No. _____

IN THE

Supreme Court of the United States

JOSHUA KATSO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a forensic analyst reports on tests targeting the accused but does not appear at trial, does the Confrontation Clause permit another analyst, who did not observe any of the testing, to testify to an opinion that necessarily relies on testimonial assertions made by the first analyst?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Katso respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces, App. 1a-41a, is reported at United States v. Katso, 74 M.J. 273, No. 14-5008/AF, 2015 CAAF LEXIS 588 (C.A.A.F. 2015). The decision of the United States Air Force Court of Criminal Appeals, App. 42a-83a, is reported at United States v. Katso, 73 M.J. 630 (A.F. Ct. Crim. 2014). The opinion of the trial court, App. 84a-97a, is unreported.

JURISDICTION OF THIS COURT

The Court of Appeals for the Armed Forces issued its decision on June 30, 2015 under 10 U.S.C. § 867(a)(2) (2012). Therefore, this Court has jurisdiction under 10 U.S.C. § 867a (2012).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Petitioner was convicted by a court-martial of aggravated sexual misconduct and other crimes. Identity was an essential part of the prosecution's case, and critical proof of identity was DNA evidence. A single analyst at a forensic crime laboratory performed all the testing on the DNA evidence and wrote a formal report stating his conclusions. But that analyst was temporarily unavailable at the time the trial began. Rather than postponing the trial very briefly to enable the reporting analyst to testify at trial, the judge, over defense objections, permitted another analyst, who had not observed any of the testing, to offer his own conclusions. Essential factual predicates for the second analyst's conclusions were assertions made in the report and other testimonial statements by the absent analyst.

Senior Airman CA (the Complainant), who resided in a dormitory on the Grand Forks Air Force Base in North Dakota, celebrated her 21st birthday on December 10, 2010, with a bout of heavy drinking that lasted into the next morning. According to her testimony, she lost memory of several hours but awoke early the next morning while a man was sexually assaulting her. After the assailant left, she reported the incident to a friend, who testified that the Complainant said, "I think it was Katso," referring to the Petitioner, an Airman Basic who also resided on the base. Appendix (App.) 107a-108a. Accordingly, suspicion immediately focused on Petitioner; no other suspect was considered. As it happens, Petitioner had also drunk heavily overnight, enough that he was unresponsive when

criminal investigators came to question him, and he also had no memory of much of the night. In particular, he denied any memory of ever going to the Complainant's room or of engaging in sexual contact with her.

To enable DNA testing, nurses took blood and saliva samples from the Complainant and from Petitioner and also collected a saliva sample from Petitioner (the "known samples"), vaginal and rectal swabs from the Complainant, and swabs from the penile head, penile shaft, and scrotum of Petitioner (the "evidentiary samples"). All these materials were sent in a double-sealed package to the United States Army Criminal Investigation Laboratory (USACIL) in Forest Park, Georgia, which performs forensic testing for all the armed forces. Upon arrival, the outer seal was broken and the evidence was logged in. The case was assigned to a single examiner, Robert Fisher, meaning that he alone had responsibility over the case from that point through the drafting of a final report stating his conclusions.

Accordingly, *assuming Fisher acted according to protocol as later described by another analyst*, he did the following: First, he retrieved the package from the evidence-processing unit. Transcript (Tr.) 186. He then broke the inner seal of the package, inventoried its items, performed a serology test on the evidentiary samples taken from the Complainant to determine whether semen might be found, and then conducted all steps of DNA testing: purifying the DNA, assessing its quantity, amplifying certain areas of the DNA, generating DNA profiles, and then interpreting the results. Tr. 187-89. He then wrote

a report stating his conclusions. Tr. 194. The report asserted that DNA that was almost certainly from Petitioner was found on the vaginal and rectal swabs taken from the Complainant, and that DNA that was almost certainly from the Complainant was found on swabs taken from Petitioner.

Petitioner was charged with aggravated sexual assault, burglary, and unlawful entry, in violation of 10 U.S.C. §§ 920, 929, and 934, respectively, and he was tried by a court-martial on the grounds of the Grand Forks base; the trier of fact was a panel composed of officers and enlisted personnel. The prosecution planned to present Fisher as a live witness, but on April 26, 2011, shortly before trial, he stated that, because his mother was having surgery, he would be unable to travel for several days; ultimately, he said not before May 5. The prosecution declined to ask for a slight postponement. Instead, it announced that it would present the live testimony of David Davenport, another USACIL lab analyst. App. 86a. Davenport had acted as technical reviewer of the report, but he had played no role in the testing or in drafting the report; everything he knew about the case, he knew from Fisher's work product. Indeed, in a suppression hearing, Davenport acknowledged that he would not "be able to tell" if Fisher was dishonest in at least some respects, App. 100a, that he "wouldn't have any knowledge of" whether Fisher departed from laboratory protocol in performing that work if Fisher "didn't write it down," App. 100a, 102a, that he would not be able to answer questions about such undocumented anomalies, App. 102a, and that he would not have any knowledge of whether Fisher's

performance of work contaminated the samples in at least some respects, App. 103a-104a; as the prosecutor summarized a portion of Davenport's testimony, he answered, "Of course not," to the question of whether he could "speak for Mr. Fisher or what Mr. Fisher did." App. 104a. Over Petitioner's objection, based principally on the Confrontation Clause of the Sixth Amendment to the Constitution, the military judge nevertheless allowed Davenport to testify at trial. Davenport did so, on the evening of May 5. He offered his opinion that, to a high degree of probability, Petitioner's DNA was found on swabs taken from the Complainant and that the Complainant's DNA was found on swabs taken from Petitioner. Davenport's trial testimony made clear – and indeed, the prosecutor emphasized – that the factual predicates for his conclusion were completely drawn from the absent analyst's report and other work product. *E.g.*, App. 113a ("Q. And that's your opinion based on your technical review?"), App. 114a ("Q. . . . Based on your review, have you formed an opinion whether DNA was present on Airman [A]'s rectal swab?").

A two-thirds majority of the court found Petitioner guilty on all three charges. He was sentenced to confinement for ten years, a dishonorable discharge, and forfeiture of all pay and allowances.

The United States Air Force Court of Criminal Appeals (AFCCA), however, set aside the findings of guilt and the sentence. The court concluded unanimously that the findings on the first two charges violated Petitioner's rights under the

Confrontation Clause.[1] The court carefully examined this court's decision in *Williams v. Illinois*, 132 S.Ct. 2221 (2012), which it said "provided no clear guidance concerning the extent to which a surrogate expert may testify about testing performed by another analyst." App. 60a. Unlike Williams, the court noted, this case

> involved a jury trial and a known suspect, against whom charges had been preferred, and who was in pretrial confinement for the suspected offense prior to the DNA testing. At the time Mr. Fisher created the DNA profiles, he knew the appellant's identity and further knew the results of his analysis would be turned over to [forensic investigators] for potential prosecution.

App. 62a-63a. And for similar reasons, unlike in *Williams*, the court could not dismiss the possibility that "sample contamination, sample switching, mislabeling, or fraud" could have explained apparently incriminatory evidence; the proper way to assess these possibilities was "confrontation and the crucible of cross-examination." App. 63a n.6. Fisher's report was therefore testimonial, and Davenport "was able to identify [Petitioner] by name only by repeating" Fisher's statement in the report "directly link[ing]" Petitioner "to the generated DNA profile." App. 68a. And "[b]ecause Mr. Davenport repeated testimonial hearsay to the factfinder, [Petitioner's] right to confront Mr. Fisher was

[1] The court also set aside the findings on the third count, for failure to allege an essential element of the crime.

violated." App. 70a. The majority also rejected the Government's argument that the error was harmless. App. 70a-74a. As Senior Judge Marksteiner noted in a concurrence, "it is simply impossible to unring the DNA evidence bell" so as to preclude a "reasonable possibility that Mr. Davenport's testimony might have contributed to the conviction." App. 80a.[2]

A divided panel of the United States Court of Appeals for the Armed Forces (CAAF) reversed. The majority emphasized that Davenport "conducted a thorough review of the entire case file," that he "personally compared" the DNA profiles generated by Fisher's work, and that he "reran the statistical analysis, and formulated his own carefully considered conclusions." App. 4a. It placed emphasis on the fact that, unlike the absent analyst in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2012), Fisher was not absent because he was "on unpaid leave for unexplained reasons"; rather, he "missed the trial in order to be with his ill mother." App. 22a. The majority operated on the assumption that Fisher's Final Report was testimonial,[3] and it recognized that Davenport relied in part on the

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[2] Senior Judge Orr, dissenting from the conclusion that the error was not harmless, pointed out that at trial Petitioner did not challenge identity. App. 82a-83a. But, as explained in the concurrence, once the military judge ruled that the DNA evidence was admissible, "it would have been beyond benign futility – indeed it likely would have been affirmatively detrimental to the appellant's case" to contest the identity issue. App. 76a.

[3] The Report formally asserted that it contained the findings of Fisher, the signing "Forensic DNA Examiner." App. 4a.

Report.[4] App. 19a. Nevertheless, it concluded that Davenport's testimony did not violate the Confrontation Clause. The court's rationale – which it recognized has been rejected by some other jurisdictions, both federal and state, App. 27a-28a n.7 – was that although Davenport relied crucially on testimonial statements of Fisher, he had formulated his own "independent opinion," App. 26a; he had been able to "satisfy [him]self of the reliability of the results" and that he offered "his own expert opinion" based on "his independent review." App. 29a, quoting in part *State v. Roach*, 95 A.3d 683, 697 (N.J. 2014). In reaching this conclusion, the majority relied on the principle of Mil. R. Evid. 703 – which is identical to Fed. R. Evid. 703 – that expert opinion may be based on information that is not in itself admissible evidence, App. 25a-26a; the majority did not address whether this principle can apply constitutionally when the source on which a prosecution witness relies is testimonial evidence.

Judge Ohlson dissented. He emphasized that Fisher handled all the samples, creating potential for contamination, especially if he did not follow the prescribed protocol, App. 32a-33a, and that this was a point on which Petitioner sought, unsuccessfully, to cross-examine Fisher. App. 33a-34a. Further,

[4] The court also stated that there was no "indication that Mr. Fisher's notes or his other lab results that underlay the Final Report were signed, certified anything, bore indicia of formality, or that Mr. Fisher expected them to be used at trial." App. 17a-18a. Of course, Fisher's notes were used at trial, as an underlying basis for Davenport's testimony, Tr. 214-23, 231, just as they would have been an underlying basis for Fisher's trial testimony, had he appeared at trial.

Davenport's "verification" that Fisher followed the required protocol consisted of reviewing Fisher's out-of-court testimonial assurances that he had done so, assurances that Davenport "effectively repeated" at trial. App. 33a, 37a. Accordingly, denying Petitioner's Confrontation Clause objection "effectively rendered impervious to cross-examination and attack the issue of whether Mr. Fisher contaminated the evidentiary sample." App. 37a. Fisher "knew from the outset[,] when he wrote his notes and conducted his tests, he likely was 'creat[ing] evidence for use at trial,'" App. 39a (quoting in part *Williams*, 132 S.Ct. at 2245 (opinion of Alito, J.)) – and that this evidence was "a central and integral element" of the prosecution case. App. 40a.[5] Accordingly, he concluded that denial of the right to cross-examine Fisher was a violation of the Confrontation Clause requiring reversal.

The majority decision being to the contrary, this petition follows.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ARE IN IRRECONCILABLE CONFLICT ON THE CRUCIAL QUESTION PRESENTED BY THIS PETITION.

