# *United States v. Blazier*: So Exactly Who Needs an Invitation to the Dance?

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## Introduction

March 8, 2010, marked the sixth anniversary of *Crawford v. Washington*,[1] the U.S. Supreme Court decision that held that an unavailable witness's statement is only admissible if the statement is nontestimonial or the accused had a prior opportunity for cross-examination of the witness.[2] The case transformed the previous practice of relying on "adequate indicia of reliability" to admit an unavailable witness's statement against an accused.[3]

Some feared that the *Crawford* opinion would bring the military's drug testing system to a screeching halt.[4] It had long been a practice of the Government to either introduce the results of a lab report through a law enforcement agent under a business record exception to the hearsay rule[5] or by having an analyst from the drug lab testify concerning the entire report.[6] Under *Crawford*, the legitimacy of both of these practices was called into doubt.[7]

After the initial dust from *Crawford* settled, judge advocates began to ask the obvious question of whether a court would consider the data in a lab report as being testimonial for the purposes of the Sixth Amendment.[8] The issue did not take long to percolate up to the Court of Appeals for the Armed Forces (CAAF).[9] Unfortunately, the answer provided by the CAAF—that lab reports can sometimes be testimonial—raised more questions than it resolved. The most critical of these questions—who does the Government have to call in order to satisfy the Confrontation Clause?—is currently being considered by the CAAF.[10]

In *United States v. Blazier*, the CAAF is wrestling with the issue of what the Confrontation Clause requires when the Government attempts to admit a drug lab report that contains testimonial evidence.[11] The answer has the potential to significantly impact the military's drug testing system. This case note discusses why the CAAF should seize this opportunity to reconsider its position on when lab reports are considered testimonial and also to provide clarity on who is required to testify as a witness to satisfy the Confrontation Clause. The following discussion will begin with a brief synopsis of the *Blazier* opinion and the main issue currently before the CAAF. Next, the article will discuss the history of relevant military Confrontation Clause cases dealing with lab reports. The article will then analyze how these cases are impacted by the recent Supreme Court decision of *Melendez-Diaz v. Massachusetts*.[12] The article will scrutinize the typical process by which laboratories test

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[1] 541 U.S. 36 (2004). Justice Scalia wrote the opinion for the Court, in which Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. Rehnquist, C.J., filed an opinion concurring in the judgment, in which O'Connor, J., joined.

[2] *Id*. at 54.

[3] Ohio v. Roberts, 448 U.S. 56 (1980). The former test was met whenever the evidence either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Id*. at 66.

[4] *See generally* Lieutenant Commander David M. Gonzalez, *The Continuing Fallout from* Crawford*: Implication for Military Justice Practitioners*, 55 NAVAL L. REV. 31 (2008).

[5] Business records are defined under Military Rule of Evidence (MRE) 803(6), which provides in pertinent part as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of Regularly Conducted Activity—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 902(11).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 803(6) (2008) [hereinafter MCM]; *see also* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539–40 (2009) (explaining that statements are not *per se* nontestimonial because they are business records, but rather, business records are nontestimonial because they are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial").

[6] *Id*.

[7] The Supreme Court declined to state specifically what constituted a "testimonial" statement, but did provide a non-exclusive list of examples: (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52. (citations and quotation marks omitted).

[8] 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.

[9] United States v. Magyari, 63 M.J. 123 (C.A.A.F. 2006).

[10] United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010).

[11] *Id*.

[12] 129 S. Ct. 2527 (2009).

military samples and how the Government obtains litigation reports from laboratories for court-martial use and concludes that under this process, every drug lab report contains testimonial statements. Finally, the article will suggest a common sense solution to the remaining issue of who the Government should call as a witness to satisfy the Confrontation Clause.

