess its truth and so the credibility of the conclusion it serves to buttress." *Id.* at 2269.

Justice Thomas warned that such analysis of the confrontation clause will "reach beyond scientific evidence to ordinary out-of-court statements." *Id.* at 2259 (*citing People v. Goldstein*, 6 N.Y.3d 119, 123–124 (2005) (psychiatrist disclosed statements made by the defendant's acquaintances as part of the basis of her opinion that the defendant was motivated to kill by his feelings of sexual frustration).

Mr. Davenport opined that Appellee's, a known suspect, DNA profile matched the male profile taken from the complaining witness. In reaching that conclusion, Mr. Davenport relied on Mr. Fisher's out-of-court statements that the profile it reported was in fact derived from the victim's swabs, rather than from some other source. Thus, the validity of Mr. Davenport's opinion ultimately turned on the truth of Mr. Fisher's statements.

B. The statements were testimonial.

Although "reasonable minds may disagree about what constitutes testimonial hearsay," *Blazier* II, 69 M.J. at 222, 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. Blazier*, 68 M.J. 439, 442 (C.A.A.F. 2010) (hereinafter *Blazier I*) (quoting *Crawford*, 541 U.S. at 51-52) (quotation marks omitted); *see also United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008); *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007). Despite the *Williams* plurality's decision, this Court in *United States v. Tearman* recognized "the language used by the Supreme Court . . .is far from fixed." *Tearman,* 72 M.J. at 58.

Prior to *Tearman,* this Court used several nonexclusive factors to distinguish between testimonial and nontestimonial

statements: "(1) whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry; (2) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters; and (3) whether the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial." *Harcrow*, 66 M.J. at 158 (citing *Rankin*, 64 M.J. at 352).

In *Tearman*, this Court listed a number of different rationales for distinguishing between testimonial and nontestimonial statements. *Id.* at 58-9. The *Tearman* majority found the unsworn chain-of-custody documents to not meet any of these rationales under the facts of that case. *Id.* at 59. Particularly, the Court found that the chain of custody workers could not have believed what they were working on would be introduced in Court. *Id.*

In the case at hand, at the time the tests were conducted, Appellee had been identified as the sole suspect in the alleged crime. His samples were taken at a hospital while the Air Force Office of Special Investigations (AFOSI) stood watch. AFOSI, a criminal investigative branch of the Air Force, acquired the samples and sent them to a forensic laboratory for the purpose of producing results which could be used in the prosecution of Appellee. Because these samples were being tested for semen and DNA, it is plain that "an objective witness [would] reasonably

believe that the statement would be available for use at a later trial." *Blazier I*, 68 M.J. at 442. In fact, the *only* reason Appellee's DNA was tested was for the specific purpose of furthering a criminal investigation and potential court-martial. Thus, the document "reviewed" by Mr. Davenport and repeated on the stand was clearly a formal document reciting findings involved in a criminal case, and to a criminal investigating agency. Under those facts, the actual declarant, or author of the forensic report, was required to testify about the findings.

As such, admitting the testimonial statements offered without proper confrontation was error.

C. The error was not harmless

"[I]n assessing harmlessness in the constitutional context, the question is not whether the evidence is legally sufficient to uphold a conviction without the erroneously admitted evidence." *Blazier II*, 69 M.J. at 226-227. Rather, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Among the factors to be considered are: (1) The importance of the testimonial hearsay to the Government's case; (2) Whether the testimonial hearsay was cumulative; (3) The existence of other corroborating evidence; (4) The extent of confrontation permitted; and (5) The strength of the Government's case.

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

The importance of the evidence here is large. This evidence places the Appellee at the scene, an Appellee who made no admission to engaging in sexual contact with the victim. The testimony, similarly, was not cumulative. No other evidence, forensic, or otherwise, evidence even placed Appellee in victim's room on that date.

The DNA evidence clearly contributed to the conviction. AFCCA found the following problems with the case:

> SrA [C.E.A.] testified that she and the [Appellee] were not close acquaintances, having only met two weeks before her birthday. He did not accompany SrA [C.E.A.] to dinner nor was he at the dormitory dayroom when she had several drinks before leaving for an off-base bar. Although the [Appellee] was at the bar, his arrival was not coordinated with SrA [C.E.A.], and he did not leave with her that evening. In fact, other witnesses testified that he went to another Airman's off-base apartment before returning to base to play video games with two other Airmen. No witnesses observed the [Appellee] entering or leaving SrA[C.E.A.]'s room. After SrA [C.E.A.] identified the [Appellee], AFOSI arrived at the [Appellee's] room to question him within an hour of her report. However, the [Appellee] was so unresponsive due to his own alcohol consumption he had to be given medical attention before he could be questioned.
>
> SrA [C.E.A.] stated she had almost no recollection of what happened after leaving the dayroom and arriving at the bar. While others testified to seeing SrA [C.E.A.] sitting on the [Appellee's] lap at the bar,

> she does not remember seeing the [Appellee] or talking with him that evening. Her last clear memory was leaving the dayroom and then waking in her bed when she felt someone having sexual intercourse with her. She testified that although there was little light in the room she was able to see his features "like a black and white photo" and was able to identify the [Appellee] through touch and/or sight of certain items he was wearing, including a beanie cap, glasses, a coat, and a pair of jeans. However, the investigating agent also testified that no forensic evidence matching the [Appellee], to include hairs or clothing fibers, was found in SrA [C.E.A.'s] room.

J.A. at 22.

Aside from the DNA, the only evidence to link Appellee to the charged offense is SrA C.E.A.'s identification. This identification was highly problematic. Her identification occurred while she was highly intoxicated, in a dimly lit room, and during a period of high stress and panic. Without the DNA evidence, the prosecution would have had to rely on a witness, with gaps in her memory, identification of the Appellee she hardly knew that she believed she saw as a black and white photo.

The Government states the defense "intended to attack the underlying facts surrounding the sexual assault, but not the reliability of the DNA results." *See* Government's Brief at 22. However, at trial the Defense attempted to attack the lab results, but was unable to due to Mr. Davenport's lack of knowledge. This highlights specifically what the core issue is

in this case. At trial, Defense counsel asked if Mr. Davenport would be aware of any contamination of the samples. J.A. at 81. The government objected stating, "I think this has been asked and answered. . . . He said, 'Of course not.'" *Id*. The military judge sustained the objection. Id. It is not, as the Government says, that the Defense *chose* not to attack the DNA testing, it was that the Defense was *unable* to attack the DNA testing for the simple fact that the proper witness was not at trial to be confronted by the appellee.

Due to the trial judge's erroneous admission of the DNA evidence through Mr. Davenport, essentially the only evidence that put Appellee at the scene, and purportedly put his DNA in compromising places on the victim, the Appellee was denied his constitutional right to confrontation. AFCCA properly found that "[w]e are therefore not convinced beyond a reasonable doubt that the constitutional error was not a factor in obtaining that conviction." J.A. at 15 (citations omitted).

WHEREFORE, this Honorable Court should AFFIRM the AFCCA decision.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 30 July 2013.

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