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[5] Judge Ohlson also noted correctly that Fisher "should not have been considered unavailable to testify at [Petitioner's] trial," App. 40a – though even if he had it would not avail the prosecution, because Petitioner had no opportunity to cross-examine Fisher. *See Crawford v. Washington*, 541 U.S. 36, 59 (2004).

The issue presented by this case is a critical one that recurs with great frequency, and the lower courts are irreconcilably divided on how to handle it: A forensic lab analyst performs one or more tests, focusing on a known suspect of a crime, and makes testimonial statements concerning the conduct and results of those tests. But for one reason or another, that analyst does not testify at trial, and the accused never has an opportunity to cross-examine him. Instead, the prosecution presents the trial testimony of another analyst, often one employed at the same lab, who did not observe the testing. The testimonial statements of the testing analyst are an essential factual predicate for the trial testimony of the second analyst – and so the Confrontation Clause appears to have been violated. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). Is that apparent violation excused if the second analyst, though not having observed the testing, was assigned to review the testing analyst's work, or offers his own opinion as to inferences that may be drawn from the facts reported by the testing analyst?

Many courts have addressed these issues. As CAAF recognized in this case, App. 27a-28a n.7, and as other courts and judges have recognized, the lower courts are in clear conflict – reaching inconsistent and divergent results. *See State v. Michaels*, 95 A.3d 648, 676-77 (N.J. 2014) (suggesting a four-part split in the lower courts); *Marshall v. People*, 309 P.3d 943, 947 n.8 (Col. 2013); *id.* at 953 (Bender, C.J., concurring in part and dissenting in part); *United States v. Turner*, 709 F.3d 1187, 1189, 1193 (7th Cir. 2013) (explaining that "the divergent analyses and conclusions of the plurality and dissent [in *Williams*]

sow confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify").

Numerous courts have applied the ordinary principles of confrontation: If a person makes a testimonial statement that is used against an accused at trial for the truth of what it asserts, that person must testify in the presence of the accused, under oath and subject to cross-examination. Thus, if the only source for an essential factual predicate of the trial testimony of a prosecution expert lies in the testimonial statement of another expert who has not been subject to confrontation – the expert who testifies at trial did not personally observe the matters reported by the other one – then there is a Confrontation Clause violation. That the trial expert may have had a role as supervisor or reviewer of the testing analyst's report or other testimonial statement does not excuse the violation. Neither does the fact that the trial expert presents his own opinion as to inferences that may be drawn from factual assertions made in the testing analyst's testimonial statement.[6]

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[6] *United States v. Ignasiak*, 667 F.3d 1217, 1229-35 (11th Cir. 2013) (Confrontation Clause violated by allowing chief medical examiner and records custodian to testify to opinion based on autopsy reports that she did not perform or observe); *United States v. Moore*, 651 F.3d 30, 71-72 (D.C. Cir. 2011) (holding Confrontation Clause was violated by admission of report that in-court witness reviewed; witness did not observe the testing and assumed that the testing analyst did the tests noted on his worksheet); *Martin v. State*, 60 A.3d 1100, 1108 (Del.2013)

The CAAF decision is one of many that stand in sharp contrast to these decisions. CAAF believed that it was sufficient to avoid a Confrontation Clause violation here that Davenport, the analyst who testified in court, had a reviewing role with respect to the formalized report and offered an "independent"

(holding that "the defendant has the right to confront the testing analyst as well [as the certifying analyst], where the certifying and testing analyst are not the same person and the certifying analyst does not observe the testing process"); *State v. Navarette*, 294 P.3d 435, 436 (N.M. 2013) ("the statements in the autopsy report were related to the jury as the basis for the pathologist's opinions and were therefore offered to prove the truth of the matters asserted"); *Jenkins v. United States*, 75 A.3d 174, 184 (D.C.2013) (violation of confrontation right in allowing testimony by lab supervisor who prepared report asserting DNA match on the basis of findings by other lab analysts); *Burch v. Texas*, 401 S.W.3d 634, 637 (Tex. Crim. App. 2013) (supervisor testifying in court had no "personal knowledge that the tests were done correctly or that the tester did not fabricate the results"; "[s]he could say only that the original analyst wrote a report claiming to have conformed with the required safeguards"); *Derr v. State*, 29 A.3d 533, 553 (Md. 2011) (holding that "the Confrontation Clause prohibits the admission of . . . testimonial statements [made by out-of-court analysts] through the testimony of an expert who did not observe or participate in the testing"). This Court vacated the decision in *Derr* for reconsideration in light of its decision in *Williams*. *Maryland v. Derr*, 133 S.Ct. 63 (2012). On remand, the Maryland court held that the statements involved in that case – which, like *Williams*, involved a cold hit – were not in fact testimonial, a conclusion that does not undercut the general assertion quoted above. 73 A.3d 254 (2013), cert. denied, 134 S.Ct. 2723 (2014). *See also United States v. Soto*, 720 F.3d 51, 60 (1st Cir. 2013) (Confrontation Clause violation where out-of-court testimonial statement "bolstered" trial witness's independent conclusion).

opinion. It did not matter to CAAF that, Davenport not having personally observed any of the testing, essential factual predicates for his opinion lay in testimonial statements made by an analyst who never confronted the accused. App. 28a-29a. Numerous courts share CAAF's view. Though one might try to discern subtle distinctions among their decisions, they all agree with the basic holding of CAAF: They believe that if one analyst makes a report or other testimonial statement but does not testify subject to confrontation, a surrogate analyst who performs some sort of reviewing role may testify to the surrogates' own opinion, even though it is necessarily based on the truth of the first analyst's testimonial statements as to factual matters that the surrogate did not personally observe.[7]

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[7] *E.g.*, *State v. Griep*, 863 N.W.2d 567 (Wis. 2015), *petition for cert. pending*, No. 15-126 (testing analyst on leave at time of trial; section chief from lab reviews report and offers "independent opinion" as to results of blood alcohol test; held that "the review necessary to protect a defendant's right of confrontation need not be formal peer review"); *State v. Michaels*, 95 A.3d 648, 651 (N.J. 2014) ("[W]e join the many courts that have concluded that a defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing."); *Marshall v. People*, 309 P.3d 943, 947-48 (Col. 2013); *Jenkins v. State*, 102 So.3d 1063, 1069 (Miss. 2012) ("While Gross was not involved in the actual testing, he reviewed the report for accuracy and signed the report as the 'case technical reviewer.'"); *State v. McLeod*, 66 A.3d 1221, 1230 (N.H. 2013) ("the Confrontation Clause is not violated when an

This conflict has persisted since the decision in *Bullcoming*. Though propositions confirmed by a majority of the Court in *Williams v. Illinois*, *supra*, show the error of the CAAF decision, *see infra*, Part II, the 4-1-4 split in *Williams* has meant that the lower courts have derived very little guidance from the case. Indeed, it has become virtually commonplace for courts – including both AFCCA and CAAF in this case – to note that point.[8] The result in *Williams* may help in a case closely resembling it, in which there is no prior suspect and the DNA evidence leads to a "cold hit." But that is not this case. *See infra*, Part II. Nor is it the majority of cases since *Williams*. Intervention by this Court is

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expert testifies regarding his or her independent judgment, even if that judgment is based upon inadmissible testimonial hearsay"); *Commonwealth v. Yohe*, 79 A.3d 520, 540-41 (Pa. 2013), *cert. denied*, 134 S.Ct. 2662 (2014); *State v. Brewington*, 743 S.E.2d 626 (2013), *cert. denied*, 134 S.Ct. 2660 (2014); *Ledger v. Georgia*, 732 S.E.2d 53, 60 (Ga. 2012).

[8] *See* App. 26a (CAAF majority); App. 31a-32a (Ohlson, J., dissenting); App. 60a (AFCCA majority). *Accord*, *e.g.*, *United States v. Maxwell*, 724 F.3d 724, 727 (7th Cir. 2013); *United States v. Pablo*, 696 F.3d 1280, 1293 (10th Cir. 2012); *State v. Norton*, 117 A.3d 1055, 1069-71 (Md. 2015) (gathering cases and summarizing disparate treatment of *Williams*); *State v. Stanfield*, 347 P.3d 175, 184 (Idaho 2015); *Young v. United States*, 63 A.3d 1033, 1043 (D.C. Cir. 2013); *Jenkins v. United States*, 75 A.3d 174, 184 (D.C. 2013); *State v. Ortiz-Zape*, 743 S.E.2d 156, 161 (N.C. 2013) ("lack of definitive guidance"), *cert. denied*, 134 S.Ct. 2660 (2014); *State v. Michaels*, 95 A.3d 648, 665 (N.J. 2014); *Martin v. State*, 60 A.3d 1100, 1104 (Del. 2013); *People v. Lopez*, 286 P.3d 469, 483 (Cal. 2012) (Liu, J., dissenting).

the only way that the conflicts reflected in this case will be resolved.

II. THE CAAF DECISION WAS WRONG AND OFFERS AN EASY PATH FOR VIOLATION OF THE CONFRONTATION RIGHT.

The decision of CAAF is fundamentally wrong as a matter of Confrontation Clause doctrine recently elucidated by this Court. But the problem is worse than that: The CAAF decision presents an easy path for prosecutors to evade the confrontation right. It was Fisher whose testimonial statements – both in his Final Report and in the work leading up to it[9] – describing matters that he observed firsthand provided the essential facts that underlay the opinion that was a crucial aspect of the prosecution's case. And so it was Fisher who should have testified subject to confrontation. But it was mildly inconvenient for Fisher to testify at trial – no more than that, because a very short continuance would have allowed him to do so. And so the prosecution substituted another analyst, Davenport, who had not

[9] Fisher's preliminary writings were not only made in anticipation of his Final Report but, like that Report, were clearly made, as the AFCCA decision recognized, App. 62a-63a, with the anticipation of providing evidence against Petitioner, the only suspect ever considered in the case; the solemnity of the setting was as clear as could be. *Cf. State v. Norton*, 117 A.3d 1055, 1073 (Md. 2015) (attempting to synthesize *Williams* by holding that a statement is testimonial either if it "is formal, as analyzed by Justice Thomas . . . or, if not, whether it is accusatory, in that it targets an individual as having engaged in criminal conduct, under Justice Alito's rationale").

observed the testing, and who indeed had no role in the case until the draft report was complete.

If the CAAF decision is correct, then, notwithstanding *Bullcoming*, a prosecution that can call on the cooperation of a forensic lab never need present the analyst whose testimonial statements are critical to its case. Instead, it can present the in-court testimony of some other analyst – "the analyst-witness of [the prosecutor's dreams]," *Williams*, 132 S.Ct. at 2272 (Kagan, J., dissenting) – who is formally designated as a reviewer or supervisor and who examines all the work product of the testimonial analyst, and it then can ask that analyst for an "independent" opinion as to the conclusion that can be drawn from that material. *See id.* (summarizing the approach – "If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back." – and noting that five Justices reject it). But in fact CAAF was wrong; the Confrontation Clause does not tolerate such an evasive procedure.

