UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2009-07**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Staff Sergeant (E-5)	)	
RACHEL K. BRADFORD,	)	
USAF,	)	
Appellee	)	**Special Panel**
	)	

THOMPSON, Judge

On 19 August 2009, counsel for the United States filed an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure. The government appeals the military judge's ruling denying a government motion to preadmit into evidence a drug testing report regarding the appellee's random positive urinalysis test result which led to a charge of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

The military judge based his decision on the recent Supreme Court decision of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Upon careful consideration of that appeal, the record of trial, and the appellate briefs prepared by both sides, we conclude the military judge erred in denying the government motion. We therefore set aside the decision and remand the case to the trial court for further proceedings.

In deciding this case, first we considered whether this Court has jurisdiction to consider the Article 62, UCMJ, appeal. We conclude that we do. Second, we examined the impact of the Supreme Court decision in *Melendez-Diaz* on the admissibility of the redacted drug testing report offered as evidence by the government. We conclude the military judge erred in his ruling that *Melendez-Diaz* prevented the admission of the entire drug testing report as redacted by the government unless the government called as witnesses the people listed in the drug testing report chain of custody documents.

Background

The appellee was selected to provide a random urinalysis sample which tested positive for cocaine. She later admitted to Air Force Office of Special Investigation agents that she tried cocaine during a New Year's Eve party. She was charged with

wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and her special court-martial began on 29 July 2009. During the initial session before the military judge and following the appellee's plea of not guilty, the government filed a motion requesting admission into evidence of the drug testing report prepared by the Air Force Drug Testing Laboratory, Brooks City-Base, Texas (AFDTL Report). In light of the Supreme Court's 25 June 2009 *Melendez-Diaz* opinion, the government redacted statements contained in the transmittal memorandum, which reported the appellee tested positive for cocaine, and removed the attached affidavit(s).[1] The unredacted transmittal memorandum provided as follows:

> 1. The urine specimen identified by Base Identification Number (BIDN) [number provided], SSAN [number provided] and Laboratory Accession Number (LAN) [number provided], was tested at the HQ Air Force Drug Testing Laboratory (HQ AFDTL). 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). The subject specimen was reported to have the following concentrations.
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> The cocaine metabolite benzoylecgonine concentration detected was 128 ng/mL. The DoD cutoff level is 100 ng/mL.

The redacted transmittal memorandum provided as follows:

> 1. The urine specimen identified by Base Identification Number (BIDN) [number provided], SSAN [number provided] and Laboratory Accession Number (LAN) [number provided], was tested at the HQ Air Force Drug Testing Laboratory (HQ AFDTL). [Redacted] "screen" and the "rescreen" immunoassay procedures. [Redacted] Gas Chromatography/Mass Spectrometry (GC/MS). [Redacted].
>
> [Redacted].

After hearing argument from trial and defense counsel and considering the motion and the response, the military judge discussed *Melendez-Diaz* and found it applied in the case at hand. He described the AFDTL Report as a "hearsay document that contains information that can only be said is compiled for testimonial purposes." He noted that he traditionally looked at the reports as falling within the business record exception and Mil. R. Evid. 803(6), but *Melendez-Diaz* dramatically changes the landscape. He noted the accused was randomly selected for urinalysis and was not under investigation. He discussed the purpose for the Air Force drug testing program and the confrontation clause. He ruled on the government's motion as follows:

[1] We note that it is not clear what affidavit(s) were attached to the Air Force Drug Testing Laboratory (AFDTL) Report, as they were removed before trial.

> But the question before me is whether or not this lab report is admissible without adhering to the requirements of confrontation. And because of the Supreme Court's decision in *Melendez-Diaz*, I conclude that it is not. If there's any part of the drug testing process that would not be testimonial, within the meaning of *Crawford* and *Melendez-Diaz*, it would be the initial screen; the collection, the chain of custody leading up to and including the initial screening test. I think there are valid arguments to be made that that's not testimonial, but once a sample test is presumptively positive, everything changes because then the lab personnel know what they're doing is confirming or invalidating that initial screen. At that point it becomes testimonial and that's when confrontation attaches to the documents. So if the government can pull out portions of this report or any records that pertain to the initial screen that would be something I would consider in the Motion to Preadmit. But the lab report, as it now stands, as contained in Appellate Exhibit XVII, will not be preadmitted.

