UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2009-09**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Senior Airman (E-4)	)	
MATTHEW D. SKREDE,	)	
USAF,	)	
Appellee	)	**Special Panel**
	)	

GREGORY, Judge

On 02 October, 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 appellee was arraigned before general court-martial on charges alleging wrongful use of cocaine, wrongful divers uses of marijuana, and wrongful divers distributions of marijuana. Prior to entry of pleas he raised various motions including a motion to exclude two drug testing reports intended to be offered by the prosecution. The first report documented testing of a urine specimen provided pursuant to random selection which was positive for THC, the metabolite of marijuana; the second report, based on a specimen provided pursuant to consent, was positive for both THC and cocaine.

Relying primarily on the recent Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the appellee moved to exclude both reports as testimonial hearsay unless all laboratory personnel involved in (1) the rescreen immunoassay and GC/MS testing of the first specimen and (2) all testing of the second specimen testified as witnesses. The prosecution argued in opposition that the reports were admissible as nontestimonial business records under *Crawford v. Washington*, 541 U.S. 36 (2004), and its application to military urinalysis cases in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006) and *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008), *pet. granted*, No. 09-0441/AF (C.A.A.F. 29 Oct 2009). After taking evidence and entering essential findings, the military judge granted the motion to exclude both drug testing reports unless the specified witnesses from the laboratory testified.

After the military judge ruled on this and other motions, the appellee entered pleas of not guilty. The prosecution then formally offered both reports as nontestimonial business records under Mil. R. Evid. 803(6). Citing her earlier ruling on the motion to exclude, the military judge denied admission of both documents. The government now appeals that ruling under Article 62, UCMJ.

Jurisdiction

The appellee disputes the Court's jurisdiction to hear the appeal of the military judge's ruling, claiming that the ruling does not conclusively exclude evidence and, therefore, fails to meet the jurisdictional requirements for interlocutory appeal under Article 62, UCMJ. The military judge first opined that her ruling was not "case dispositive" since the "government's evidence appears to be intact and sufficient to go forward." Later, however, after expressly excluding both drug testing reports offered by the prosecution, she recognized the practical effect of her ruling: "I believe that the effect of the ruling and the effect of my denial of admission of Prosecution Exhibits 1 and 2 . . . enable the government to . . . appeal." This later view is correct.

Rulings that are the practical equivalent of a suppression or exclusion order may be appealed under Article 62, UCMJ. *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). The term "excludes" in Article 62, UCMJ, is not limited to absolute exclusions of evidence but includes rulings that "limit the pool" of potential admissible evidence. *Id*. at 74 (quoting *United States v. Watson*, 386 F.3d 304, 313 (1st Cir. 2004)). Here, the ruling has the practical effect of excluding the two drug testing reports unless the government complies with the condition predicate imposed by the ruling.

After entry of pleas the prosecution formally offered both drug testing reports and, citing her earlier ruling, the military judge excluded them. Responding to the defense counsel's assertion that the evidence had not been excluded, the trial counsel countered that the evidence has been offered and "at this point is excluded." Under the appellee's rationale, the government would be forced at this point to either try the case without this substantial evidence or dismiss the effected charges. Under these circumstances, the practical equivalent of the ruling is exclusion of substantial proof material to the proceedings, making it, therefore, subject to appeal. Article 62(a)(1)(B), UCMJ; Rule for Courts-Martial 908(a); *Wuterich*, 67 M.J. 63.

Admissibility of Drug Testing Reports

The circumstances surrounding the collection and processing of the appellee's urine specimens are nothing new. The appellee was randomly selected to provide a urine specimen for urinalysis drug testing on 12 November 2008, and his sample was shipped to the Air Force Drug Testing Laboratory (AFDTL) at Brooks City-Base, Texas. After initial screening identified THC in the specimen, subsequent immunoassay and GC/MS

testing confirmed the presence of THC above the established Department of Defense cut-off levels.