At the outset, it is important to recognize the sharp differences between this case and *Williams* that make it clear that the Final Report, together with Fisher's statements in preparation of it, was testimonial. Here, in contrast to *Williams*, the report was produced, and indeed all the testing was done, after the eventual accused had been identified as a suspect, compare *Williams*, 132 S.Ct. at 2242-43 (opinion of Alito, J.), and indeed as the only person the authorities ever targeted as a suspect in the case. Here, in contrast to *Williams*, the report was plainly sought "for the purpose of obtaining evidence to be

used against petitioner," not "for the purpose of finding a rapist who was on the loose." *Id.* at 2228. Here, in contrast to *Williams*, the DNA profiles to which the report referred were "inherently inculpatory." *Id.* In *Williams*, the Cellmark lab produced a profile that, taken by itself, proved nothing and pointed to nobody; that profile tended to prove Williams's guilt only in conjunction with another profile taken from Williams at another time and by another lab. Here, Fisher reported facts indicating that, in samples taken from the Complainant and from the Petitioner, the DNA of both was present; it is hard to imagine anything more inculpatory. Finally, in *Williams*, the possibility was "beyond fanciful" that some error, intentional or accidental, could have led to the production of a profile that happened to match that of a person who happened to live in the vicinity of the crime and who, as it later turned out, was implicated by other evidence. *Id.* at 2245. Here, by contrast, one analyst performed all the tests on all the samples, knowing full well what result the authorities were seeking. [10] Especially in light of the well-known history of critical errors by forensic labs,[11] both intentional and accidental – a history in

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[10] Furthermore, in this case, unlike *Williams*, the trier of fact was a panel composed of laypeople. *Cf.* 132 S.Ct. at 2234, 2236-37 (emphasizing that *Williams* was a bench trial and that the judge would understand that certain evidence was not admitted for the truth of the matter asserted).

[11] *See, e.g.*, ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (forthcoming, Oct. 6, 2015). WILLIAM C. THOMPSON, *Forensic DNA Evidence: The Myth of Infallibility*, in

which the very lab involved in this case figures very prominently[12] – the Court cannot put aside a claim of

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SHELDON KRIMSKY & JEREMY GRUBER, eds., GENETIC EXPLANATIONS: SENSE AND NONSENSE 227 (2013). Murphy says:

> By now, tales of forensic science failures are as common in the newspapers as tales of forensic science successes. . . . In fact, nearly every major DNA unit, from the most applauded and sophisticated to the most amateur and haphazard, has endured a scandal of some kind.

Murphy, *supra*, at 53. *Accord*, Thompson, *supra*, at 229 (reports of errors – which "may be the tip of an iceberg of undetected or unreported error" – "are sufficiently numerous to refute claims that errors are extremely rare or unlikely events"). Murphy emphasizes "the simple ease with which contamination may occur":

> Study after study has shown that DNA has a way of ending up where it should not be. And as labs process more low-quantity samples, even the slightest amount of contamination may compromise the entire test result.

Murphy, *supra*, at 56. *Accord*, Thompson, *supra*, at 229-30 (cross-contamination of samples is "a common problem in laboratories"). And, Murphy says,

> [T]here are also far too many stories of deliberate fraud. These acts tend to derive from sheer laziness, a desire to appear industrious, or an attempt to mask incompetence.

Murphy, *supra*, at 67-68. Thompson adds another explanation: "The guilty analysts" – including one at the lab involved in this case – "appear to have been motivated partly by a desire to help police and prosecutors convict the 'right' people." Thompson, *supra*, at 239.

[12] As summarized by Thompson, *supra*, at 238:

a Confrontation Clause violation by simply assuming the truth of testimonial statements made by Fisher. *See Williams*, 132 S.Ct. at 2264-65 (Kagan, J., dissenting) ("[T]he Confrontation Clause prescribes a particular method for determining whether [forensic evidence has been properly produced]. . . . Cross examination of the analyst is especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded.")

It is also important to understand what Petitioner does not contend. Petitioner does not contend that it would be improper for Davenport to testify to his opinion if the facts underlying that opinion were properly proven, or if he relied on information learned other than through testimonial statements made by a witness not subject to confrontation. Nor does Petitioner contend that there is a confrontation right with respect to the output of a machine. Nor does he contend that in a case of this sort the Confrontation Clause requires everyone who handles DNA evidence (if the lab

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> A multi-year investigation by the McClatchy news organization, beginning in 2005, revealed that an analyst at the U.S. Army Criminal Investigation Laboratory had a history of cross-contaminating samples, had violated laboratory protocols, and had falsified test results. An independent investigation found significant problems in one-quarter of all the cases this analyst had handled. Laboratory managers failed to disclose these problems to lawyers involved in the relevant cases and took other steps to cover up these problems.

chooses to organize itself so that multiple people handle it) to testify.

Rather, Petitioner's argument is based on the fundamental proposition that if the prosecution uses a testimonial statement to prove the truth of a proposition asserted in the statement, then the accused must have an opportunity to be confronted with the witness who made that statement. In this case, statements by Fisher were plainly essential predicates for any opinion concerning the DNA evidence: If Fisher did not perform the tests he said he did on the samples he said he did, or if he purposely corrupted the samples (a possibility Davenport expressly acknowledged[13]), then no opinion about matching profiles would have any value whatsoever.[14] Moreover, if he did not follow the lab's protocol, so as to minimize the chance of accidental contamination, then the value of any such opinion would be severely impaired. Davenport did not know the truth with respect to these propositions from personal knowledge[15]; plainly, he relied, at least

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[13] Asked by the prosecutor whether cross-contamination of an unknown sample by using a known sample was possible, Davenport replied, "Sure." App. 105a.

[14] The prosecutor conceded that testimonial hearsay was part of the basis for Davenport's opinion. Tr. 253 ("Mr. Davenport's independent opinion based on his review of *not only* . . . testimonial hearsay . . .").

[15] The CAAF majority asserted:

> Mr. Davenport relied on his own analysis of the data to rule out certain mistakes, such as contamination, that would produce unusual or

in significant part, on Fisher's testimonial assertions as to them.[16]

> illogical results. For example, Mr. Davenport testified that had the swabs from the victim been contaminated with the known samples from Appellee, he would have noticed a male non-semen DNA profile on the swabs.

App. 19a. Petitioner does not concede that Davenport could determine – without relying on the truth of assertions by Fisher – that certain violations of protocol, intentional or unintentional, that would produce "illogical" results did not occur. But even assuming that is so, Davenport plainly did not testify, and could not have plausibly maintained that without relying on Fisher's statements he could determine that no violations of protocol occurred – and that there was no contamination.

For example, if Fisher had simply rubbed the vaginal swabs together with the penile swabs, there could have been contamination and Davenport would have no way of knowing about it. In fact, it appears that Davenport only testified that if the known sample taken from Petitioner were switched with the evidence sample taken from Complainant, that would produce an illogical and detectable result, Tr. 232, and that if someone else's semen were substituted for Petitioner's in the evidence sample, then it would not "match the people involved in the case." Tr. 233. Of course, if that other person's known sample were also switched with Petitioner's, then it would appear to match the people "involved in the case."

[16] Fisher's testimonial statements were not formally introduced, but that does not matter; it has never been true that a statement raises a Confrontation Clause problem only if introduced verbatim, and such a rule would eviscerate the protections of the Clause. Note that in *Williams*, the in-court witness "did not quote or read from the report" 132 S.Ct. at 2230 (opinion of Alito, J.). Nevertheless, five members of this Court recognized that the prosecution "'elected to introduce' the

How, then, could Davenport testify to his opinion without Fisher testifying subject to cross-examination? The CAAF majority indicates that the fact that Davenport was assigned as a reviewer of the report is a crucial consideration. But it cannot be. Davenport had no role in the case until the Final Report was drafted; he never observed any of the underlying factual matters reported by Fisher. (If he had observed the testing, even if he did not perform it or write the report, this case would be altogether different, because then his opinion could be based on his own personal knowledge rather than on Fisher's testimonial statements.) Moreover, if Davenport's status as a reviewer excused what would otherwise be a Confrontation Clause violation, a forensic lab could simply pick its preferred witnesses, designate them as reviewers, and present their live testimony at trial rather than that of the analysts who personally observed the matters and made the testimonial statements crucial to the case.

The CAAF majority also relied on the fact that Davenport offered what he called "independent" opinions. But no matter how many times Davenport

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substance of Cellmark's report into evidence" through that witness, 132 S.Ct. at 2268 (Kagan, J., dissenting) (quoting in part *Bullcoming*, supra, 131 S.Ct. at 2716, thus implicating the Clause. *See Martin v. State*, 60 A.3d 1100, 1107 (Del. 2013) (concluding, where in-court expert, Wert, "relied on" statements by out-of-court expert, Smith, in forming opinion, that "the State introduced the substance of Wert's statements during Smith's testimony"); *State v. Navarette*, 294 P.3d 435, 439 (N.M. 2013) (holding, on the basis of five Justices' votes in *Williams*, that Confrontation Clause was violated where autopsy report was not formally offered into evidence but statements in it were disclosed as the basis for in-court witness' opinion).

recited the mantra that his opinions were independent – and he did many times – those opinions were independent only in the sense that he drew his own inferences, but *based on the facts determined and reported by Fisher*. Davenport's presentation of his own opinion did not nullify the fact that the prosecution relied on Fisher's factual observations and testimonial reports.

"[W]hen a witness, expert or otherwise," bases a conclusion on an out-of-court statement, "the statement's utility is then dependent on its truth," *Williams*, *supra*, 132 S.Ct. at 2268 (Kagan, J., dissenting); there is thus no effective difference between using the statement for its truth and using it as support for the expert's opinion. *Id.* at 2268-69 (asserting that five Justices agree on the point); *accord*, *id.* at 2257 (Thomas, J., concurring in the judgment) ("There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth.").[17]

The CAAF majority nevertheless relied on the principle underlying Mil. R. Evid. 703, which is identical to Fed. R. Evid. 703[18]: An expert may present an opinion that relies on evidence not

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[17] A somewhat narrower proposition, which leads to the same result in this case, is that when an opinion depends on the truth of an out-of-court statement, using the statement to support the opinion necessarily entails using it for its truth.

[18] The CAAF majority quoted the form of the rule that was in effect at the time of trial; the rule has since been restyled to match the restyled Federal Rule.

otherwise admissible if it is of a type reasonably relied on by experts in the field. Petitioner does not dispute the usefulness in many contexts of Rule 703. But it must be recognized that this is not a traditional rule of evidence.[19] On the contrary, it was, as its drafters recognized, contrary to the common law. *Williams*, 132 S.Ct. at 2257 (Kagan, J., dissenting); Reporter's Memorandum No. 4, Advisory Committee on Evidence, p. 7 (c. 1965), available at <https://www.law.umich.edu/facultyhome/richardfriedman/Documents/4. Art 7 1st draft.pdf>. This rule cannot be constitutionally applied when an expert testifying against an accused at trial relies on an out-of-court testimonial statement; otherwise, the obvious effect would be to allow the out-of-court witness to testify without being subjected to confrontation.

Indeed, if the CAAF decision were correct, it is hard to see what limits there could be: If the law of the jurisdiction allowed, an expert could testify to an opinion of guilt, basing the opinion on out-of-court testimonial statements of any sort, so long as the expert testified that experts in the field reasonably relied on statements of that sort. This would represent not only a flagrant violation of the confrontation right but a fundamental alteration of the way in which criminal trials have always been conducted in the common-law system.

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[19] For all its defects, the justly repudiated doctrine of *Ohio v. Roberts*, 448 U.S. 56 (1980), by referring to "firmly rooted" hearsay exceptions, at least attempted to adhere to traditional principles. But the approach adopted by CAAF here attempts to constitutionalize a procedure, contrary to well established prior practice, that was developed in the late twentieth century.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERATION OF THE QUESTION PRESENTED.

