

**Friday, 20 January 2012**

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**United States v. Kilariski**

Panel Two - J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN,  
Appellate Military Judges

For Appellant: LT Daniel LaPenta, JAGC, USN For Appellee: Maj  
Paul Ervasti, USMC

A panel of members sitting as a special court-martial convicted the appellant, contrary to his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. 912a (2006). The members sentenced the appellant to confinement for two months, reduction to pay grade E-2, forfeiture of \$1096.00 pay per month for two months, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and ordered it executed.

The issues to be argued before the Court are the following:

I. UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION, AN ACCUSED HAS THE RIGHT "TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM."

A RECENT SUPREME COURT DECISION, BULLCOMING V. NEW MEXICO, RULED THAT SURROGATE TESTIMONY OF A SCIENTIST WHO DID NOT CERTIFY A FORENSIC LABORATORY REPORT INTRODUCED INTO EVIDENCE VIOLATES THE CONFRONTATION CLAUSE. HERE, DESPITE THE DEFENSE'S REQUEST FOR THE CERTIFYING SCIENTIST'S TESTIMONY, THE MILITARY JUDGE PERMITTED A SURROGATE TO TESTIFY. DID THE MILITARY JUDGE ERR?

II. AFTER INSPECTING CORPORAL KILARSKI'S URINE SAMPLE, THE LABORATORY ACCESSIONS TECHNICIAN HANDWROTE A DISCREPANCY CODE ON THE SPECIMEN CUSTODY DOCUMENT. BEFORE TRIAL, THE DEFENSE ARGUED THE CONFRONTATION CLAUSE REQUIRED THE ACCESSIONS TECHNICIAN'S TESTIMONY, BUT THE MILITARY JUDGE DENIED ITS MOTION. DID THE MILITARY JUDGE ERR?