AFDTL reported the positive result to the appellee's base, where agents assigned to the local detachment of the Air Force Office of Special Investigations interviewed the appellee under rights advisement on 10 December 2008. The appellee consented to provide a second urine specimen which, like the first, was shipped to AFDTL for testing. Initial screening of this second specimen identified both THC and cocaine, and subsequent immunoassay and GC/MS testing confirmed the presence of both substances above established Department of Defense cut-off levels.

The appellee moved to exclude the drug testing reports for both specimens as testimonial hearsay under *Melendez-Diaz*. The government argued both reports were admissible as nontestimonial business records which could be used by an expert witness to interpret the results at trial, citing our superior court's holding in *Magyari* as well as our decision in *Blazier*. In ruling both reports inadmissible unless specified personnel from the laboratory testified, the military judge found that *Melendez-Diaz* "specifically rejected" the rationale of both *Magyari* and *Blazier*.

We review de novo matters of law in an Article 62, UCMJ, appeal. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). On factual determinations we are bound by those of the military judge unless they are unsupported by the record or are clearly erroneous. *Id*. "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is *correct*." *Id*. (quoting *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)) (alterations in original).

In *Blazier*, we addressed a similar factual scenario involving drug testing reports on urinalysis specimens obtained first through random selection then by consent after a positive result. Applying both *Crawford* and our superior court's decision in *Magyari*, we concluded that both reports were nontestimonial and, therefore, admissible. Our sister court reached the same conclusion in *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). The military judge concluded that *Magyari* and *Blazier* are no longer applicable because (1) they predate *Melendez-Diaz* and (2) both are "based on the same arguments . . . specifically rejected" in *Melendez-Diaz*. We disagree.

The Confrontation Clause[1] guarantees the right of a criminal defendant to confront the witnesses against him. Whether a particular out-of-court statement triggers the right to confront the person who made it depends on whether the statement is testimonial. *Crawford*, 541 U.S. at 68. Rather than provide an exhaustive list of those statements that

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

would be testimonial, *Crawford* described classes of statements that would be testimonial:

> Various formulations of this core class of "testimonial" statements exist: "*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; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; 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."

Id. at 51 (internal citations omitted) (alterations in original). A laboratory report falls within the broad range of statements subject to Confrontation Clause analysis, and, as *Crawford* informs us, the circumstances of the report's preparation determine whether it falls within the class of statements described as testimonial.

Laboratories generate many types of reports under a variety of circumstances. At one end of the spectrum are detailed reports of raw data generated by various machines which are simply certified by laboratory technicians. Use of such reports of raw data at trial by an expert witness to render independent conclusions does not require the testimony of the technicians who reported the raw data. *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S.Ct. 2856 (2009). Indeed, in such circumstances the technicians could neither affirm nor deny the test results independently but could only defer to the raw data printed out by the machine: "[T]here would be no value in cross-examining the lab technicians on their out-of-court statements . . . because they made no such statements." *Id*. at 230. The raw data generated by machines are the statements of the machines themselves, not their operators, and statements made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause. *Id*.

At the other end of the spectrum are summary affidavits by laboratory technicians prepared expressly at the direction of law enforcement personnel for criminal prosecution. Such was the case in *Melendez-Diaz* where the Court held admission of such affidavits violates the right of confrontation and requires the testimony of the technician. The affidavits at issue in *Melendez-Diaz* failed to even identify the tests performed, whether the tests were routine, and whether the results required interpretation beyond the skills of the technicians running the machine; indeed, the affidavits contained only the "bare-bones" statement that a contraband substance was found. *Melendez-Diaz*, 129 S.Ct. at 2537. In what Justice Scalia described as a "straightforward application" of *Crawford*, the Court found such affidavits clearly testimonial. *Id*. at 2533. With that

perspective, we turn to the application of *Crawford* to laboratory reports offered as evidence in trial by court-martial.