### The *Blazier* Rubik's Cube[13]

In *Blazier*, the Government obtained a urine sample from Blazier as part of a random urinalysis. The sample was sent to a military testing laboratory that subsequently reported that the sample tested positive for the presence of several controlled substances. As a result of the positive urinalysis, Blazier was interviewed by the Air Force Office of Special Investigations (AFOSI). During this interview he consented to a second urinalysis. The second urinalysis was also sent to the lab for testing, and it also tested positive for the presence of several controlled substances.[14]

Based on the positive results, the Government charged Blazier with dereliction of duty and wrongful use of controlled substances.[15] In preparation for court-martial, the prosecution requested "the drug testing reports and specimen bottles" for the two urine samples.[16] The drug testing laboratory sent the prosecution a cover memorandum for each urinalysis and the results of the tests. The cover memoranda stated, among other things, "The specimen was determined to be presumptive positive by the 'screen' and the 'rescreen' immunoassay procedures. The specimen was then confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS)."[17] Each cover memorandum listed the nature of the substances, the concentrations of the substances, and the corresponding Department of Defense (DoD) cutoff levels. The memoranda were each signed by a "Results Reporting Assistant" from the drug testing division and by Dr. Vincent Papa the "Laboratory Certifying Official."[18]

Prior to trial, the defense filed a motion requesting that the military judge either preclude the Government from admitting the laboratory reports and the testimony of Dr. Papa, or compel the Government to produce each member of the laboratory "who had the most important actions involved in the samples."[19] The defense, however, did not name the specific individuals it wanted to testify from the laboratory.

The military judge denied the defense motion. He ruled that the two reports were nontestimonial, for different reasons, and allowed Dr. Papa to testify as an expert witness concerning the positive results and as a foundation witness for the admissibility of both reports.[20] Based in large part on the testimony of Dr. Papa, Blazier was convicted by a court-martial panel of the two wrongful uses of controlled substances.[21] The Air Force Court of Criminal Appeals (AFCCA) affirmed.[22]

The CAAF granted the petition for review of the case based in large part on the Supreme Court's *Melendez-Diaz* decision.[23] On 23 March 2010, the CAAF issued a preliminary opinion in *Blazier*.[24] Instead of issuing a final opinion, the CAAF sought the view of the parties, as well as the Government and defense appellate divisions of each service, on an additional question: Although the drug testing reports were testimonial and the accused did not have the opportunity at trial to cross-examine the declarants of the testimonial statements, was the Confrontation Clause nevertheless satisfied by testimony from Dr. Papa?[25]

The CAAF will presumably provide an answer to this question soon. Meanwhile, it should take this opportunity to reconsider its position on when lab reports should be considered testimonial and clarify who must testify as a witness to satisfy the Confrontation Clause.

### To Be or Not To Be Testimonial

In 2006, and then again in 2008, the CAAF was asked to consider whether statements in a lab report were testimonial, thus entitling an accused the right to confront

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[13] The Rubik's Cube is a 3-D mechanical puzzle invested in 1974 by Hungarian sculptor and professor of architecture Erno Rubik. Encyclopedia Britannica Online, Rubik's Cube (Puzzle Toy), http://www.britannica.com/EBchecked/topic/511992/Rubiks-Cube (last visited July 20, 2010).

[14] *Blazier*, 68 M.J. 439, 440.

[15] *Id.*

[16] The request by the Government noted that the information was "needed for court-martial use." *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] The military judge determined that the lab analysts in the first test did not associate the sample collected from Blazier with a particular individual, it was a random urinalysis, and it was not processed in furtherance of a law enforcement investigation. With regards to the second test, the military judge determined that the request for consent was "more akin to a shot in the dark than a pursuit of a specific law enforcement objective." *Id.*

[21] Appellant was convicted of dereliction of duty and wrongful use of controlled substances in violation of Articles 92 and 112a, Uniform Code of Military Justice. 10 U.S.C. §§ 892, 912a (2006). The members sentenced the appellant to a bad-conduct discharge, forty-five days of confinement, and reduction to the grade of E-3. *Id.*

[22] United States v. Blazier, 68 M.J. 544 (A.F.C.C.A. 2008).

[23] United States v. Blazier, 68 M.J. 240 (C.A.A.F. 2009).

[24] *Blazier*, 68 M.J. 439.