This case raises the Question Presented in a clean and crisp form. The case arises on direct appeal. This Court's jurisdiction is clear. The issue was explicitly preserved at the trial level and since. There can be no serious doubt that the error was prejudicial. Apart from the DNA evidence, the only proof of identity was identification by the Complainant. She observed the assailant only in the dark, having just been awakened after a night of heavy drinking, and her first statement, immediately after the incident, was that she thought the Petitioner was the perpetrator. App. 107a-108a. Indeed, at the suppression hearing, the prosecutor announced that, if the trial judge excluded the evidence, he would consider taking an interlocutory appeal; especially given the darkness of the room, he explained, the DNA evidence was important to the Government's case. App. 106a-107a. ("[T]he identity would be an issue. She said that it was a dark room. She identified Katso, but the defense would challenge that so the confirmation of that identity through the DNA testing would be a substantial piece of evidence.")

Perhaps even more fundamentally, the basic structure of this case makes it an excellent vehicle for consideration of the Question Presented. Despite the fact that this case involves DNA evidence, a particularly complex form of forensic lab testing, only one analyst performed all the tests and made all the testimonial statements at issue. App. 98a. There is,

therefore, no concern here that vindicating the confrontation right would require a parade of trial witnesses from the lab. (And, indeed, the fact that this major lab organized its work this way indicates that others could do the same, effectively eliminating the supposed multi-witness problem.) The Government sent one analyst from Georgia to testify at trial in North Dakota, and Petitioner does not suggest that it needed to have sent more than that. Moreover, the one analyst who should have testified at trial could have done so if there had been a very brief continuance. The CAAF decision therefore reflects a view that, for virtually any reason at all, a prosecution can, rather than presenting the live testimony of the person who made the testimonial statements on which its case fundamentally relies, pick an expert who can testify to an opinion for which those statements are essential predicates.

Thus, this case presents as starkly as can be the consequences of a frequently recurring issue on which the lower courts are in clear conflict.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully Submitted,

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Counsel for Petitioner

No. _____

IN THE

Supreme Court of the United States

JOSHUA KATSO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Armed Forces

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES, Appellant
v.

Joshua KATSO, Airman Basic
U.S. Air Force, Appellee

No. 14-5008

Crim.App. No. 38005

United States Court of Appeals for the Armed Forces

Argued October 7, 2014

Decided June 30, 2015

RYAN, J., delivered the opinion of the Court, in which BAKER, C.J., and ERDMANN and STUCKY, JJ. joined. OHLSON, J., filed a separate dissenting opinion.

Counsel

For Appellant: Captain Thomas J. Alford (argued); Colonel Don M. Christensen and Gerald R. Bruce, Esq. (on brief).

For Appellee: Major Nicholas D. Carter (argued); Major Isaac C. Kennen.

Amicus Curiae for Appellant: Anece Baxter White, Esq. (on brief) – Defense Forensic Science

Center/United States Army Criminal Investigation Laboratory.

Military Judges: William C. Muldoon Jr. and Mattew D. Van Dalen

Judge RYAN delivered the opinion of the Court.

Appellee was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members of one specification of aggravated sexual assault, one specification of burglary, and one specification of unlawful entry, in violation of Articles 120, 129, and 134, UCMJ, 10 U.S.C. §§ 920, 929, 934. United States v. Katso, 73 M.J. 630, 632 (A.F. Ct. Crim. App. 2014). Appellee was sentenced to confinement for ten years, a dishonorable discharge, and forfeiture of all pay and allowances. Id. The convening authority approved the sentence. Id. The United States Air Force Court of Criminal Appeals (CCA) set aside and dismissed the findings and sentence, holding that the testimony of a Government expert witness was based on a testimonial report written by an out-of-court declarant, thereby violating Appellee's right to confrontation under the Sixth Amendment of the United States Constitution. Id. at 638-40, 642.

The Judge Advocate General of the Air Force certified the following issue to this Court:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED

WHEN IT FOUND APPELLEE'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE MILITARY JUDGE PERMITTED, OVER DEFENSE OBJECTION, THE TESTIMONY OF THE GOVERNMENT'S DNA EXPERT, AND THAT THE ERROR WAS NOT HARMLESS.

This case requires us to examine the application of the Sixth Amendment to testimony relating the results of forensic analysis that was the product of collaboration among a number of laboratory employees. When an expert's knowledge and opinions are based in part on tests performed by others, what may the expert tell the factfinder without violating the defendant's right to confrontation? To answer this question, we apply the frameworks developed by the Supreme Court and by this Court to a set of facts that neither court has considered.

We hold that the testimony of the Government's forensic expert witness, David Davenport, did not violate Appellee's right to confrontation. Unlike the experts in Bullcoming v. New Mexico, 131 S. Ct. 2705, 2715 (2011), and United States v. Blazier (Blazier II), 69 M.J. 218, 226 (C.A.A.F. 2010), Mr. Davenport's personal knowledge regarding the derivation of the evidence at issue made him neither a "surrogate" expert, Bullcoming, 131 S. Ct. at 2715, nor a mere "conduit" for the

testimonial statements of another. Blazier II, 69 M.J. at 225; see also Williams v. Illinois, 132 S. Ct. 2221, 2241 (2012). Mr. Davenport conducted a thorough review of the entire case file, including the documents submitted with the evidence, the tests performed on the evidentiary samples, and the quality control measures. He personally compared the DNA profiles from the evidentiary samples to the DNA profiles from the known samples, reran the statistical analysis, and formulated his own carefully considered conclusions. Much of the data underlying his opinion was not testimonial, and, assuming arguendo that the report prepared for his technical review was testimonial, Mr. Davenport did not act as a mere conduit for the report. See Memorandum from Robert Fisher, Forensic DNA Examiner, to Commander, Air Force Office of Special Investigations, Detachment 320 (Jan. 28, 2011) [hereinafter Final Report]. The military judge's denial of Appellee's motion to exclude the expert's testimony was not an abuse of discretion, and the decision of the CCA is reversed.

I. FACTS

A. Collecting and Analyzing the DNA Evidence

On the morning of December 11, 2010, Senior Airman (SrA) CA reported that she had been raped, and identified Appellee as the perpetrator. Agents from the Air Force Office of Special Investigations (AFOSI) promptly brought SrA CA to the hospital for

an examination. A Sexual Assault Nurse Examiner (SANE) testified that she collected, among other items, vaginal, oral, and rectal swabs from SrA CA, a blood sample, and debris from SrA CA's clothing. The nurse examiner handed these samples to an AFOSI agent. Another SANE testified that she collected Appellee's blood and saliva, obtained penile and scrotal swabs, and handed the samples to an AFOSI agent.

AFOSI Special Agent (SA) Richard Blair testified at trial that he received the samples from the two agents who had been at the hospital. The samples were combined into two separate "sexual assault kits," containing samples from Appellee and SrA CA, respectively. SA Blair explained that the agents who received the samples prepared a set of documents to accompany each kit, which SA Blair reviewed. SA Blair sent this evidence and documents to the United States Army Criminal Investigation Laboratory (USACIL), enclosing a request form that described each piece of evidence and listed identifying numbers for the evidence.[1]

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[1] The filled-out forms that accompanied the kits are not in the record. However, SA Blair noted that Dep't of the Air Force Form 52, Evidence Tag (July 1986) [hereinafter AF Form 52], was included with each kit. Mr. Davenport also stated that a "chain of custody" document and a "laboratory exam request" accompany all evidence arriving at USACIL through the mail. Dep't of the Army Form 4137, Evidence/Property Custody Document (July 1976)

B. Mr. Davenport's Testimony on the Motion to Suppress

Robert Fisher, the USACIL employee responsible for the initial analysis of the sexual assault kits, was in Florida during the court-martial to be by his mother's side while she underwent major surgery. The Government notified the defense that it would elicit testimony about the forensic analysis from Mr. Davenport, who conducted the technical review of Mr. Fisher's analysis. At the time of the trial, Mr. Davenport had worked as a forensic DNA examiner at USACIL for more than six years. Appellee made a motion in limine to exclude Mr. Davenport's testimony, arguing that such testimony would violate his right to confrontation. In an Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2012), session, Mr. Davenport testified both about the steps that USACIL technicians follow to process evidence

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[hereinafter DA Form 4137], and Dep't of Defense Form 2922, Forensic Laboratory Examination Request (July 2006) [hereinafter DD Form 2922], are the forms submitted to USACIL with evidence. See Dep't of the Air Force, Instr. 31-206, Security Forces Investigations Program para. 2.7.1.10 (Sept. 16, 2009) (describing procedures for submission of evidence by Air Force Security Forces). While we do not know what information was filled out in this case, the generic forms -- AF Form 52, DA Form 4137, and DD Form 2922 -- request the names of the party or parties from whom the evidence was derived.

in cases of alleged sexual assault and his own role in reviewing and testing the evidence in this case.

i. USACIL's Procedure for Processing Evidence

Testifying during the hearing on the motion to suppress, Mr. Davenport described the path of sexual assault kits through USACIL. First, employees in the evidence processing section receive the evidence. They then scan and save an electronic copy of the forms accompanying the evidence into a "case file" on the laboratory's computer system. The "case examiner" checks the evidence out of the evidence processing section, breaks the seal on the evidence, and checks the forms that accompanied the package against the evidence to ensure that the lab received all items reflected therein. The examiner then inventories the evidence, verifies that the evidence was properly sealed, and notes any irregularities with the evidence. The examiner is required to document any accidents or mistakes that occurred during the tests.

The case examiner performs a serological examination, which entails looking for traces of semen on the evidence collected from the victim. Various steps of this exam require the examiner to record his visual observations.[2] The examiner then

[2] Mr. Davenport reviewed observations recorded during the testing process, such as these, along with Mr. Fisher's other notes and data, to determine that

creates DNA profiles from the "evidentiary samples" -- the samples identified by the serology exam and the swabs collected during the SANE's examination of the suspect -- and creates DNA profiles from the blood or saliva of the parties, the "known samples." To create a DNA profile, the examiner must "purify" the DNA, extracting it from the sample; determine the quantity and type of DNA present using an instrument that generates a computer printout; copy portions of the DNA; and use another instrument to produce the machine-generated data that comprises the DNA profile.

The examiner compares the DNA profiles from the evidentiary samples to the DNA profiles from the known samples. Based on this comparison, the examiner determines whether any sample identified by the serology exam contains a DNA profile matching the DNA from the known sample of the suspect, and whether any swab collected from the suspect contains a DNA profile matching DNA from the known sample of the victim. For each match, the examiner calculates the probability that the DNA profile on the evidentiary sample would match an unrelated individual selected at random from the American population. The examiner then drafts a report summarizing these results.

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proper protocol was followed. Mr. Davenport did not rely on some assertion or assurance by Mr. Fisher (which resides nowhere in the record), as the dissent proposes. United States v. Katso, ___ M.J. ___, ___ (C.A.A.F. 2015) (Ohlson, J., dissenting).

ii. Mr. Davenport's Technical Review

As the "technical reviewer," Mr. Davenport was required to verify Mr. Fisher's results and approve the Final Report, which Mr. Fisher drafted. In the Article 39(a) session, Mr. Davenport outlined the steps he took to review Mr. Fisher's work. According to Mr. Davenport, his review focused on the items in the case file, which contained, inter alia, the request for analysis and forms submitted by AFOSI, Mr. Fisher's handwritten notes, records of the quality control measures used during testing, all printouts generated during the testing process, the raw DNA profile data, and the Final Report. Mr. Davenport neither handled the initial evidence submitted nor observed Mr. Fisher's testing procedures.