When asked which witnesses would be needed to satisfy the confrontation clause, the military judge stated, "My conclusion is that what is required is actually more than what the defense has conceded. My conclusion of what is required is the testimony of anyone involved at any stage in the testing after the initial screening to the extent that you are pursuing the result." When asked to clarify, the military judge stated: "everyone connected to the chain of custody or any of the procedures in testing the sample" would be required to testify to satisfy confrontation.

The government filed an appeal pursuant to Article 62, UCMJ, asserting the military judge erred in his ruling. Additionally, after filing the appeal, the government filed a motion requesting the military judge reconsider his previous ruling. Upon reconsideration the military judge maintained his initial position.

Discussion

Jurisdiction Pursuant to Article 62, UCMJ

Congress provided authority for interlocutory government appeals under Article 62, UCMJ. Pursuant to Article 62(a)(1)(B), UCMJ, an order or ruling which excludes evidence that is substantial proof of a fact material in the proceedings is proper grounds for appeal. Our superior court recently addressed the meaning of "excludes evidence" and noted the legislative history of Article 62, UCMJ, makes clear: (1) that Congress intended for appeals under Article 62, UCMJ, to be conducted under procedures similar to those governing an appeal by the United States in a federal civilian prosecution pursuant to 18 U.S.C. § 3731, therefore, military appellate courts look to federal court decisions as guidance in the interpretation of Article 62, UCMJ; and (2) the term "excludes" is not to be a term of art limited to rulings on admissibility. *See United States*

v. Wuterich, 67 M.J. 63, 71, 74 (C.A.A.F. 2008) (the term "excludes" focuses on the pool of available evidence, not a formal ruling on admissibility); *see also United States v. Hobbs*, 62 M.J. 556 (A.F. Ct. Crim. App. 2005) (ruling excluding a positive drug urinalysis result is within the jurisdiction of Article 62, UCMJ).

Recognizing the term "excludes" is not a term of art, we look to federal cases applying 18 U.S.C. § 3731. In so doing, we note in *United States v. Hendricks*, 395 F.3d 173 (3rd Cir. 2005), the Third Circuit addressed a government appeal which is quite similar in many respects to the appeal involved in the case at hand. In that case, during trial, the government requested pretrial rulings on two items of evidence. *Hendricks*, 395 F.3d at 175. As background, the Supreme Court had recently issued the decision of *Crawford v. Washington*, 541 U.S. 36 (2004), which was considered by the district court judge. The district court judge held the government could not introduce any statements intercepted in Title III wiretaps except those statements made by a witness who testifies at trial. *Id*. at 176. The government appealed, noting *Crawford* applied only to testimonial hearsay not nontestimonial hearsay provided it complied with *Ohio v. Roberts*, 448 U.S. 56 (1980). The Third Circuit considered the government's appeal pursuant to 18 U.S.C. § 3731 and found the district court judge erred in his ruling that *Crawford* impacted the admissibility of the tapes. *Id*. at 182. The Third Circuit found the tapes to be nontestimonial hearsay, reversed the district court's order, and remanded the case for further proceedings. *Id*. at 184.

Thus, like the Third Circuit, this Court is faced with an appeal by the government involving a ruling by the military judge denying the preadmission of evidence unless the government produces witnesses. The military judge based his ruling on his application of the law as announced by the Supreme Court in *Melendez-Diaz* and held the chain of custody lab technicians involved in all testing beyond the initial screening test were testimonial witnesses. Therefore, as the Third Circuit did in *Hendricks*, this Court holds the ruling by the military judge to be one within of our statutory authority to consider on appeal. The military judge's ruling had the effect of excluding evidence that is substantial proof of a fact material for the government's case. Thus, the appeal by the government pursuant to Article 62, UCMJ, is properly before this Court.

Admissibility of the Drug Testing Report

Melendez-Diaz

In *Melendez-Diaz*, the Supreme Court held that affidavits used to convict the defendant were "testimonial" making the affiants "witnesses" subject to the defendant's right to confrontation under the Sixth Amendment.[2] In that case, the defendant was prosecuted for cocaine distribution and trafficking based upon a law enforcement undercover operation. The seized evidence was sent to the state laboratory responsible

[2] U.S. CONST. amend. VI.

by state law for conducting chemical analysis on evidence at the police request. The evidence tested positive for cocaine. During the trial, the prosecution submitted three "certificates of analysis" that reported the results of the forensic analysis performed on the substances. "The certificates reported the weight of the seized bags and stated that the bags '[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine.' The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law." *Melendez-Diaz* 129 S.Ct. at 2531 (internal citations omitted) (alterations in original). The certificates were admitted into evidence without any live testimony, unlike typical military urinalysis cases where an expert testifies.