[25] The CAAF also asked an additional question: If Dr. Papa's testimony did not itself satisfy the Confrontation Clause, was the introduction of testimonial evidence nevertheless harmless beyond a reasonable doubt under the circumstances of this case if he was qualified as, and testified as, an expert under MRE 703? *Id.*

the makers of the statements. In its first opinion, *United States v. Magyari*, the CAAF concluded that lab report statements were not testimonial.[26] Two years later the CAAF reached the exact opposite conclusion in *United States v. Harcrow*.[27] Both *Magyari* and *Harcrow* were cases largely decided on their specific facts.

In *Magyari*, the appellant's name was randomly generated for urinalysis testing. He, along with over thirty other servicemembers, provided a urine sample for testing. Their samples were sent to the Navy Drug Screening laboratory in San Diego, California. Once at the lab, Magyari's sample was combined in a batch of 200 samples. As a result of the analysis by the drug lab, Magyari's sample tested positive for methamphetamine.[28]

At his contested court-martial, the Government introduced the lab report from the Navy Drug Screening Laboratory and called four additional witnesses to testify concerning the evidence contained in the lab report. Three of those witnesses were from Magayri's unit and had been involved in the collection of his sample. The remaining witness, Mr. Robert Czamy, was the civilian quality assurance officer for the drug screening laboratory. He testified at the court-martial about how the urine samples were handled, how the lab generated its results, and that he had signed off on Magayri's report. Significantly, Mr. Czamy was not personally involved in the handling or testing of Magayri's sample.[29]

Instead of requesting a witness from the lab who had handled or tested the urine sample, the defense counsel chose instead to cross-examine Mr. Czamy. On appeal, Magayri claimed his constitutional rights were violated because he was not provided the opportunity to cross-examine the lab technicians who had handled and tested his sample. Magayri contended that the data recorded in the lab reports were testimonial statements; therefore, he argued, the Government could not use the lab report against him at trial without first affording him the opportunity to cross-examine the lab technicians who made the testimonial statements contained in the report.[30]

The CAAF rejected Magyari's claim and held that the statements in the lab report were not testimonial.[31] The court concluded that the lab technicians worked in a "nonadversarial environment" and had no reason to suspect or zero in on Magyari's sample.[32] In the context of a random urinalysis, the court believed the "lab technicians were not engaged in a law enforcement function."[33] Based on its conclusions, the court held "the technicians could not reasonably expect their data entries would 'bear testimony' against Appellant at his court-martial."[34]

Unlike in *Magyari*, the evidence seized in *Harcrow* was conducted at the direction of law enforcement.[35] Instead of resulting from a random, non-investigative screening, the lab report was generated based on evidence seized during an arrest. Additionally, the samples sent to the lab, and tested by the lab technicians, indentified the accused as "a 'suspect.'"[36] Given these facts, the CAAF concluded that the statements in the lab report in *Harcrow* were testimonial. The CAAF applied the following three factors to reach its conclusion:

> (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.[37]

These factors, commonly referred to as *Rankin* factors,[38] are designed to test whether, under the totality of the circumstances, a particular statement is testimonial or not.

After *Magyari* and *Harcrow*, it appeared that statements contained in a lab report generated as a result of a non-investigative screening—not in the furtherance of a particular law enforcement investigation—would be considered nontestimonial and could be admitted as a business record at trial.[39] Likewise, statements in lab reports

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[26] 63 M.J. 123 (C.A.A.F. 2006). The CAAF, however, did not rule out the possibility that a lab report could be testimonial.

[27] 66 M.J. 145 (C.A.A.F. 2008).

[28] *Id.*

[29] *Id.* at 124–25. The Government chose not to call any of the approximately twenty lab personnel who handled or tested Appellant's sample. *Id*. at 124.

[30] *Id*. at 125–26.

[31] *Id*. at 126–27.

[32] *Id*. at 127.

[33] The court believed the data entries by the lab technicians were "simply a routine objective cataloging of an unambiguous factual matter." *Id.* at 126 (citing United States v. Bahena-Cardenas, 411 F.3d 1067, 1075 (9th Cir. 2005) (internal quotations omitted)).

[34] *Id*. at 127.

[35] United States v. Harcrow, 66 M.J. 154, 159 (C.A.A.F. 2008).

[36] *Id*.

[37] *Id*. at 158 (citing United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007)).

[38] *Id.* at 159.

