

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
L.T. BOOKER, F.D. MITCHELL, J.K. CARBERRY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ANTHONY J. SANDERS  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000522  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 3 June 2010.

**Military Judge:** LtCol Robert Ward, USMC.

**Convening Authority:** Commanding Officer, 3d Battalion, 8th Marine Regiment, 2d Marine Division, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** LtCol J.W. Hitesman, USMC.

**For Appellant:** LT James Head, JAGC, USN; LT Ryan Santicola, JAGC, USN.

**For Appellee:** Maj William Kirby, USMC.

**19 April 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of wrongfully using marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The approved sentence included reduction to pay grade E-1 and a bad-conduct discharge.

The appellant alleges on appeal that Prosecution Exhibit 3, the "Specimen Custody Document-Drug Testing" was testimonial hearsay, that the military judge abused his discretion in admitting the document into evidence, and that its admission violated his Sixth Amendment right to confrontation.

After careful examination of the record of trial and the parties' pleadings, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

### **Background**

Pursuant to a unit sweep urinalysis, the appellant provided a urine sample that was subsequently sent to the Navy Drug Screening Laboratory, Jacksonville, FL (NDSL). The urine sample was tested and returned positive for the metabolite found in marijuana, THC. The NDSL prepared a 33-page report which, over defense objection, was admitted into evidence. The report principally contained, *inter alia*, raw, computer-generated data, chain-of-custody documents, and occasional handwritten annotations of laboratory technicians. Notably, PE 3 did not contain a cover memorandum summarizing the finding of the lab report.

The NDSL laboratory technicians and certifying official who tested the sample, made notations on the lab report and chain of custody documents, and certified the testing results, did not testify. Instead, Dr. [B], a chemist and expert witness from the NDSL, testified regarding the urine sample handling procedures, testing reliability, report generation, and the results of the tests on the appellant's urine sample.

The appellant argues that PE 3, the laboratory report, is testimonial hearsay because: (1) it was generated by laboratory technicians whose mission is to provide scientifically and legally defensible test results at court-martial; and, (2) the laboratory employees perform a law enforcement function.

In this case, the military judge admitted, over defense objection, the drug testing report on the grounds that it was not testimonial and therefore not subject to the requirements of *Crawford v. Washington*, 541 U.S. 36, 50-52 (2004) which held that the Confrontation Clause gives defendants the right to question not only witnesses providing oral, in-court testimony, but also the declarant of any hearsay that is "testimonial.

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), we review the question of whether evidence at issue constitutes testimonial hearsay *de novo*. *Id.*

### **Analysis**

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI. The Confrontation Clause gives defendants the right to question not only witnesses providing oral, in-court testimony, but also the declarant of any hearsay that is "testimonial." *Crawford*, 541 U.S. at 50-52. Before testimonial hearsay may be admitted, the Confrontation Clause requires that the accused have been afforded a prior opportunity to cross-examine the witness and that the witness be unavailable. *Id.* at 53-54, 68.

The appellant, citing to *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_\_, 129 S. Ct. 2527 (2009), argues that the lab report generated by machines and numerous lab technicians was testimonial and its admittance into evidence violated the Confrontation Clause. The facts surrounding the sworn affidavits in *Melendez-Diaz*, however, differ significantly from the facts surrounding the lab report in the appellant's case. In *Melendez-Diaz*, the tested drugs were seized from the appellant pursuant to his arrest and "certificates of analysis" were admitted at trial "pursuant to state law as 'prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed.'" *Id.* at 2530-31 (citation omitted). Noting that "under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance," the Supreme Court stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose -- as stated in the relevant state-law provision -- was reprinted on the affidavits themselves." *Id.* at 2532 (citation omitted).

In the appellant's case, he was not arrested or suspected of an offense when his urine was collected and tested. Rather, his urine was collected and tested pursuant to a unit sweep in which 50% of the unit was randomly selected for testing; his sample was not identified by his name; it was tested with a batch of 100 other anonymous samples, two of which were control

samples; there is no evidence that the technicians who tested the urine equated specific samples with particular individuals or were serving in a law enforcement capacity; and the statements of the technicians consisted principally of unsworn notations on the machine generated report. Moreover, unlike the "certificates of analysis" in *Melendez-Díaz* that established a *prima facie* case for the composition, weight and quality of substance analyzed, the lab report here was not the only evidence that the appellant had ingested marijuana. In addition to the lab report, the urinalysis coordinator, the unit's Substance Abuse Control Specialist, the urinalysis observer, and Dr. B, the expert witness, all testified. The three Marine witnesses testified as to the manner in which the appellant's urine was collected and sent to the NDSL. Dr. [B]. testified that he reviewed all the ministerial and machine-generated data in PE 3 and then offered his opinion that the urine sample provided by the appellant indicated that he had ingested marijuana, producing a metabolite not naturally occurring in the human. Finally, there is no evidence that the lab technicians were performing a law enforcement function or could reasonably expect their statements to bear testimony against the appellant. Simply put, not every positive urine sample, e.g., positive control samples and cases resolved administratively, results in a court-martial.

In light of the facts peculiar to the appellant's case -- this urine sample was taken pursuant to a random inspection; the sample was not associated with any particular service member; the laboratory technicians were merely cataloging results of routine tests and were not acting in any law-enforcement capacity -- and consistent with the principles articulated in *Melendez-Díaz*, *Crawford*, *Blazier I and II*,<sup>1</sup> *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008) and *United States v. Magyari*, 63 M.J. 123, 126 (C.A.A.F. 2006), we conclude that PE 3 was not testimonial and thus did not trigger the requirement for confrontation. Accordingly, it was not error to admit that portion of the lab report as a record of regularly conducted activity of the NDSL that qualifies as a business record under MILITARY RULE OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), a firmly rooted hearsay exception. See *Magyari*, 63 M.J. at 126-27.

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<sup>1</sup> *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010), *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010).

**Conclusion**

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court