Mr. Davenport verified that Mr. Fisher followed protocol and properly documented each step, and that the protocol utilized by USACIL is widely accepted in the field of forensic DNA analysis. Mr. Davenport testified that USACIL procedures require many quality control measures, such as running positive and negative controls, recording the lot numbers of the chemicals used, processing an unrelated known DNA sample along with the samples at issue, and processing test tubes that contain reagent but not DNA. Mr. Davenport testified that he was able to determine, based on the contents of the case file, that Mr. Fisher took these measures.

Mr. Davenport explained that, since Mr. Fisher was required to document accidents or mistakes, he could determine whether any accidents occurred or whether Mr. Fisher made any mistakes by reviewing Mr. Fisher's notes. Additionally, he would have been able to catch undocumented mistakes by checking for irregularities in the results. For example, Mr. Davenport checked that the quality control sample produced the expected results and that known samples produced correctly gendered profiles. Logically inconsistent results -- such as a complete male profile in non-semen DNA taken from the victim or a complete female profile generated from DNA supposedly extracted from semen -- could signify a mix-up. Additionally, the presence of a DNA profile not matching a known sample could indicate contamination. These objective measures enable the technical reviewer to determine that cross-contamination did not occur.

Mr. Davenport independently compared the DNA profiles of the evidentiary and known samples to verify the matches. This involved processing the machine-generated raw profile data using a computer program and interpreting the profiles to detect matches between the samples. Mr. Davenport then recalculated the probability of a match between the DNA profiles for each matching evidentiary sample and an individual selected at random from the American population. Based on review and interpretation of all of the above, Mr. Davenport determined that he agreed with Mr. Fisher's results

and initialed the Final Report, allowing the report to progress to the next stage of the review process.

iii. Military Judge's Ruling on Motion to Exclude Testimony

Relying on Mr. Davenport's motions testimony detailing his knowledge of and involvement in the testing process, the military judge concluded that "Mr. Davenport's opinions will be based on his training and experience, and his review of the entire case," and denied Appellee's motion. The military judge found that Mr. Davenport analyzed the raw data "to ensure he reached the same results and conclusions as Mr. Fisher had," and noted that Mr. Davenport explained he had "review[ed] the case from beginning to end." The ruling permitted Mr. Davenport to state his "opinion concerning the reliability of testing procedures used in this case, the findings/results in this case and the frequency statistics" only "[s]o long as Mr. Davenport does not become a conduit of inadmissible testimonial hearsay."

C. Mr. Davenport's Court-Martial Testimony

Mr. Davenport testified before members as an expert, providing his independent opinion on the results of the DNA analysis. Mr. Davenport told members that, as the technical reviewer, he based his opinions on his review of the case file. The Final Report was not admitted into evidence. Mr. Davenport only referenced the Final Report to note

that he reviewed Mr. Fisher's interpretation of the results and checked the Final Report against the documents submitted by AFOSI to make sure that the report properly listed and identified the items submitted as evidence.[3] Based on his review of the entire case file, Mr. Davenport testified that:

1. The evidence collected from SrA CA and Appellee was tested "per protocol,"

2. The evidence was received in a sealed condition,

3. The evidence was inventoried properly,

4. The known samples were analyzed properly,

5. DNA profiles were generated "from the known blood of [SrA CA] and [Appellee],"

6. The swabs collected from SrA CA contained semen,

7. DNA consistent with SrA CA and Appellee was found on the rectal swabs from SrA CA,

8. Unidentifiable male DNA was found on SrA CA's vaginal swab, and

9. DNA consistent with SrA CA and Appellee was found on Appellee's penile and scrotal swabs.

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[3] The Final Report included evidence custody document (ECD) numbers for each kit.

Mr. Davenport also testified to the likelihood that the recovered DNA profiles would match other individuals. On cross-examination, defense counsel clarified briefly that Mr. Davenport did not conduct the initial tests that produced the DNA profiles. Defense counsel successfully got Mr. Davenport to concede that the DNA analysis did not reveal anything about the nature of the sexual contact.

II. CCA DECISION

The CCA's analysis focused on the relationship between Mr. Davenport's trial testimony and the Final Report, but did not directly address either the testimony on the motion in limine or the military judge's findings or conclusions on that motion. Katso, 73 M.J. at 637-40. The CCA held that the Final Report was testimonial, and determined that Mr. Davenport's trial testimony improperly repeated information from the report. Id. at 638-40. Specifically, it held that Mr. Davenport repeated testimonial hearsay when he identified Appellee as the source of the DNA found on samples collected from SrA CA, acting as a "conduit" for this information. Id. at 639-40 (quoting Blazier II, 69 M.J. at 225). The CCA found as a matter of fact that "the record of trial does not definitively establish that Mr. Davenport had first-hand knowledge as to whom the known DNA sample or its corresponding profile belonged" and was "able to identify [Appellee] by name only by repeating the testimonial statement contained in Mr. Fisher's report that directly linked [Appellee] to the generated DNA profile." Id. at 638-

39. Because the Government "failed to demonstrate that the DNA evidence played an insignificant role" in the case, the CCA was not convinced beyond a reasonable doubt that Mr. Davenport's presentation of the evidence was harmless. Id. at 641.

III. DISCUSSION

The Sixth Amendment prohibits the admission of "testimonial statements of a witness who did not appear at trial," unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004). Whether evidence is testimonial hearsay is a question of law reviewed de novo. United States v. Tearman, 72 M.J. 54, 58 (C.A.A.F. 2013). We review the military judge's ruling on a motion to exclude evidence for an abuse of discretion, "consider[ing] the evidence in the light most favorable to the prevailing party."[4]

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[4] The CCA is required to apply the same deferential standard when reviewing a military judge's ruling on a motion to suppress. United States v. Kitts, 43 M.J. 23, 28 (C.A.A.F. 1995) (standard applies "on appeal" generally). However, by focusing its analysis on Mr. Davenport's trial testimony as it related to the Final Report, Katso, 73 M.J. at 637-40, the CCA did not give adequate deference to the military judge's findings of fact or consider the evidence supporting the ruling "in the light most favorable to the prevailing party." United States v. Reister, 44 M.J.

Reister, 44 M.J. at 413 (internal quotation marks omitted). Additionally, this Court will not overturn the CCA's factual findings unless they are clearly erroneous or unsupported by the record. United States v. Teffeau, 58 M.J. 62, 66-67 (C.A.A.F. 2003) (citing United States v. Tollinchi, 54 M.J. 80, 82 (C.A.A.F. 2000)).

A.

"[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Crawford, 541 U.S. at 50. The Confrontation Clause thus protects defendants by excluding the introduction of "hearsay" that is "testimonial," the equivalent of an ex parte examination. Id. at 51. Relevant to this case, determining whether an expert witness's testimony has violated the Confrontation Clause requires asking two questions: First, did the expert's testimony rely in some way on out-of-court statements that were themselves testimonial? Id. at 51-52. Second, if so, was the expert's testimony nonetheless admissible because he reached his own conclusions based on knowledge of the underlying data and facts, such that the expert himself, not the out-of-court declarant, was the "witness[] against [Appellee]" under the Sixth Amendment? U.S.

409, 413 (C.A.A.F. 1996) (internal quotation marks omitted).

Const. amend. VI; see Blazier II, 69 M.J. at 224-25; Crawford, 541 U.S. at 44. We turn to these two questions in order.[5]

B.

This Court has already delineated the boundary between testimonial and nontestimonial statements in detail. "[A] statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" United States v. Sweeney, 70 M.J. 296, 301 (C.A.A.F. 2011) (quoting United States v. Blazier (Blazier I), 68 M.J. 439, 442 (C.A.A.F. 2010)); see Crawford, 541 U.S. at 51-52; Tearman, 72 M.J. at 58. In making this determination, this Court has asked whether it would "be reasonably foreseeable to an objective person that the purpose of any individual statement . . . is evidentiary," considering the formality of the statement as well as the knowledge of the declarant. Tearman, 72 M.J. at 58 (citation and internal quotation marks omitted); compare id., 72 M.J. at 59-

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[5] This case illustrates the gatekeeping role that military judges play, not only to ensure that expert testimony is reliable, but also to evaluate whether an expert's conclusions rely in part on testimonial hearsay, and, if so, whether the expert undertook sufficient independent analysis to render his own opinions as defined in Blazier II. 69 M.J. at 224-25; cf. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993).

61 (chain of custody documents and internal review worksheets were not testimonial, in part because an objective witness would reasonably believe that the documents were filled out for "internal control, not to create evidence" and because they "lack[ed] any indicia of formality or solemnity"), with Sweeney, 70 M.J. at 299, 304 (a signed memorandum reporting the results of a drug and a signed, "formal, affidavit-like" document certifying the integrity of the sample and compliance with protocol were testimonial), and Blazier I, 68 M.J. at 440, 443 (signed declarations served an "evidentiary purpose" because they "summarize[d] and clearly set forth [an] 'accusation,'" and were generated in response to a command request).

As detailed more fully below, many of the out-of-court data and "statements" relied upon by Mr. Davenport in reaching his conclusion were not testimonial. The case file -- containing the AFOSI documents, the computer-generated raw data, and Mr. Fisher's handwritten notes, including his documentation of the conditions of the samples upon arrival and quality control measures -- is not in the record. However, Mr. Davenport's testimony makes clear that he reviewed all such documents. Nothing suggests that the AFOSI documents, which appear to primarily serve a chain of custody function, see supra note 1, were testimonial, or that the computer-generated raw data was either a statement or testimonial. See Tearman, 72 M.J. at 61; Sweeney, 70 M.J. at 305. Nor is there any indication that Mr. Fisher's notes or his other lab results that underlay

the Final Report were signed, certified anything, bore indicia of formality, or that Mr. Fisher expected them to be used at trial.

Moreover, the CCA's "finding" that Mr. Davenport was "able to identify [Appellee] by name only by repeating the testimonial statement contained in Mr. Fisher's report that directly linked [Appellee] to the generated DNA profile," Katso, 73 M.J. at 639 (emphasis added), was clearly erroneous and is unsupported by the record. See Teffeau, 58 M.J. at 66-67; Kitts, 43 M.J. at 28; see also United States v. Piolunek, 74 M.J. 107, 110 n.3 (C.A.A.F. 2015). Rather, the record indicates that Mr. Davenport learned the names of the parties the same way Mr. Fisher did -- through the underlying data in the case file, including the forms submitted by AFOSI. See supra note 1. The Confrontation Clause does not require either Mr. Fisher or Mr. Davenport to personally shadow the evidence from its collection to USACIL in order to opine that it is what it purports to be and was collected from the persons indicated on the forms. Furthermore, both Mr. Fisher and Mr. Davenport were in a position to testify as to whether lab procedures were followed in this regard.

In sum, Mr. Davenport's statements regarding proper testing, receipt, inventory, and analysis of the evidence, as well as his identification of the parties,

relied on nontestimonial items in the case file.[6] This testimony was therefore admissible.

The Final Report, which served as a consolidated and conclusory summary of Mr. Fisher's analysis, presents a more complicated problem, since, while it does not contain a formal certification, the record indicates that Mr. Fisher knew Appellee was a suspect in a sexual assault and that the Final Report would be "made official and sent to the agent in the case." This problem is best resolved by assuming, arguendo, that the Final Report itself was testimonial, though based on evidence that was not testimonial, and that Mr. Davenport's testimony regarding the results of the serology exam and the DNA analysis may have relied in part on the Final Report (since he had to conduct the technical review of it) as well as the evidence that underlay it. From there, we proceed to the question whether, given those assumptions, Mr. Davenport's opinion was admissible despite its partial reliance on testimonial hearsay that was not itself introduced or repeated at trial.