[39] United States v. Magyari, 63 M.J. 123, 124–25 (C.A.A.F. 2006). *But see* Lieutenant Colonel Nicholas F. Lancaster, *If It Walks Like a Duck, Talks Like a Duck, and Looks Like a Duck, Then It's Probably Testimonial*, ARMY LAW., June 2008, at 16, 24–27 (providing a detailed discussion of how *Ohio v. Roberts* may still apply in the military to nontestimonial statements); *see also* United States v. Rankin, 64 M.J. 348 (C.A.A.F. 2007).

generated "at the behest of law enforcement in anticipation of prosecution" would be viewed as testimonial.[40] However, just as the confrontational requirements for admitting a drug lab report in the military were becoming clearer, the Supreme Court muddied the waters with its decision in *Melendez-Diaz v. Massachusetts*.[41]

### De-Facto Testimonial Under *Melendez-Diaz*?

In *Melendez-Diaz*, the defendant was charged with distributing and trafficking cocaine.[42] The prosecution submitted three certificates in affidavit form to prove the substance found by the police was cocaine.[43] The certificates reported the weight of the seized bags and the composition and quality of the controlled substance.[44] The prosecution chose not to call an expert witness from the drug lab to lay the foundation for the certificates.[45] In an unusual 5-4 split, Justice Scalia, writing for the majority, concluded that results of the lab report, in affidavit form, were within the core class of testimonial statements covered by the Confrontation Clause.[46]

The impact of the *Melendez-Diaz* opinion on the military is debatable.[47] On one end of the spectrum, based on the Court's assertion that its decision was a straightforward "application of our holding in *Crawford*," *Melendez-Diaz* arguably changes nothing.[48] Meanwhile, at least two of the military service courts have adopted this view.[49] In their opinions, the service courts distinguish *Melendez-Diaz* by noting that *Melendez-Diaz*, unlike in *Magyari*, dealt with "summary affidavits by laboratory technicians prepared expressly at the direction of law enforcement personnel for criminal prosecution."[50] The service courts equate this situation to the one in *Harcrow* where the CAAF determined, using the *Rankin* factors, that under the totality of the circumstances, the statements in the laboratory report were testimonial because the tests were specifically requested by law enforcement and because the information in the reports indicated the technicians knew the items tested were seized during the arrest of an identified "suspect."[51]

Other service courts have followed this line of reasoning.[52] For example, in *United States v. Harris*, the appellant was singled out for testing and his sample was labeled as a probable cause urinalysis when it was sent to the testing laboratory.[53] However, even under these circumstances, the AFCCA determined the statements in the lab report were nontestimonial. In reaching this conclusion, the service court noted the manner of collection and the labeling of the sample did not alter how the laboratory conducted its tests. Despite being a probable cause urinalysis, the Harris's sample was still placed in a batch of 100 other samples; the batch contained blind samples for quality assurance; the laboratory technicians did not associate any particular sample with Harris; and the laboratory technicians did not have an expectation that any particular sample would test positive for a particular drug.[54] In applying the *Rankin* factors, the service court emphasized the primary purpose of the testing:

> [W]hile at some level of administrative control within the lab, the designation of the sample as "probable cause" was known, given the range of options for which a positive lab report might be used by a Navy command, it is less than certain that a "probable cause" designation alone would lead a lab official to believe the report would be used in a criminal prosecution. Finally in this regard, the prospective witnesses, the technicians, were unaware the sample had been obtained based on probable cause, so they

[40] *Magyari*, 63 M.J. at 127.

[41] 129 S. Ct. 2527 (2009).

[42] *Id*. at 2530.

[43] *Id*. at 2531.

[44] *Id*.

[45] *Id*.

[46] Scalia, J., delivered the opinion of the Court, in which Stevens, Souter, Thomas, and Ginsburg, JJ., joined. Thomas, J., filed an opinion concurring in the judgment. *Id*. at 2532 ("[T]he *Confrontation Clause* is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions").

[47] *See* Major Daniel M. Froehlich, *The Impact of* Melendez-Diaz v. Massachusetts *on Admissibility of Forensic Test Results at Courts-Martial*, ARMY LAW., Feb. 2010, at 24 (providing an excellent discussion on the impact of *Melendez-Diaz* on the military).

