

DEPARTMENT OF THE NAVY
SPECIAL COURT-MARTIAL
WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES)	
)	
v.)	SPECIAL COURT-MARTIAL
)	
JARA L. HOOEE)	MOTION IN LIMINE TO SUPPRESS
AVIATION ELECTRICIAN'S)	INADMISSABLE EVIDENCE
MATE AIRMAN (AEAN))	
U.S. NAVY)	U.S. Const. Amend. VI, M.R.E. 801,

17 January 2011

1. Nature of Motion.

The defense respectfully requests that the "Forensic Drug Testing Records for Laboratory Accession Number (LAN) S10J0177005, SSN XXX-XX-1835" be excluded entirely by the court from the government's case-in-chief, pursuant to the Sixth Amendment, Rule for Courts-Martial (RCM) 906(b)(13), Crawford v. Washington, 541 U.S. 36 (2004), Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), and in light of Bullcoming v. New Mexico, 131 S. Ct. 62 (2010).

2. Facts.

For the purposes of this motion, the defense adopts substantially the same facts as in its other motion in limine.

3. Discussion.

a. The Sixth Amendment in relevant part states: "In all criminal prosecutions, the accused

shall enjoy the right ... to be confronted with the witnesses against him.”

b. Confrontation Clause of the Sixth Amendment forbids the prosecution from introducing a witness’s out-of-court testimonial statements unless that witness testifies at trial – or unless the witness is unavailable and the defense has had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. at 59.

c. Authors of forensic reports are witnesses under the Sixth Amendment and are therefore subject to cross examination. Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2531-32.

d. The question whether a drug testing report (i.e., a forensic analysis report) in its entirety is admissible is at present an unsettled question. The U.S. Supreme Court has granted certiorari of this very issue. See Bullcoming v. New Mexico, 131 S. Ct. 62 (2010).

e. Melendez-Diaz does not create an exception to the Court’s holding in Crawford for forensic reports because forensic reports contain the same risk of manipulation and error as other *ex parte* testimony. Melendez-Diaz, 129 S. Ct. at 2536. Forensic reports such as the Drug Testing Reports¹ produced by the Air Force Drug Testing Laboratory (AFDTL) are prepared in preparation of use in trial for the purpose of obtaining a criminal conviction, thus triggering the Sixth Amendment right to confrontation as articulated in Melendez-Diaz.

f. Because of the plethora of forensic analysts involved in the creation of a Drug Testing Report by AFDTL, and the very fact that the Drug Testing Report is prepared in anticipation for use at trial, the Drug Testing Report should be excluded in its entirety pursuant to the Supreme Court’s holding in Melendez-Diaz.²

g. Lastly, the defense understands under the principle of *stare decisis* that this Court is bound by CAAF’s holdings in *U.S. v. Blazier*, 68 M.J. 439, 443 (C.A.A.F. 2010). and *US v.*

¹ Drug Testing Reports were formerly known as “Litigation Packages” prior to Crawford.

² To be clear, this objection is a standing objection.

Blazier ("Blazier II"), 69 MJ 218, 222 (C.A.A.F. 2010) regarding machine-generated information contained in the Drug Testing Report. Because this area of the law is unsettled and this issue is under review at the Supreme Court level, the defense wishes to preserve this issue for appeal.

5. Evidence.

The defense has included a copy of the NDSL forensic drug testing report generated for this case.

6. Argument.

The defense does not request oral argument for this motion.

R. R. CROSSWELL
Captain, USMC
Detailed Defense Counsel

A true copy of this motion was served on the Court and trial counsel, Captain Ryan Stys, via electronic mail this 17 day of January, 2011.

R. R. Crosswell
Captain, USMC
Detailed Defense Counsel