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[6] Moreover, Mr. Davenport relied on his own analysis of the data to rule out certain mistakes, such as contamination, that would produce unusual or illogical results. For example, Mr. Davenport testified that had the swabs from the victim been contaminated with the known samples from Appellee, he would have noticed a male non-semen DNA profile on the swabs.

C.

To determine whether the portions of Mr. Davenport's testimony that may have been based in part on testimonial hearsay should have been admitted, we apply this Court's precedent, from Blazier I through Tearman. Under that line of cases, we ask whether Mr. Davenport had sufficient personal knowledge to reach an independent conclusion as to the object of his testimony and his expert opinion. Blazier II, 69 M.J. at 224-25. Framed another way, this Court queries whether Mr. Davenport was a "witness[] against" Appellee, the type of declarant Appellee had the constitutional right to cross-examine, or a mere "conduit" for another "witness[]," namely, Mr. Fisher. U.S. Const. amend. VI; Blazier II, 69 M.J. at 225; see Crawford, 541 U.S. at 44 (recounting Sir Walter Raleigh's demand that Lord Cobham, who had implicated Raleigh in a treason plot, be compelled to appear in person at trial to testify against him). We review Supreme Court precedent and undertake a highly fact-specific inquiry to determine that Mr. Davenport was a "witness[]" rather than a "conduit."

i.

The Supreme Court has repeatedly applied the Confrontation Clause in the context of expert forensic analysis to determine whether evidence admitted at trial repeated testimonial hearsay, but it has not faced a situation identical to the one before us. Mr. Davenport, an expert with detailed

knowledge of the results he presented, delivered testimony that does not easily fit into the Supreme Court's framework. However, reviewing those Confrontation Clause cases most directly related to the facts of this case convinces us that no Supreme Court precedent bars the application of the principles established in Blazier II or warrants concluding that Mr. Davenport's testimony simply repeated testimonial hearsay by an out-of-court declarant. We discuss each case in turn.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308, 329 (2009), the Supreme Court held that the petitioner's right to confrontation was violated when the prosecution submitted "certificates of analysis" into evidence without relying on the testimony of an expert witness. In Appellee's case, the Government did not introduce the Final Report. In Melendez-Diaz, the Supreme Court held that the analysts who prepared the certificates were "witnesses," 557 U.S. at 311 (internal quotation marks omitted), who, through the certificates, made only a "bare-bones statement" and did not provide the petitioner the opportunity to learn about the tests performed or the analysts' ability to interpret those tests. Id. at 320. In this case, Mr. Davenport's testimony at trial and knowledge of the underlying facts provided Appellee ample opportunity to ascertain "what tests [Mr. Fisher] performed, whether those tests were routine," and whether Mr. Davenport had the requisite "judgment" and "skills" to interpret the results. See id.

In Bullcoming, 131 S. Ct. at 2711-12, the trial court allowed the state to introduce a certified report attesting to the petitioner's blood alcohol content through the testimony of an expert witness who had no knowledge about the analysis at all. The Supreme Court reversed, holding that the "surrogate testimony" of the expert, "who had neither observed nor reviewed [the] analysis," could not "convey what [the scientist] knew or observed about the events his certification concerned." Id. at 2712, 2715. Several concerns with the testimony led the Supreme Court to conclude that the expert had provided "surrogate" testimony: the expert could not describe "the particular test and testing process [the analyst] employed," id. at 2715; could not "expose any lapses or lies on the . . . analyst's part," id.; nor could he explain why the analyst "had been placed on unpaid leave." Id. Moreover, the State did not "assert that . . . [the expert] had any independent opinion concerning [the results]." Id. at 2716 (internal quotation marks omitted).

Here, by contrast, no certified report was introduced; Mr. Davenport described, based on his personal knowledge, the tests and testing processes used, and the means for discerning protocol lapses. Unlike the analyst in Bullcoming, 131 S. Ct. at 2715, Mr. Fisher had not been placed on unpaid leave for unexplained reasons; rather, Mr. Fisher missed the trial in order to be with his ill mother, circumstances that indicate neither incompetence on Mr. Fisher's part nor a ploy by the Government to gain a tactical advantage. Mr. Davenport confirmed that he had

formed and was testifying to his "independent opinion," providing opportunity for cross-examination. Moreover, Mr. Davenport's extensive review likely places this case well within Justice Sotomayor's hypothetical. See id. at 2722 (Sotomayor, J., concurring in part) (the testimony might have been admissible if the expert had some "degree of involvement" in the testing process, as when "the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the test at issue").

In Williams, 132 S. Ct. at 2230, the expert witness testified that she compared a DNA profile known to be from the petitioner to a DNA profile from a swab from the victim. The scientist who generated the known profile also testified. Id. at 2229. However, the DNA profile from the victim's swab was produced by an outside laboratory, Cellmark, and nobody from Cellmark testified at trial. Id. The expert "trusted Cellmark to do reliable work because it was an accredited lab," but "had not seen any of the calibrations or work that Cellmark had done." Id. at 2230. The plurality decided that the testimony regarding the underlying report was not presented for the "truth of the matter asserted," but rather as a basis for the expert's opinion. Id. at 2236-37, 2240. Five Justices disagreed with this conclusion. Id. at 2258-59 (Thomas, J., concurring in the judgment); id. at 2268-69 (Kagan, J., dissenting, in which Scalia, Ginsburg, and Sotomayor, JJ., joined).

In this case, Mr. Davenport saw all of the calibrations and work underlying the tests, and his close scrutiny and analysis of the results, comparison of the DNA profiles, and rerunning of the statistical analysis differed remarkably from the Williams expert's bald reliance on the Cellmark report, and seems to satisfy the concerns expressed by Justices Thomas and Kagan. See id. at 2258 (Thomas, J., concurring in the judgment) (explaining that the value of the expert's testimony "depended on the truth" of the out-of-court statement on which the expert relied); id. at 2270 (Kagan, J., dissenting, in which Scalia, Ginsburg, and Sotomayor, JJ., joined) ("[The expert] became just like the surrogate witness in Bullcoming -- a person knowing nothing about 'the particular test and testing process,' but vouching for them regardless." (quoting Bullcoming, 131 S. Ct. at 2715)). Whatever the differences between Williams and this case may be, the lack of majority support in Williams "for any point but the result" means that Williams does not alter "this Court's Confrontation Clause jurisprudence." Tearman, 72 M.J. at 59 n.6 (dictum).

Thus, although the Supreme Court has not provided a workable majority rule that would resolve this case, the Court's precedent does not dictate the conclusion that Appellee lacked the opportunity to confront a witness against him.

ii.

In the absence of clear guidance from the Supreme Court, we are bound, within the constraints discernible from controlling precedent, to provide a clear rule for the military justice system. Fortunately, we already have a rule. This Court's precedent makes clear that even when an expert relies in part upon "statements" by an out-of-court declarant, the admissibility of the expert's opinion hinges on the degree of independent analysis the expert undertook in order to arrive at that opinion. Blazier II, 69 M.J. at 224-25.

On the one hand, experts may not "act as a conduit for repeating testimonial hearsay," id. at 225, circumventing the Sixth Amendment by acting as a "transmitter" instead of communicating an "independent judgment." Id. (quoting United States v. Ayala, 601 F.3d 256, 275 (4th Cir. 2010)). For this reason, the testimony of an expert witness who repeated statements in inadmissible cover memoranda violated the Confrontation Clause. Id. at 226. The witness should have "proffer[ed] a proper expert opinion based on machine-generated data and calibration charts, his knowledge, education, and experience and his review of the drug testing reports alone." Id.; see also Sweeney, 70 M.J. at 304 (an expert's testimony that a document "showed the presence of cocaine and codeine" was erroneously admitted). On the other hand, "[a]n expert witness need not necessarily have personally performed a forensic test in order to review and

interpret the results and data of that test." Blazier II, 69 M.J. at 224-25; cf. M.R.E. 703 ("[F]acts or data . . . upon which an expert bases an opinion . . . . need not be admissible."). Experts may "review and rely upon the work of others, including laboratory testing conducted by others, so long as they reach their own opinions in conformance with evidentiary rules regarding expert opinions." Blazier II, 69 M.J. at 224. That is precisely what happened here.

This rule is not inconsistent with Williams or the precedent applied by the Williams plurality or dissenters. See supra Part III.C.i. Moreover, as Justice Kagan noted in her dissent, the "clear rule" established in prior cases is "clear no longer," since "[t]he five Justices who control[led] the outcome of [Williams] agree[d] on very little," and "left significant confusion in their wake." Williams, 132 S. Ct. at 2277 (Kagan, J., dissenting, in which Scalia, Ginsburg, and Sotomayor, JJ., joined). Nonetheless, two things are clear: first, none of the decisions of the Supreme Court have purported to jettison expert testimony in toto; and, second, neither have they suggested that each individual who touched the evidence or was involved in its analysis must testify. And, since Williams, other courts have also focused on the extent to which an expert formed an independent opinion to determine whether the testimony was permissible in light of Crawford, as we did in Blazier II. See, e.g., United States v. Vera, 770 F.3d 1232, 1239-40 (9th Cir. 2014) (an expert's opinion regarding a gang's control over narcotics trafficking was admissible because the combination

of the expert's knowledge, even if gleaned from testimonial statements, and his own observations turned his opinion into "an original product that could have been tested through cross-examination" (internal quotation marks omitted)); Leger v. State, 291 Ga. 584, 732 S.E.2d 53, 60 (Ga. 2012) (a laboratory supervisor's testimony was admissible because her involvement in the testing gave her a "significant personal connection to the test"); State v. Roach, 219 N.J. 58, 95 A.3d 683, 688, 697 (N.J. 2014) (an expert was permitted to testify regarding the comparison between a DNA profile she generated and a profile generated by another analyst because she "used her scientific expertise and knowledge to independently review and analyze" the analyst's data, and "satisf[ied] herself of the reliability of the results"); State v. Lopez, 45 A.3d 1, 13-14 (R.I. 2012) (an expert's opinion was admissible because he was "integrally involved" in the testing process, formulating his own conclusions rather than "act[ing] as a conduit of the opinions of, or parrot[ing] the data produced by, other[s]").[7]

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[7] See also Hingle v. State, 153 So.3d 659, 664-65 (Miss. 2014) (the testimony of a witness who reviewed the testing analyst's report was admissible because the reviewer had "intimate knowledge" of the testing, and reached an "independent conclusion"); State v. Ortiz-Zape, 367 N.C. 1, 743 S.E.2d 156, 161 (N.C. 2013) (an expert can provide testimony that relies on out-of-court statements so long as the expert does not "merely repeat[] out-of-court statements"). Some courts eschew this rule,

iii.