[48] *Melendez-Diaz*, 129 S. Ct. at 2542.

[49] United States v. Borgman, 2009 CCA LEXIS 488 (A.F. Ct. Crim. App. Dec. 14, 2009) (unpublished) (holding at an Article 62 appeal that judge's denial of a Government motion to admit drug testing results based on Melendez-Diaz was in error); United States v. Bradford, 2009 CCA LEXIS 437 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding at an Article 62 appeal of a random urinalysis case that the judge committed error by denying the Government motion to preadmit into evidence a drug testing report based on the determination that post-initial screening tests are testimonial); United States v. Skrede, 2009 CCA LEXIS 443 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding at an Article 62 appeal that military judge read *Melendez-Diaz* too broadly and improperly granted a defense motion to exclude two drug testing reports); United States v. Anderson, 2009 CCA LEXIS 438 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding at an Article 62 appeal that the military judge improper denied Government motion to admit accused's drug testing report).

[50] *Borgman*, 2009 CCA LEXIS 488.

[51] *Id*. (citing United States v. Harcrow, 66 M.J. 154, 159 C.A.A.F. 2008)).

[52] *Skrede*, 2009 CCA LEXIS 443; United States v. Harris, 66 M.J. 781 (N-M. Ct. Crim. App. 2008), *pet. dismissed*, 68 M.J. 174 (C.A.A.F. 2009).

[53] 66 M.J. at 789.

[54] *Id*. at 788–89.

> employed the standard urinalysis testing and reporting protocol, just as in *Magyari*, objectively cataloging the facts. Their primary purpose in so doing was the proper implementation of the Navy Lab's drug screening program, not the production of evidence against this appellant for use at trial.[55]

On the other end of the spectrum, it could be argued, and this article agrees, that *Melendez-Diaz* severely undercuts the logic of *Magyari*, the second *Rankin* factor relied on by the CAAF in *Harcrow*, and various military service court decisions, such *Harris*.[56] Significantly, *Melendez-Diaz* rejected the argument focused on how the lab technicians' entries were not part of a law enforcement function but, instead, the "result of neutral, scientific testing" and "simply a routine objective cataloging of an unambiguous factual matter."[57] The Court perceived these arguments as "little more than an invitation to return to our overruled decision of *Ohio v. Roberts*, which held that evidence with 'particularized guarantees of trustworthiness' was admissible notwithstanding the Confrontation Clause."[58] In rejecting this argument, the Court held that "the analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation."[59]

The analysts in *Magyari*, *Harcrow*, and *Harris* are no different from those in *Melendez-Diaz*. Their statements, like those in *Melendez-Diaz*, were necessary to prove the presence and nature of the illegal substance within the accused's sample. Without their statements, the Government would not have been able to prove its case. As the Court in *Melendez-Diaz* stated, the text of the Sixth Amendment "contemplates two classes of witnesses—those against the defendant and those in his favor . . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[60]

Under *Melendez-Diaz*, the better approach seems to be to discard the second *Rankin* factor—"whether the statement involved more than a routine and objective cataloging of unambiguous factual matters"—and, instead, focus the analysis on the remaining two factors untouched by *Melendez-Diaz*: "whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry" and "whether the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial."[61] In considering these remaining *Rankin* factors, it is important to discuss how laboratories test the samples sent to them and how the Government obtains a litigation report from drug testing laboratories.

### Military Testing Procedure

Once a servicemember's sample reaches one of the military's forensic drug testing labs, the laboratory processes the sample. As part of this process, the laboratory inserts blind negative and positive control samples into every batch of specimens tested. These blind quality control samples are tested without any indication that they are control samples. As a result, laboratory technicians do not know whether a particular sample being tested belongs to a servicemember or whether it is a quality control sample.[62]

The laboratory employs an immunoassay-based test to quickly distinguish between samples that are negative and those which are presumptive positive. Specimens that test negative are reported as negative and are subsequently destroyed. Specimens that test presumptive positive, on the other hand, go on for further testing. The next level of testing simply repeats the immunoassay-based test a second time to determine whether the second test corroborates the presumptive positive result obtained from the first. If the second test matches the first, then the laboratory performs a final confirmatory test by Gas Chromatography/Mass Spectrometry (GC/MS). Gas chromatography/mass spectrometry is considered the "gold standard" of tests within the forensic drug testing field.[63] If the GC/MS test confirms the earlier two results, the sample is reported as positive.[64]