After concluding the certificates were "quite plainly affidavits," the Supreme Court held that the affidavits clearly fell within testimonial evidence because they "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'" the analysts swearing their accuracy were witnesses for Sixth Amendment purposes, and the defendant was entitled to "be confronted with" the analysts at trial, absent a showing that the analysts were unavailable to testify and the defendant had a prior opportunity to cross-examine them. *Id.* at 2532. The Supreme Court described the affidavits as including only a "bare-bones statement" that the substance was found to be cocaine and emphasized that the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." *Id.* at 2537.

In a footnote, the Supreme Court stated that they

> do not hold, and 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. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . *this does not mean that everyone who laid hands on the evidence must be called*. As stated in the dissent's own quotation, . . . from *United States v. Lott,* 854 F.2d 244, 250 (C.A.7 1988), '*gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility*.' 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 (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Id. at 2532 n.1 (emphasis added).

In addressing the argument that the certificates were admissible without confrontation because they qualified as business records, the Court held as follows:

"[T]he affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless. Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Id.* at 2538 (internal citation omitted). Continuing, the Supreme Court noted that a clerk's certificate authenticating an official record, or a copy thereof, was admissible as evidence. "But a clerk's authority in that regard was narrowly circumscribed. He was permitted 'to certify to the correctness of a copy of a record kept in his office,' but had 'no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.'" *Id.* at 2538-39 (citations omitted). The Supreme Court continued:

> As we stated in *Crawford*: "Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records. . . ." Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because--*having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial*--they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here--prepared specifically for use at petitioner's trial--were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Id. at 2539-40 (internal citations omitted) (emphasis added).

Application of Melendez-Diaz

A survey of the case law following the issuance of *Melendez-Diaz* reveals the courts are focusing on the requirement that an expert testify and that he or she do so using the data produced by the labs as the basis for his or her testimony. The lab technicians were not required to be produced as witnesses. *See United States v. Darden*, 2009 WL 3049886 (D. Md. Sep. 24, 2009). In *Darden,* the district court judge held the Confrontation Clause was not violated when two lab technicians who conducted the tests the expert relied upon were not called as witnesses. The district court judge noted the lab technicians produced raw data which the expert used to reach his own conclusions and findings. In fact, the judge found the technicians did not generate their own conclusions, but simply ran the tests which generated the data. Further, the district judge noted that the lab report was not offered in evidence in lieu of the expert's opinion, but was offered to supplement his opinion. *Id*. at *3. The judge concluded any concerns regarding reliability of the machine-generated information is addressed through authentication, not by hearsay or Confrontation Clause analysis. *Id*. at *4; *see also Pendergrass v. State of Indiana*, 913 N.E.2d 703 (Ind. 2009). In *Pendergrass,* two witnesses testified about the lab procedures and the conclusions drawn after review of the data. The prosecutor did not call the technician who did the tests. The trial judge reviewed *Melendez-Diaz* and

found no Confrontation Clause violation. Unlike *Melendez-Diaz*, in *Pendergrass* live witnesses were called and the trial judge concluded there was no need to call the host of witnesses involved in the testing. The Supreme Court of Indiana held the reliability of the tests could be challenged by cross-examination of the witness from the lab. *Pendergrass*, 913 N.E.2d at 708. Additionally, they held the expert witness may rely on testing by others to reach his conclusion. *Id*. at 708-09.

Finally, of note is a Fourth Circuit case which specifically dealt with the issue of lab technicians and the Confrontation Clause. The Supreme Court denied certiorari in *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert denied*, 129 S.Ct. 2856 (2009), four days after issuing *Melendez-Diaz*.[3] The issue in that case involved whether lab technicians who ran the machines must be called to testify to satisfy the Confrontation Clause. The Fourth Circuit held the data produced from the machines: "(1) did not constitute statements of the lab technicians; (2) were not hearsay statements; and (3) were not testimonial." *Washington*, 498 F.3d at 227. The expert who testified relied on raw data produced by machines. The court concluded that "[t]he most the technicians could have said was that the *printed data* from their chromatograph machines showed that the blood contained PCP and alcohol. The machine printout is the only source of the statement, and no person viewed a blood sample and concluded that it contained PCP and alcohol." *Id*. at 229-30. The Fourth Circuit held that at most the "statements" were made from the machines and "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause. *Id*. at 230. The Fourth Circuit wrote that pursuant to Fed. R. Evid. 801(a) a "statement" is one made by a person. *Id*. The lab technicians' role was merely to operate the machines. Thus, the court concluded the data was not hearsay because it was not a statement by a person. *Id*.