In *Magyari*, the laboratory reports at issue concerned a specimen submitted pursuant to random selection. Like the present case, laboratory technicians worked with batches of urine samples that each contained multiple individual samples. *Magyari*, 63 M.J. at 126. The laboratory technicians could not equate a particular sample with a particular person, the vast majority of samples would not test positive for illegal drugs, and not all positive results would end in prosecution. *Id*. Laboratory personnel had no reason to anticipate that any particular sample would test positive and be used at trial and therefore were "not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial." *Id*. Applying *Crawford*, our superior court reasoned that "[b]ecause the lab technicians were merely cataloging the results of routine tests, the technicians could not reasonably expect their data entries would 'bear testimony' against [the] [a]ppellant at his court-martial." *Id*. at 127. The processing of the specimen, the resulting laboratory report, and the presentation at trial through expert testimony are all like that in *Washington*, and both cases are consistent in their application of *Crawford*.

In a case more analogous to *Melendez-Diaz*, our superior court in *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008), found laboratory reports from a state crime lab testimonial where the reports were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. In reaching this conclusion, the Court applied three factors aimed at objectively evaluating the totality of the circumstances of a particular statement under *Crawford*: "(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 *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)). While arresting Harcrow for desertion and other unrelated state charges, the sheriff's deputies seized drug paraphernalia from his residence and sent the items to the Virginia Division of Forensic Science which issued two laboratory reports documenting the presence of cocaine and heroin on several of these items. *Id*. at 155. In applying the *Rankin* factors to these facts and finding the reports testimonial, our superior court emphasized that the laboratory tests were specifically requested by law enforcement and the information relayed on the laboratory reports pertained to items seized during the arrest of an identified "suspect." *Id*. at 159. Again, as in *Magyari*, the result is consistent with the application of *Crawford*.

This fact-centered, totality of the circumstances approach also assists in evaluating more complex situations where, for example, an individual is singled out for testing locally but the laboratory process remains generic, as in both *Blazier* and *Harris*. In *Harris*, the court noted that although the appellant was singled out for testing and his sample was labeled probable cause this did not appear to alter the methods used to test

and report the results. The appellant's sample was one among 100, some of which were blind samples provided for quality assurance. The technicians did not associate any sample with a particular person, and they had no expectation that any particular sample would test positive for any particular drug. Finally, as in *Magyari*, the lab technicians testing the appellant's sample had no reason to suspect him of drug use, and no basis upon which to believe that his sample would test positive for methamphetamine.

In distinguishing the application of *Crawford* in both *Harcrow* and *Magyari*, the *Harris* court explained that the key to understanding the result in both cases is the application of the *Rankin* factors to distinguish between testimonial and nontestimonial hearsay. The goal in applying these non-exclusive factors is "an objective look at the totality of the circumstances surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial." *Harris*, 66 M.J. at 788 (quoting *Harcrow*, 66 M.J. at 158). In applying the test and finding the laboratory report nontestimonial, the 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 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.

Id. at 788-89. This totality of the circumstances application of *Crawford*, provided in *Davis v. Washington*, 547 U.S. 813 (2006), and expressly adopted by our superior court in *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007), remains unchanged by *Melendez-Diaz*. Indeed, application of the *Davis* approach to the facts of *Melendez-Diaz* yields the same result and demonstrates the continued vitality of this well-settled method of applying *Crawford*.

In declaring that *Melendez-Diaz* rejects the rationale of our decision in *Blazier*, which applied *Davis* and *Gardinier* to evaluate the testimonial character of a laboratory report, the military judge appears to confuse concern over compliance with laboratory procedure[2] with the basis for admission under *Crawford*. She concludes that *Melendez-Diaz* "seems to establish" that when laboratory personnel deviate from certain operating instructions in "what would normally be viewed as routine procedures" such personnel

[2] The military judge's findings of fact consist of 16 paragraphs; half relate to a false positive that occurred six months after the appellee's sample was tested.

"may indeed have to be called" as witnesses. It does not. Commenting on this concern raised in a dissenting opinion, Justice Scalia writes: "Contrary to the dissent's suggestion . . . we 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." *Melendez-Diaz*, 129 S.Ct. at 2532 n.1 (internal citation omitted).