Based on the process described above, laboratory personnel must realize that subsequent tests performed on presumptive positive samples are intended to either confirm or invalidate the initial screen.[65] Thus, second immunoassay screenings and GC/MS tests seem to be conducted solely for the purpose of producing "evidence with an eye toward

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[55] *Id.*

[56] *See* Froehlich, *supra* note 47, at 24 (discussing how the U.S. Supreme Court in *Melendez-Diaz* rejected the logic of *Commonwealth v. Virginia*, 827 N.E.2d 701, 704 (Mass. 2005) relied on by the CAAF in *Magyari*).

[57] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009).

[58] *Id.*

[59] *Id.* at 2537.

[60] *Id.* at 2533.

[61] United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007).

[62] Fort Meade Forensic Toxicology Drug Testing Laboratory, Tour Our Lab, https://iftdtl.amedd.army.mil/ftmd/Tour.html (last visited July 20, 2010). *See also* United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010) (discussing the normal process for drug testing at a military drug testing laboratory).

[63] *Id.*

[64] *Id.* For a sample to be reported as positive, it must be above a cutoff level in all three independent tests. A sample is reported as negative if it is below a cutoff value in any of the three tests. *Id.*

[65] The CAAF asked several questions on this point during the oral argument of *United States v. Blazier*. *See* Audio Recording, Oral Arguments, Jan. 26, 2010, United States v. Blazier (C.A.A.F. Oct. 29, 2009) (No. 09-0441/AF), *available at* http://www.armfor.uscourts.gov/CourtAudio2/20100126a.wma.

trial,"[66] and, therefore, any statements made by analysts based on second immunoassay screenings or GC/MS tests are clearly testimonial.[67]

### Drug Testing Cover Memorandum

Under the usual process, the prosecution sends a memorandum to the drug testing lab requesting drug testing reports and specimen bottles.[68] Usually the Government's request will note that the information is needed for court-martial and will also request that the lab expedite its response. The drug lab will then prepare a report with a cover memorandum summarizing both the tests and results of the examination. Cover memoranda are signed by the primary analysts who conducted the examination and a certifying official confirming the authenticity of the report and declaring that it was created and kept in the course of regularly conducted activity.[69]

The drug testing cover memoranda prepared by labs closely resemble the affidavits at issue in *Melendez-Diaz*. Both documents are used by the prosecution to indentify the nature of an illegal substance and its quantity. Even under the most strained reading of *Melendez-Diaz*, it is difficult to imagine how a drug testing cover memorandum from a lab could ever be viewed as non-testimonial. As the Court in *Melendez-Diaz* acknowledged, "We can safely assume that the analysts were aware of the affidavits' evidentiary purpose . . . ."[70] Likewise, we can safely assume that analysts at a military laboratory are aware of a drug testing cover memorandum's evidentiary purpose. The CAAF, in its initial *Blaizer* opinion, acknowledges as much but arrives at this conclusion through a strained analysis that seems to ignore the practical realities of when a drug testing cover memorandum is created.[71] A better approach for the CAAF would be to simply state that drug testing cover memoranda are always testimonial, and that the analysts who signed them are always "witnesses" for purposes of the Sixth Amendment.

### Common Sense Solution

Assuming that drug testing cover memoranda are testimonial and that any tests conducted after the first immunoassay are for a law enforcement purpose, who does the Government need to call in order to satisfy the Confrontation Clause? The CAAF has sought assistance from the parties to answer this remaining question;[72] however, the answer should not be an unnecessarily complicated one. The CAAF should look to the Military Rules of Evidence (MRE) to resolve this issue. If the Government does not attempt to admit a drug testing cover memorandum, it should be able to call any qualified expert to testify regarding the testing results and the actual raw data from those tests.