Military Case Law

Prior to the Supreme Court's decision in *Melendez-Diaz*, our superior court addressed lab reports and random urinalysis tests and concluded lab reports contained nontestimonial hearsay with indicia of reliability and the appellant's Confrontation Clause rights were not violated. *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). In that case, the government called four witnesses-three chain of custody witnesses involved in the urine collection and one expert witness from the lab. The expert described the handling and testing procedures at the lab and stated he signed off on the test results but was not personally involved in handling or testing the appellant's sample. None of the lab technicians listed on the lab report were called as witnesses. The appellant asserted the data in the lab reports were statements because the lab technicians

[3] On the same day, the Supreme Court granted certiorari, vacated, and remanded several other cases in light of its decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). This Court understands the importance in not drawing conclusions about the Supreme Court's decisions to deny certiorari. Further, we do not read the Supreme Court's denial of certiorari in *Washington* as an implicit approval of the Fourth Circuit's ruling in that case. However, that decision was left undisturbed, remains Fourth Circuit precedent on this issue, and provides helpful analysis for reviewing the issues in the case at hand.

would have anticipated the lab report would be used against him at trial. Our superior court did not concur and noted:

> On the one hand, technicians working in government laboratories screening and testing urine samples are surely aware that a sample testing positive for a controlled substance may be used to prosecute the provider of the sample. On the other hand, not all urine samples test positive, and not all positive results end in prosecution. The record in this case reflects that the lab technicians work with batches of urine samples containing about 200 samples each. The technicians do not equate a particular sample with a particular person; instead, they assign identification numbers to every sample. The vast majority of samples analyzed do not test positive for illegal substances. The lab technicians handling samples work in a nonadversarial environment, where they conduct routine series of tests requiring virtually no discretionary judgments. The lab technicians handling [the] [a]ppellant's particular sample had no reason to suspect him of wrongdoing, and no reason to anticipate that his sample, out of all the 200 samples in the batch, would test positive and be used at a trial. . . . [T]he better view is that these lab technicians were not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial. Rather, their data entries were "simply a routine, objective cataloging of an unambiguous factual matter."

Id. at 126 (citations omitted).

Our superior court noted approximately 20 different people were involved in the lab test and as such made clerical data notations in the records or at one time had physical custody of the urine sample. Our superior court found no indication that any of these people had reason or were under pressure to reach a particular conclusion about the appellant's urine, or that they had reason to distinguish his sample number from the other thousands of samples routinely screened and tested by batch at the laboratory. *Id*. at 127.

Finally, our superior court rejected the government's assertion that lab reports are inherently nontestimonial because they are business records.

> For sure, the [a]ppellant's lab report is a business record. . . . Nonetheless, the same types of records may also be prepared at the behest of law enforcement in anticipation of a prosecution, which may make the reports testimonial. . . . Thus, lab results or other types of routine records may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence.

Id. (internal citations omitted). Our superior court concluded by finding the lab report to be a record of a regularly conducted activity of the Navy Drug Screening Laboratory that qualifies as a business record under Mil. R. Evid. 803(6), a firmly rooted hearsay exception.

In *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008), our superior court held lab reports were testimonial when evidence was seized by law enforcement and sent to a state lab for testing. Important to our superior court was that the laboratory analysis was conducted at the behest of the sheriff's office after arresting the accused for suspected drug use. The laboratory reports pertain to items seized from the accused's home at the time of arrest and the reports expressly identify the accused as a "suspect." Our superior court held that lab results or other types of routine records may become testimonial where the record is prepared at the behest of law enforcement in anticipation of a prosecution, where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence. *Harcrow*, 66 M.J. at 158-59.

