

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

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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,

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17 January 2011

1. Nature of Motion.

Pursuant to Rule for Court-Martial 906(b)(13), the defense respectfully requests:

- 1) that the government be precluded from presenting to the members during its case-in-chief the pages of the "Forensic Drug Testing Records for Laboratory Accession Number (LAN) S10J0177005, SSN XXX-XX-1835" which contain writings or markings that were not machine-generated;
- 2) that the government be precluded from presenting to the members during its case-in-chief the page of the report entitled "Forensic Laboratory Results" (page 2 of the report); and
- 3) that any expert witness for the government be prohibited from repeating the substance of hearsay statements in court.

2. Summary of Facts.

- a. AEAN Jara L. Hooee is charged with one specification under Article 112a of the Uniform Code of Military Justice (UCMJ) for wrongful use of cocaine.
- b. On 8 September 2010, Marine Fighter Attack Training Squadron 101 conducted a command urinalysis. As a member of the squadron, AEAN Hooee gave a urine specimen.

c. On 14 September 2010, the command received analytical results from the Navy Drug Screening Laboratory. The documentation showed that AEAN Hooee tested positive for cocaine at a level of 131 ng/mL.

d. On 27 December 2010, the trial counsel in this case sent a "Request for Drug Testing Technical Information" to the Commanding Officer of Navy Drug Screening Laboratory (NDSL), San Diego, CA. The trial counsel stated that the documentation was necessary "to properly resolve the disposition of the subject's positive result."

e. In response, Mr. Christopher. E. George of NDSL mailed to the Military Justice section of the Joint Law Center, Marine Corps Air Station Miramar, a 38-page "documentation package for subject specimen." This documentation package includes chain-of-custody records as well as computer-generated testing records. The first page indicates that the documentation package was certified by Mr. George (who is identified as a chemist), but that it was prepared by Mr. Sigfred S. Albino. The cover letter by Mr. George states that "the enclosed documentation package contains forensic laboratory reports and chain of custody documents that were made in the regular course of business," but the second page of the documentation lists the results of the specimen's test and the corresponding Department of Defense cutoff levels for illegal substances.

f. On at least 18 pages of the NDSL report, there is either signatures of government employees, handwritten notes, or stamps that are not computer-generated. The pages with writings that are not computer-generated include the chain-of-custody documentation, the "Screen/Re-Screen Review Worksheet," and the computer generated charts of the urinalysis results. (See Enclosure 1. The non-computer-generated markings on the reports have been circled by the defense to assist the court).

### 3. Discussion.

The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...” U.S. Const. amend. VI. Testimonial hearsay is inadmissible unless 1) the witness is unavailable, and 2) the witness was subject to prior cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-53 (2004). Where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either 1) subject to cross-examination at trial, or 2) unavailable and subject to previous cross-examination. *U.S. v. Blazier*, 69 MJ 218, 222 (C.A.A.F. 2010)

Here, the defense suspects the government may attempt to admit as an exhibit the NDSL “documentation package” in the subject case. NDSL’s documentation in this case is a textbook example of the kind testimonial documentation that will no longer be admissible, post-*Blazier II*, through the government’s use of one certifying official’s testimony at trial. *See Id at 224* (holding that the admission of hearsay was not cured by the testimony of the “laboratory certifying official” who was not directly involved with the substantive analyses). Similarly to *Blazier*, the documentation produced by NDSL in this case is annotated with handwritten notes by declarants other than Mr. George. And while the *Blazier* decision states that purely machine-generated printouts are not testimonial, *Id. at 225-226*, here, man-made notes and signatures litter much of the report. Even stamps on the NDSL documentation constitute out-of-court statements that do not originate from a machine and are therefore inadmissible hearsay. As stated in footnote 1 of *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the government does not need to call every person who may have been involved in the handling of evidence to the

stand, as gaps in the chain of custody go to the weight of the evidence rather than its admissibility; but the testimony that *is* introduced must be introduced live. *Id. at 2532.*

The defense further requests that pursuant to the C.A.A.F.'s decision in *Blazier I*, the page of the NDSL report entitled "Forensic Laboratory Results" be excluded. *See U.S. v. Blazier*, 68 M.J. 439, 443 (C.A.A.F. 2010). In *Blazier I*, the top portion of the drug testing report cover identified the presence and quantity of an illegal drug. It was generated in response to a command request indicating its need for a court-martial. It summarized voluminous data and made it easily digestible. The court found the evidentiary purpose to be apparent, irrespective of the impetus behind the testing or the knowledge of those involved. *Id; See also Blazier II at 221.* Here, similarly, the subject page lists eleven controlled substances and the cut-off levels allowed by the Department of Defense. It further confirms that the subject specimen at this point was above the permissible Department of Defense GC/MA cutoff for cocaine, which it specifies as 150 ng/ML. It is the functional equivalent of the memoranda used by the government in *Blazier I* and should therefore similarly be found testimonial for Confrontation Clause purposes.

Finally, in *Blazier II*, the court held that while an expert witness may review and rely upon inadmissible hearsay in forming independent conclusions, he may not circumvent either the Military Rules of Evidence or the Sixth Amendment by acting as a surrogate expert for testimonial hearsay. *Id. at 225.* The defense therefore respectfully requests that the court prohibits anyone but the individuals who played custodial roles themselves or were involved with the testing to offer testimony on such matters.

AEAN Hooee has a right confront the witnesses against here in this case, including those individuals who handled her urine during its testing. The handwritten notations and other non-machine-generated markings on the documentation package in this case are out of court-

statements vouching for the handling of the urine specimen. As such, the documentation should be excluded at trial.

5. Evidence.

The defense intends to introduce the following evidence for the purpose of litigating this motion:

- 1) a copy of the NDSL's documentation package in which the non-machine-generated markings and writings have been circled by the defense.
- 2) a copy of page 2 of this report, which is entitled "Forensic Laboratory Results."

6. Argument.

Oral argument is requested.

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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.

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