Even if Mr. Davenport's in-court statements that semen or DNA were found on the evidentiary swabs and that certain DNA samples matched each other were based in part on the Final Report, they were admissible. Mr. Davenport performed an extensive independent review of the case file, upon which the Final Report was based, during which he

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however, and find a Confrontation Clause violation even if the expert had a high degree of involvement in the testing process or thoughtfully formulated her own conclusions. See, e.g., United States v. Turner, 709 F.3d 1187, 1188-89, 1193 (7th Cir. 2013) (a supervisor who reviewed an analyst's notes, data, and report violated the Confrontation Clause when she testified to the analyst's procedures and conclusions, although the error was harmless beyond a reasonable doubt); Martin v. State, 60 A.3d 1100, 1101, 1108 (Del. 2013) (the testimony of a laboratory manager with knowledge of lab procedures who reviewed an analyst's test results and prepared her own report violated the Confrontation Clause because the manager relied on the analyst's representations in reaching her conclusions); Jenkins v. United States, 75 A.3d 174, 189-90 (D.C. 2013) (a supervisor who assessed whether two DNA profiles matched based on his review of the work of biologists and technicians in his lab "relayed hearsay" when he repeated some of his subordinates' observations and conclusions, including the conclusion that the evidence contained the appellant's DNA).

determined that Mr. Fisher took the prescribed quality control measures, that no accidents occurred, and that the results were logically consistent. He compared the ECD numbers on the Final Report to the numeric identifiers found elsewhere in the case file to check that Mr. Fisher had analyzed the correct samples. He reanalyzed the DNA profile data that Mr. Fisher generated to verify the matches that Mr. Fisher reported and recalculated the frequency statistics. This extensive review process, explored in full before the military judge during the hearing on the motion in limine, allowed Mr. Davenport to "satisfy [him]self of the reliability of the results." See Roach, 95 A.3d at 697. In sum, Mr. Davenport presented his own expert opinion at trial, which he formed as a result of his independent review, and clearly conveyed the basis for his conclusions during the hearing on the motion in limine.

That Mr. Davenport did not himself perform aspects of the tests "goes to the weight, rather than to the admissibility" of his opinion. Blazier II, 69 M.J. at 225. And given defense counsel's limited cross-examination of Mr. Davenport at trial, we decline to assume that they believed that there were grounds to attack the tests he did not personally perform.

D.

We conclude that this case does not implicate the concern described in Crawford, as Appellee was not deprived of the opportunity to question and

confront an opposing witness. 541 U.S. at 50-51. Mr. Davenport's conclusions regarding the presence of semen and identification of DNA were his own. Even if those conclusions may have derived in part from the Final Report, Mr. Davenport's reliance on other, nontestimonial factual bases -- which also served as the foundation for the Final Report -- allowed him to render his own opinion. The witness against Appellee was not Mr. Fisher or the Final Report, but Mr. Davenport, who appeared in person at trial. Appellee had the opportunity to cross-examine Mr. Davenport about his review of the case file and his expert opinion, and, generally, to "subject [the testimony] to adversarial testing." Id. at 43.

Having thus parsed Mr. Davenport's testimony, we conclude that it was admissible. Therefore, the military judge did not abuse his discretion in denying Appellee's motion in limine, nor did Mr. Davenport's trial testimony violate Appellee's right to confrontation.

IV. DECISION

The decision of the United States Air Force Court of Criminal Appeals is reversed.[8] The record is

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[8] Appellee's motion to attach is denied, and Appellee's motion for appropriate relief in the nature of directing specific action upon a remand to the lower court is denied without prejudice to his right to request such relief from that court. Appellant's

returned to the Judge Advocate General of the Air Force for remand to the CCA for further proceedings under Article 66, UCMJ, 10 U.S.C. § 866 (2012).

OHLSON, Judge (dissenting):

To be clear, I do not disagree with much of the analysis and many of the conclusions contained in the majority opinion. Rather, I diverge from the majority's view of this case in regard to just one point -- but it is a point which I believe proves fatal to the Government's position. Specifically, I believe Appellee had a Sixth Amendment right to confront the initial laboratory technician, Mr. Fisher, regarding whether he precisely followed the required protocols for preparing the DNA samples, and thus whether he may have contaminated the evidentiary DNA sample with the known DNA sample.

Because Appellee was not afforded this opportunity, and because I find an insufficient basis to conclude that the Government has met its burden of demonstrating that this constitutional error was harmless beyond a reasonable doubt, I conclude that Appellee's conviction must be reversed. Accordingly, I respectfully dissent.

It would be an understatement, indeed, to say that the Supreme Court's decision in Williams v. Illinois, 132 S. Ct. 2221 (2012), where no single line

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motion to supplement the record is also denied without prejudice.

of reasoning garnered a majority of the justices' votes, has muddled the boundaries of an accused's Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). This is particularly true in those instances where, as here, forensic results are a central point at trial, and questions arise pursuant to the Confrontation Clause regarding who must testify about the tests that were performed, the procedures that were followed, and the results that were obtained. Indeed, the confusion that Williams has sown seems to have consigned appellate courts such as ours to now view the issues that arise in these types of Confrontation Clause cases as "through a glass, darkly." Nevertheless, I conclude that by analyzing other applicable precedents of the Supreme Court, as well as the jurisprudence of our own Court, answers to these questions may ultimately be discerned.

The majority does a thorough job of reciting the facts in this case, and therefore I will not repeat them in toto. Instead, I merely note the following points which I view as essential to the proper understanding and analysis of the issue before us.

First, Mr. Fisher handled and prepared for testing both the material that contained the evidentiary DNA samples and the material that contained the known DNA samples. As a result, there was a potential for contamination of the two

samples. This potential was significantly increased if Mr. Fisher did not precisely follow the laboratory's protocol when handling and preparing the samples, and such contamination would render meaningless any subsequent analysis.

Second, although Mr. Davenport compared the data from the two DNA samples that previously had been prepared by Mr. Fisher, he did not handle the original evidence that was submitted to the laboratory and did not independently prepare his own DNA samples for testing. Moreover, Mr. Davenport did not observe Mr. Fisher's handling of the original evidence, nor did he observe Mr. Fisher's preparation of these samples. Accordingly, Mr. Davenport's "verification" that Mr. Fisher followed the required protocol consisted of reviewing Mr. Fisher's written statements in the file in which Mr. Fisher asserted that he had done so.

Third, in motions practice, Appellee not only sought to require Mr. Fisher's testimony at the court-martial, he also specifically cited as a basis for this demand his concern about potential contamination of the DNA samples. Appellee presumably wanted to question Mr. Fisher about the precise steps he took in preparing the samples, as well as to probe the credibility and reliability of this witness. As Justice Kagan noted in her dissenting opinion in Williams: "[A] defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures?

Contaminate the sample in any way?" 132 S. Ct. at 2275 (Kagan, J., dissenting, in which Scalia, Ginsburg, and Sotomayor, JJ., joined).

Fourth, despite Appellee's articulation of his concern about contamination, the military judge denied Appellee the opportunity to confront Mr. Fisher at trial, essentially ruling that Mr. Davenport was an adequate substitute for Mr. Fisher and that his appearance satisfied the requirements of the Confrontation Clause.

Fifth, when Mr. Davenport appeared before the court-martial, he did not testify that if Mr. Fisher followed all of the required protocols and if Mr. Fisher did not commit any errors or mistakes, then, in his opinion, the DNA samples were properly handled and prepared and the results of the testing could be relied upon. Rather, Mr. Davenport merely assumed, without saying so, that Mr. Fisher's written assertion in the file that he had not committed any mistakes or errors was true, and then testified before the panel members that the proper protocols were followed and that his own independent examination of the computer files relating to the samples prepared by Mr. Fisher demonstrated that the evidentiary sample matched the known sample.

In turning to my analysis of these facts and the applicable law, I first must emphasize that I do not contest the proposition that an appropriately credentialed individual may give expert testimony

regarding data produced by another laboratory technician. United States v. Blazier (Blazier II), 69 M.J. 218, 222 (C.A.A.F. 2010) ("[A]n expert may, consistent with the Confrontation Clause and the rules of evidence, (1) rely on, repeat, or interpret admissible and nonhearsay machine-generated printouts of machine-generated data, and/or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own." (citations omitted)). Further, I do not seek to suggest that every individual who touches DNA evidence as it progresses from the crime scene to the courthouse must testify at trial. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009). Not at all.

On the other hand, however, I also note that it is a simple fact that "[f]orensic evidence is not uniquely immune from the risk of manipulation [and mistake]." Id. at 318. Therefore, a defendant's right to confront and cross-examine laboratory technicians regarding the steps they took in developing this forensic evidence may not be summarily curtailed merely because science and statistics are involved. To the contrary, an accused has the right to ask "questions designed to reveal whether [a lab analyst's] incompetence . . . or dishonesty" tainted the forensic results. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2715 (2011). In the instant case, Appellee was not afforded that right.

Mr. Davenport was an expert on, among other issues, what the laboratory protocols were in a case such as this one. However, he was not an expert on the issue of whether Mr. Fisher unerringly followed those protocols. Accordingly, Mr. Davenport could use his expertise to examine and testify about such issues as the efficacy of the laboratory protocols, whether there were irregularities between the samples that were tested, whether the two samples matched one another, and the statistical likelihood that Appellee was the source of the evidentiary DNA. However, despite his expertise on these issues, in determining whether Mr. Fisher actually followed the protocols that were required of laboratory technicians, the underlying facts in this case show that Mr. Davenport relied on Mr. Fisher's out-of-court written assurances that he had done so. This was testimonial hearsay. See Bullcoming, 131 S. Ct. at 2715 (stating that surrogate could not expose any lapses or lies on the certifying analyst's part).

In analyzing this concern, I first note that Mr. Fisher's routine written assurances in the file that he properly performed all the required procedures and did not commit any mistakes or errors did not carry with them any particular indicia of reliability. But more importantly, I further note that "'reliability' is no substitute for [the] right of confrontation." Blazier II, 69 M.J. at 223. As the Supreme Court explained in Crawford v. Washington, "Where testimonial statements are involved, ... [the Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a

particular manner: by testing in the crucible of cross-examination." 541 U.S. 36, 61 (2004).

Second, as pointed out by the majority, I acknowledge that these written assurances, along with Mr. Fisher's other notes, the test results, and the written report, were not admitted into evidence, and therefore this case does not squarely present the type of Confrontation Clause issues that the Supreme Court addressed in Bullcoming and Melendez-Diaz. Nevertheless, in my view, Mr. Davenport effectively repeated the out-of-court statements made by Mr. Fisher when he testified that Mr. Fisher had followed standard procedures in preparing the DNA samples -- a putative fact about which Mr. Davenport had no independent knowledge. Moreover, when the military judge denied Appellee's request to have Mr. Fisher testify, the military judge effectively rendered impervious to cross-examination and attack the issue of whether Mr. Fisher contaminated the evidentiary sample. See Bullcoming, 131 S. Ct. at 2715 n.7. (an accused has a right to question a laboratory technician about his "proficiency, the care he took in performing his work, and his veracity").

Accordingly, I conclude that Justice Kagan's dissenting opinion in Williams, which managed to garner the votes of four justices despite the highly fractured nature of the Court, neatly and succinctly captures the essence of what I believe to be still-controlling precedent in regard to the required analysis of cases such as the one before us:

> Under our Confrontation Clause precedents, this is an open-and-shut case. The State of Illinois prosecuted Sandy Williams for rape based in part on a DNA profile created in Cellmark's laboratory. Yet the State did not give Williams [*41] a chance to question the analyst who produced that evidence. Instead, the prosecution introduced the results of Cellmark's testing through an expert witness who had no idea how they were generated. That approach -- no less (perhaps more) than the confrontation-free methods of presenting forensic evidence we have formerly banned -- deprived Williams of his Sixth Amendment right to "confron[t] . . . the witnesses against him."

Williams, 132 S. Ct. at 2265 (Kagan, J., dissenting, in which Scalia, Ginsburg, and Sotomayor, JJ., joined) (alteration in original).