Finally, this Court recently held both the random and consent urinalysis drug testing reports to be nontestimonial. *See United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008), *pet. granted*, No. 09-0441/AF (C.A.A.F. 2009).[4] This Court applied the Supreme Court's "primary purpose" test put forth in *Davis v. Washington*, 547 U.S. 813, 822 (2006) for determining whether statements are testimonial or nontestimonial. *Id*. at 545. "A statement is testimonial when its 'primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecutions.'" *Id.* (quoting *Davis*, 547 U.S. at 822). We objectively "look at the totality of the circumstance surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial." *United States v. Gardinier*, 65 M.J. 60, 65 (C.A.A.F. 2007). "Statements may become testimonial where the appellant is under investigation and the testing was initiated by the prosecution to discover incriminating evidence." *Blazier*, 68 M.J. at 545 (citing *Harcrow*, 66 M.J. at 159). This Court looked to the *Magyari* opinion and reviewed the conduct of the drug testing lab. In light of the totality of the circumstances, this Court found the lab report to be nontestimonial. Important to this Court was that the appellant's urine sample was routinely screened along with all the other samples at the lab. *Id*. at 545-46. Thus, the lab reports were nontestimonial statements properly admitted as "business records." Mil. R. Evid. 803(6) and 902(11).

Discussion-Admissibility of the AFDTL Report

In contrast with our powers of review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we may only act "with respect to matters of law" in this appeal submitted

[4] We reviewed the opinion in *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008) in light of *Melendez-Diaz* and conclude the opinion is not overruled. Granted, following the decision in *Melendez-Diaz*, our analysis of this issue will also address the concerns raised by the Supreme Court, as we do in this opinion. However, the bottom line is that we continue to hold random and consent urinalysis test reports to be admissible as nontestimonial business records.

pursuant to Article 62, UCMJ. Article 62(b), UCMJ. In ruling on an appeal under Article 62, UCMJ, this Court conducts a de novo review on matters of law. Article 62(b), UCMJ; Rule for Courts-Martial 908(c)(2); *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). We cannot find facts in addition to those adduced by the military judge and may only disturb the military judge's findings of fact if they are unsupported by the record or are clearly erroneous. *United States v. Fling*, 40 M.J. 847, 849 (A.F.C.M.R. 1994) (citing *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985); *United States v. Pacheco*, 36 M.J. 530, 533 (A.F.C.M.R. 1992)). Our superior court recently emphasized that "[m]ilitary judges must be careful to restrict findings of fact to things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequence, or interpretation.'" *Cossio*, 64 M.J. at 257 (quoting *Black's Law Dictionary* 628 (8th ed. 2004)) (military judge mixed findings of fact with "criticism," "apparent belief," and "opinions").

As in *Cossio*, we conclude the military judge in this case mixed findings of fact with matters of law when he ruled based on his belief, opinions, and conclusions of the legal effect, consequence, and interpretation of *Melendez-Diaz.* We therefore accept the military judge's findings of fact insofar as they establish the case involves a random urinalysis, the appellee was not under investigation, and the purposes of the Air Force drug testing program. We review de novo his application of the law as he considered the admissibility of the AFDTL Report. We hold the military judge erred in his application of the law.

The analysis of the urine sample was conducted at the AFDTL. As stated by the commander of the AFDTL,[5] the AFDTL is the only drug testing laboratory in the Air Force. The AFDTL is part of the Department of Defense Drug Testing System. In accordance with Department of Defense Instruction (DODI) 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program* (9 Dec 1994):

> It is DoD policy to:
>
> [1] Use drug testing to deter Military Service members . . . from abusing drugs (including illegal drugs and other illicit substance).
>
> [2] Use drug testing to permit commanders to assess the security, military fitness, readiness, good order, and discipline of their commands.

[5] In review of the government's Motion to Reconsider the Ruling to Preadmit the Drug Testing Report, we note the government attached an affidavit from the commander of the AFDTL. In the affidavit, the commander references a Department of Defense Instruction. As the affidavit was considered by the military trial judge in denying the government's motion to reconsider, we likewise shall consider the affidavit and referenced instruction in determining this appeal.

> [3] Ensure that urine specimens collected as part of the drug abuse testing program are supported by a stringent chain of custody procedure at the collection site, during transport, and at the drug testing laboratory.
>
> [4] Ensure that all military specimens are tested by a DoD-certified drug testing laboratory. . . .

DODI 1010.16, ¶ 3. The AFDTL processes approximately 800,000 samples per year, or 2,000 to 3,000 samples per day. Most of the specimens are from the Air Force random drug screening program. However, AFDTL also processes samples obtained through probable cause, consent, commander-directed, new entrants, and inspections. Of the samples processed each year, approximately 0.5 percent test positive for a controlled substance. Of those approximately 2,500 positive samples, there are an estimated 600 drug testing reports ordered.