In the wake of *Melendez-Diaz*, the United States District Court for the District of Maryland addressed this distinction between confrontation analysis and concern over testing procedures:

> Finally, to the extent Defendant suggests that the presence of the technicians is required in order to cross-examine them regarding the reliability of the data, that concern was also addressed in *Washington* in which the Fourth Circuit stated "[a]ny concerns about the reliability of such machine generated information is addressed through the process of authentication not by hearsay or Confrontation Clause analysis." *Washington*, 498 F.3d at 231. Certainly, a technician who conducts lab tests could intentionally or unintentionally affect the data generated. The same could be said, however, for anyone handling the sample in the chain of custody, or anyone involved in the authenticity of the sample or anyone certifying the accuracy of the test devices. Yet, the Supreme Court noted that it was not holding that these potential witnesses must appear as part of the prosecution's case. *Melendez-Diaz*, 129 S.Ct. at 2352, n.1.

United States v. Darden, 2009 WL 3049886 *4 (D. Md. Sep. 24, 2009). As is the case here, whether the laboratory reports are testimonial for purposes of confrontation does not depend on whether the laboratory complied with internal procedures; such concerns go to weight, not admissibility. *See Melendez-Diaz*, 129 S. Ct. at 2352, n.1 (quoting *United States v. Lott*, 854 F.2d 244, 250 (CA7 1988)).

Beyond her concerns with the processing of the specimens, the military judge concluded that the reports at issue were "created under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Neither the case law nor the evidence presented on the motion supports this conclusion. Dr. MB, Deputy Director of AFDTL, testified on the motion. After qualifying as an expert without objection, Dr. MB explained that AFDTL receives 3,000 to 4,000 samples each day and that each sample is processed the same way in accordance with established operating instructions regardless of origin and regardless of how the sample was acquired, "Our job is simply to test it and report it out." Drug testing reports are generated contemporaneously with completion of testing by the respective machine and are produced in the normal course of business at the laboratory: "For example, an instrument, you load the sample on there, the instruments finished running the test, these printouts come off the printer attached to the instrument."

Laboratory certifying officials review the reports from the instruments to check calibration, controls, and chain of custody. They cross check the results with established cut-offs and sign the report. Certifying officials do not have any information on the individual who provided the specimen other than Social Security number and unit of assignment. The basis for a test, whether it be random, consent, or otherwise, is not used by the laboratory in processing the specimen; in fact, only the individuals who initially prepare the specimens for testing even see the two-letter basis code, and all personnel are instructed that each sample is to be processed the same way.

Of the approximately 800,000 samples tested each year at AFDTL only about 2,500 test positive for any drug, and only about 600 of those (less than one percent) require an accompanying drug testing report. The great majority of positive specimens either results in no action following medical review or are handled administratively. Given the large volume of tests performed each day, technicians operating the various machines would likely not remember any particular sample and could only testify concerning the laboratory's normal operating procedures – the same information provided by AFDTL experts who testify at trial.

The process employed by AFDTL is essentially the same as that described in *Blazier* where this Court found that laboratory reports on such routine testing of multiple specimens were nontestimonial. More importantly, as in *Washington*, these reports are simply raw data generated by machines that, if used at trial, require expert testimony to explain. Such reports are far different than the conclusory affidavits offered in *Melendez-Diaz*, affidavits that did not even identify which tests were performed, whether the tests were routine, and whether interpretation of results required skills beyond those of the analysts making the affidavits.

While we appreciate the military judge's diligence as evidentiary gatekeeper, she reads *Melendez-Diaz* too broadly in concluding that it somehow expands the application of *Crawford* and requires rejection of the type of laboratory reports which under *Crawford* have been found nontestimonial in the prior cases of this Court and others – both military and civilian. The *Melendez-Diaz* opinion itself cautions against such expansive interpretations, stating: "This case involves little more than the application of our holding in *Crawford v. Washington*. . . . The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Melendez-Diaz*, 129 S.Ct. at 2542.

Consistent with this admonition, the totality of the circumstances application of *Crawford* provided in *Davis* and expressly adopted by our superior court in *Gardinier* remains unchanged by *Melendez-Diaz.* Our decision in *Blazier* relies on that established test and, contrary to the military judge's conclusion, remains controlling in this case. Therefore, the laboratory reports at issue in this case are nontestimonial and their admission as business records does not violate the Confrontation Clause.

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 THOMPSON, Judge participating)

FOR THE COURT

OFFICIAL

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