Expert testimony in a court-martial must pass several evidentiary hurdles, governed by MREs 702 through 705, before a military judge may admit it.[73] Military Rule of Evidence 702 establishes the first two hurdles: that the expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue" and that the individual testifying qualifies as an expert by "knowledge, skill, experience, training, or education."[74] In wrongful use, possession, or distribution cases, neither of these hurdles is usually much of an issue. It is usually clear that expert testimony will be required in these types of cases, and the witnesses called to testify on these matters almost always satisfy the knowledge requirements of MRE 702.[75] The more controversial issue is whether the expert will be allowed to discuss the basis of her opinion.[76]

Military Rule of Evidence 703 refers to the facts or data on which an expert can base an opinion or inference.[77] Experts are not limited to opinions or inferences based on their own perceptions.[78] Instead, experts may also consider information that they learn from attending the trial or

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[66] Dr. Vincent Papa testified that the purpose of the lab was "[t]o produced forensically defensible results for the military to use in legal proceedings." *Blazier*, 68 M.J. 439.

[67] Any argument that the analysts do not know the sample being tested is a quality control sample or a servicemember's sample and thus the statements are not testimonial seems to rely on the *Verde* line of reasoning subsequently rejected by *Melendez-Diaz*. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009).

[68] Fort Meade Forensic Toxicology Drug Testing Laboratory, Tour Our Lab, https://iftdtl.amedd.army.mil/ftmd/Litigation.html (last visited July 20, 2010).

[69] *Id*.

[70] *Melendez-Diaz*, 129 S. Ct. at 2532.

[71] *Blazier*, 68 M.J. 439.

[72] *Id*.

[73] MCM, *supra* note 5, MIL. R. EVID. 702–705. These evidentiary tests are questions of law that the military judge must decide. The proponent of the expert testimony has the burden of proving its right to admissibility by a preponderance of the evidence. *Id.* MIL. R. EVID. 104(a).

[74] *Id.* MIL. R. EVID. 702.

[75] Military Rule of Evidence 702 provides that an expert is anyone "qualified as an expert by knowledge, skill, experience, training, or education." *Id*. An expert need only have greater knowledge that a lay person to make her testimony "helpful" to the trier of fact. *Id*.

[76] *See* United States v. Neeley, 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988) (holding that an expert witness could not testify regarding inadmissible basis of her opinion); United States v. Hartford, 50 M.J. 402 (1999) (defense not allowed to use the basis of an expert witness' opinion to smuggle in impermissible evidence).

[77] MCM, *supra* note 5, MIL. R. EVID. 703. The language of the rule is broad enough to allow three types of bases: facts personally observed by the expert; facts posed in hypothetical question; and hearsay reports from third parties. United States v. Reveles, 42 M.J. 388 (1995).

[78] *Id*.

hearing itself, as well as other facts or data not otherwise admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[79] Therefore, a doctor could consider hospital records, other doctors' opinions, medical treatises, statements from family and friends of the patient, the patient's own statements, and even *laboratory results* in forming her opinion.[80]

While a doctor could rely on "facts or data" not otherwise admissible into evidence, MRE 703 specifically precludes disclosing this portion of the basis for the expert's opinion to the members unless the military judge determines that the "probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect."[81] While the proponent of the expert testimony is limited in what it can disclose under MRE 703, the opponent is not. Under MRE 705, an opponent is free to disclose the other otherwise inadmissible evidentiary basis on cross-examination if they chose to do so.[82] Typically, this would be done when the opponent believes the basis calls into question the accuracy or veracity of the expert's testimony.[83]

What about the expert in *United States v. Blazier*? Can Dr. Vincent Papa base his opinion on the cover memorandum and the raw data from the testing results even though some of this information would otherwise offend the Confrontation Clause? The simple answer is yes he can. The Fourth Circuit Court of Appeals case of *United States v. Washington* illustrates this point.[84]

In *Washington*, the accused, Dwonne Washington, was charged with driving under the influence and unsafe operation of a vehicle.[85] At his trial, the district court admitted the testimony of a Government expert, Dr. Barry Levine. Dr. Levine, the Director of the Forensic Toxicology Laboratory of the Armed Forces Institute of Pathology, was called to testify about the lab testing procedure and to prove that a blood sample taken from Washington contained drugs and alcohol. At trial, Washington claimed Dr. Levine's testimony amounted to testimonial hearsay statements of the lab technicians who operated the machines and, therefore, violated his Sixth Amendment rights. The magistrate judge overruled Washington's objection and admitted Dr. Levine's testimony. On appeal, Washington maintained that Dr. Levine's testimony was admitted in violation of the Confrontation Clause and the hearsay rule.[86]