Review of the AFDTL Report clearly indicates the report contains a business record affidavit, chain of custody forms with signatures, and raw data produced by the drug testing machines. There is no indication of the appellee as "suspect" on any of the pages of the AFDTL Report. *See Harcrow*, 66 M.J. at 159 (the appellant's name was listed as "suspect"). The AFDTL is mandated to process the urine sample using intra-laboratory chain of custody procedures. DODI 1010.16, ¶ E1.3. Review of the record makes it clear the lab technicians merely process the urine sample to and from the machines and their signatures document the intra-laboratory chain of custody. The machines are generating the data, not the lab technicians. As stated by the AFDTL commander, the vast majority of samples analyzed at AFDTL do not test positive for illegal substances. As noted by our superior court when discussing the Navy drug testing laboratory, the lab technicians handling the samples work in a nonadversarial environment where they conduct routine series of tests requiring virtually no discretionary judgments. *See Magyari*, 63 M.J. at 126. There was no indication that any of the people involved had reason, or were under pressure, to reach a particular conclusion about the appellant's urine, or that they had reason to distinguish her sample number from the other thousands of samples routinely screened and tested by batch at the laboratory. The lab technicians handling the appellant's particular sample had no reason to suspect her of wrongdoing, and no reason to anticipate that her sample would test positive and be used at a trial. In fact, review of DODI 101.16 makes it clear that a sample is not positive until the conclusion of all testing and reviews.[6] As our superior court held, the lab technicians were "not engaged in a law enforcement function," and

[6] In this regard, we do not concur with the military judge that the Confrontation Clause analysis differs between the initial screening and the two follow-up tests: the rescreening and the GC/MS confirmatory test. Review of the record and Department of Defense Instruction 1010.16 clearly indicate that a sample is not deemed positive until all tests and subsequent reviews and analysis are complete. Additionally, as we discuss later in this opinion, the chain of custody lab technicians make no statements which would fall within the Confrontation Clause and the holding of *Melendez-Diaz.*

"their data entries were simply a routine, objective cataloging of an unambiguous factual matter." *Id.* (citations omitted).

Therefore, we hold the chain of custody signatures and notations in the AFDTL Report are not statements which fall within the Confrontation Clause as outlined by *Melendez-Diaz*. The Supreme Court clearly stated they were not requiring 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. The Supreme Court held that although the government must establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called. Issues with the chain of custody go to the weight of the evidence rather than its admissibility. "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 (if the defendant objects) be introduced live." *Melendez-Diaz,* 129 S.Ct. at 2532 n.1. The lab technicians' notations and signatures are not "testimony."

Additionally, we hold the AFDTL Report is admissible as a business record pursuant to Mil. R. Evid. 803(6). The AFDTL Report is a compilation of chain of custody documents and raw data from the machines that conducted the tests. The chain of custody documents and the raw data are obtained on every sample processed at the AFDTL. *See* DODI 1010.16. Granted, the AFDTL Report in this case was generated upon request by "19AW/JA" arguably for use in an administrative or criminal proceeding, but the underlying chain of custody records and data from the machines were created contemporaneously with the testing of the urine sample and in accordance with DOD policy, not in preparation for litigation. If anything was created in preparation for litigation, we hold the transmittal memorandum was created as such. However, the government redacted the AFDTL Report to remove the language that we hold would violate the Confrontation Clause pursuant to the holdings of *Melendez-Diaz*. Thus, we reviewed the AFDTL Report as redacted. As the Supreme Court held when discussing the business records and official records, the question is whether the records have "been *created* for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial," if so, they are not testimonial. *Melendez-Diaz,* 129 S.Ct. 2539-40 (emphasis added). Here, it is quite clear. The AFDTL Report is a compilation of documentation created in the administration of the AFDTL's affairs, i.e. drug testing pursuant to DOD Policy as outlined above. The report itself is not testimonial.[7] Therefore, we hold the AFDTL Report admissible as a business record of a regularly conducted activity and conclude the holdings of *Melendez-Diaz* do not impact its admissibility.

[7] The government proffered to the military judge that they would produce an expert witness who will discuss the laboratory testing process and procedures, will analyze the raw data, and will testify as to his conclusion regarding the appellee's test results. Assuming the expert witness testifies as proffered, it is the conclusion of this Court that the expert witness' testimony would satisfy the Confrontation Clause and the holdings of *Melendez-Diaz*.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 23rd day of November, 2009,

ORDERED:

That the United States Appeal Under Article 62, UCMJ is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings.

(BRAND, Chief Judge and HELGET, Senior Judge participated)

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court