The *Washington* case, like the *Blazier* case, involved an expert who did not conduct any of the tests himself.[87] Instead, both experts relied on the raw data presented to them by the lab technicians who actually conducted the tests.[88] To establish a Confrontation Clause issue, Washington argued that the raw data relied on by the respective experts were the hearsay "testimonial statements" of the various lab technicians who operated the machines.[89] The Fourth Circuit rejected this argument and instead found that the statements were "of the machines themselves."[90] Based on this determination, the Fourth Circuit concluded that statements "made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.[91] As such, Washington could not complain when Dr. Levine relied on this information in forming his expert opinion.[92]

The CAAF in *Blaizer* should likewise determine that the raw data relied on by Dr. Papa was not testimonial hearsay. The fact the Dr. Papa did not himself conduct any of the tests is of no consequence.[93] Any concern about the reliability of the testing or the raw data provided by the machines should be "addressed through the process of authentication not by hearsay or Confrontation Clause analysis."[94]

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[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] MCM, *supra* note 5, MIL. R. EVID. 705 (2008). Military Rule of Evidence 705 does not require that the expert on direct examination disclose underlying facts or data before stating an opinion or inference unless the military judge requires it. However, the expert may be required, on cross-examination, to disclose the underlying facts or data.

[83] This is most commonly seen in situations where the basis of the expert's opinion is the statements of the accused.

[84] United States v. Washington, 498 F. 3d 225 (4th Cir. 2007).

[85] *Id*. at 227.

[86] *Id*. at 227–30.

[87] *Id*.; United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010).

[88] *Id*.

[89] *Washington*, 498 F. 3d at 230.

[90] *Id*.

[91] *Id*. at 231. A "statement" is defined by MRE 801(a) as an "(1) oral or written assertion or (2) nonverbal conduct of a *person*, if it is intended by the person as an assertion." MCM, *supra* note 5, MIL. R. EVID. 801 (2008).

[92] The U.S. Supreme Court denied certiorari in *United States v. Washington*. 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (U.S. June 29, 2009). The denial of certiorari is significant given the fact the court had vacated other cases in light of *Melendez-Diaz*. *See* Froehlich, *supra* note 47. *See also* United States v. Moon, 512 F.3d 359 (7th Cir. 2008) (citing *Washington* for support of determination that the laboratory's raw results are not "testimonial" statements of the lab technicians); United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008).

[93] *Moon*, 512 F.3d at 362 ("[W]e agree with *Washington* that the *Sixth Amendment* does not demand that a chemist or other testifying expert have done the lab work himself.") (citing *Washington* for support of determination that the laboratory's raw results are not "testimonial" statements of the lab technicians); United States v. Washington, 498 F. 3d 225 (4th Cir. 2007); United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008)).

[94] *Washington*, 498 F. 3d at 231.

## Conclusion

The CAAF in *Blaizer* should reconsider when lab reports will be considered testimonial. By discarding the second *Rankin* factor, the CAAF can simplify this area of the law. The resulting analysis should focus on whether a statement is "elicited or made in response to law enforcement or prosecutorial inquiry" and whether "the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial."[95] Under this analysis, only the cover memoranda from drug testing laboratory reports should be considered testimonial hearsay. If the Government chooses to admit a memorandum, then it should be subjected to the requirements of the Confrontation Clause. Otherwise, the Government should be able to rely on a single expert to provide the testimony necessary to admit raw data from a laboratory examination and the actual results of those tests.

It has been six years since *Crawford* transformed the landscape of the Sixth Amendment. Since that landmark decision, courts have attempted to define *Crawford's* left and right boundaries. The CAAF in *Blazier* can take a positive step towards simplifying this area for military practitioners. Time will tell if the CAAF seizes the opportunity to do so.

[95] United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007).