Moreover, I note that there are aspects of the instant case that differ from the facts in the Williams case and, in my view, these differences serve to make the Confrontation Clause problem more acute here. First, in Williams the plurality seemed to place significant emphasis on the fact that the purpose of the laboratory DNA profile was not "to create evidence for use at trial." Id. at 2243. Justice Alito noted that at the time Cellmark analyzed the DNA

sample, no one had been identified as the possible perpetrator of the offense and it was unclear that anyone would ever be arrested. Id. at 2243-44. Not so here. Mr. Fisher knew from the outset that an accused had been identified, and thus he knew that when he wrote his notes and conducted his tests, he likely was "creat[ing] evidence for use at trial." Id. at 2245. This fact places Mr. Fisher's statements "squarely within the heartland of Confrontation Clause jurisprudence." United States v. Turner, 709 F.3d 1187, 1193 (7th Cir. 2013).

Second, this was a court-martial with panel members rather than a military judge-alone trial. By the plurality's own reckoning in Williams, this increased the chances that the trier of fact relied on the out-of-court statements implicit in Mr. Davenport's testimony for their truth. See Williams, 132 S. Ct. at 2236 ("The dissent's argument would have force if petitioner had elected to have a jury trial.").

Although the Government elicited testimonial hearsay from Mr. Davenport, this does not end my Confrontation Clause inquiry. I next turn my attention to the Supreme Court's decision in Crawford where, as the majority notes, the Court held that a prosecutor's use of testimonial hearsay violates the Confrontation Clause -- unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 59. I concede that this provides a significant exception to the Confrontation Clause in

particular instances. However, I do not believe that the holding in Crawford is applicable to the instant case because I am not convinced that the record of trial supports the military judge's finding that Mr. Fisher was unavailable to testify.

First, the military judge noted that based on communications with counsel, Mr. Fisher himself estimated that he would be available for witness interviews on "approximately Tuesday, 3 May 2011." Because Appellee's court-martial began on May 3, 2011, and continued through May 6, 2011, Mr. Fisher's own estimation of his schedule made him available for questioning. Further, the military judge found as fact that Mr. Fisher would be "unable to travel to testify at the court-martial until 5 May 11 at the earliest." Because the record reflects that Mr. Davenport, Mr. Fisher's substitute, was not called to testify in this case until the evening of May 5, the military judge's own findings indicate that Mr. Fisher likely was available to testify. Accordingly, I conclude that there was a Confrontation Clause violation under Crawford because Mr. Fisher should not have been considered unavailable to testify at Appellee's trial.

And finally, I find that the DNA evidence was a central and integral element of the Government's case against Appellee, and that the Government was unable to demonstrate that the constitutional error pertaining to that evidence was harmless beyond a reasonable doubt. Stated differently, I find that "'there is a reasonable possibility that the evidence

complained of might have contributed to the conviction.'" Chapman v. California, 386 U.S. 18, 23 (1967) (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). Accordingly, I conclude that Appellee's conviction must be reversed, and I respectfully dissent.

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOSHUA KATSO
United States Air Force

ACM 38005

11 April 2014

73 M.J. 630

Sentence adjudged 6 May 2011 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Matthew D. van Dalen.

Approved Sentence: Dishonorable discharge, confinement for 10 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan and Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Tyson D. Kindness, and Gerald R. Bruce, Esquire.

Before

ROAN, ORR, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

ROAN, Chief Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members of one specification of aggravated sexual assault, one specification of burglary, and one specification of unlawful entry in violation of Articles 120, 129, and 134, UCMJ, 10 U.S.C. §§ 920, 929, 934. The adjudged and approved sentence consisted of a dishonorable discharge, 10 years of confinement, and forfeiture of all pay and allowances. The appellant raises two issues for our consideration: (1) Whether the appellant's right to confrontation was denied when the military judged overruled a defense objection to the testimony of the Government's DNA expert, and (2) Whether the appellant's conviction for unlawful entry should be dismissed because the specification failed to state the terminal element.[1] For the reasons discussed below, we find the surrogate expert improperly repeated testimonial hearsay and that the error was not harmless beyond a reasonable doubt.

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[1] Senior Judge Orr took part in this opinion prior to his retirement.

Background

While celebrating her 21st birthday with several friends, Senior Airman (SrA) CA became intoxicated after consuming between 15 and 20 drinks over the course of the evening. At an off-base bar and unable to return to the base on her own, she was assisted back to her room and fell asleep on her bed. SrA CA testified that she woke up when she felt "someone having sex with [her]." She said she was attacked by someone wearing denim pants, glasses, a beanie cap, and a coat. After SrA CA struggled against him, her assailant left, and SrA CA ran into another room and told a friend she had been raped. SrA CA subsequently identified the appellant as her attacker.

Agents of the local Air Force Office of Special Investigations (AFOSI) responded and collected blood and DNA samples from SrA CA and the appellant. The evidence was sent to the United States Army Criminal Investigations Laboratory (USACIL) for analysis. Mr. Fisher, a USACIL forensic DNA examiner, examined the samples and produced a report reflecting a match between the appellant's DNA profile and semen retrieved from SrA CA during the sexual assault examination. In accordance with USACIL's standard operating procedures, a second DNA examiner, Mr. Davenport, conducted a technical review to verify Mr. Fisher's findings.

Shortly before trial, Mr. Fisher informed the Government that he would not be available to testify due to a family emergency. The Government sought to have Mr. Davenport testify in place of Mr. Fisher. Defense counsel objected to Mr. Davenport's testimony, arguing the appellant's right to confront Mr. Fisher, the witness who had performed key steps in the DNA analysis that was to be used against him at trial, would be violated.

During both the motion hearing and before the members, Mr. Davenport explained the process for analyzing and interpreting DNA samples, which is summarized below:

> 1. Evidence is sent by investigators to USACIL in a double-wrapped box. Included with the sealed box are the shipping documents and any documents sent by AFOSI, including chain of custody information, the request for DNA examination, and in some cases, statements pertinent to the case.
>
> 2. The evidence processing section scans the documents into the laboratory's document management system to create a case file which is then viewable by all technicians involved with the case. The sealed box containing the physical evidence is logged into the evidence processing section.

3. The case file is sent to the DNA analysis branch and a DNA examiner is randomly assigned to conduct the DNA testing.

4. The DNA examiner checks the physical evidence box out from the evidence processing section.

5. The DNA examiner opens the evidence box, examines the inventory, and looks at the tag numbers and chain of custody documents to verify the laboratory has received everything that is listed as having been sent by investigators.

6. When the evidence has been collected during a sexual assault examination, the DNA examiner conducts a visual serology examination to determine if semen is on the items associated with the case. This serology determination involves three presumptive tests performed on a portion of the swab:

a. The DNA examiner applies a chemical agent to the sample and looks for a particular change in color;

b. The DNA examiner conducts a microscopic evaluation, looking for the presence of sperm cells; and

c. The DNA examiner applies a chemical liquid to the sample and places that liquid in a "test cassette" which will then show either a positive or negative result.

d. The DNA examiner also runs a positive and negative control for each chemical used in the process. He also records the lot numbers of the chemicals to ensure they are not expired.

7. If semen is found, the evidentiary item will be sent for DNA analysis, as will the known samples taken from the victim and any suspect, in order to generate DNA profiles for comparison purposes. To ensure quality control, the examiner creates a profile from a known DNA sample from the laboratory and runs a blank reagent (which should yield no DNA profile). The DNA analysis process involves four steps for each sample, performed by the DNA examiner using machines within the laboratory:

a. Purifying the DNA;

b. Determining the quantity of DNA present by using a kit that creates a computer printout of the results;

c. Making "copies" of certain areas of the DNA; and

d. Generating a DNA profile by using a machine which creates computer files consisting of raw data.

8. The raw data generated in step 7d above is run through a computer program which assigns certain numbers to the DNA profile and creates an image with peaks reflecting those numbers. If a male DNA profile is found on the questioned sample, the DNA examiner "interprets" the evidence by comparing the DNA profile from the questioned samples with the DNA profile found in the suspect's known profile swabs. If there is a match, the examiner conducts a statistical frequency calculation.

9. The statistical determination is created by comparing the male DNA profile found on the victim's swab to the DNA profiles in the FBI database to determine how common or rare the profiles are. Using this database, the DNA examiner calculates the "statistical frequency," namely the frequency that genetic match will be found within the population.

10. The DNA examiner writes a report containing the results of the testing and

analysis, including the serology findings, the DNA findings, and the frequency statistic.

11. The report goes through a two-step review process before it is published: a technical review and an administrative review.

a. The technical review is performed by another qualified DNA examiner at the laboratory. The reviewer looks at the case file which contains information about the evidence from its arrival in evidence through the creation of the report, including the notes of the initial examiner. In conducting this review, he does not re-accomplish the work done in steps 3-7 by the initial examiner. Instead, he checks to see if that examiner's notes show that proper testing protocol was followed and that his notes match his report. The reviewer does repeat the work done by the initial examiner in steps 8 and 9 by running the raw data computer files created in step 7d through the computer program to reach his own conclusions about the evidence. If they match the results of the initial examiner, the technical reviewer will sign off on the initial examiner's report.

b. The administrative review is performed to check for typographical errors and to ensure all pages of the report are present.

12. The report is published and returned to the law enforcement agency that requested the test.

Mr. Davenport stated the process used by USACIL has proven reliable and has gained widespread acceptance in the scientific community.

Mr. Davenport testified that during his technical review of Mr. Fisher's report, he examined the case file and reviewed the documents submitted by AFOSI to ensure the tag numbers were properly reflected on the report confirming that evidence in fact came into the laboratory and was properly documented. He also examined the report to ensure all steps of the testing process were conducted and recorded, the positive and negative controls were tested, and the lot numbers were written down. As part of the technical review, Mr. Davenport testified that although he did not reconstruct the DNA profiles previously developed by Mr. Fisher (as described in steps 1 through 7 above), he did examine the raw data that was created during the generation of the DNA profile by running the information through a computer program to produce a statistical frequency determination. He personally interpreted the data to determine whether the DNA profiles

matched and then compared his findings with those of the original analyst to verify the results. This same process was repeated for all known samples and submitted items of evidence. Following this, Mr. Davenport concluded the semen found on the swabs taken from the victim in this case contained the appellant's DNA profile.

After argument, the military judge denied the defense's motion, finding Mr. Davenport could testify concerning his independent findings without violating the Confrontation Clause. This included providing his independent opinion about the reliability of the testing procedures used, the findings and results, and the frequency statistics related to those findings and results.

Before the members, Mr. Davenport testified that he independently determined: (1) The evidentiary items were received and analyzed in accordance with established USACIL and DNA testing protocol; (2) The vaginal swabs, rectal swabs, and debris collection swabs obtained from the victim contained semen; (3) The appellant's DNA profile matched the DNA profile obtained from the victim's rectal swabs; (4) Male DNA was present on the victim's vaginal swabs; and (5) A mixture of DNA profiles from the victim and appellant were obtained from the penile head swabs, penile shaft swabs, and the scrotum swab. Mr. Davenport also testified as to the statistical frequency associated with the DNA

profiles. The DNA report itself was not admitted into evidence.

Law of Confrontation

The appellant argues on appeal that his right to confrontation was violated when the substitute analyst, Mr. Davenport, was permitted to testify in place of Mr. Fisher, the original analyst, concerning the DNA findings. Specifically, the appellant contends Mr. Davenport repeated inadmissible testimonial hearsay to the members that should have been excluded pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny.

The Sixth Amendment[2] provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Therefore, "no testimonial hearsay may be admitted against a criminal defendant unless (1) the witness is unavailable, and (2) the witness was subject to prior cross-examination." *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010) [hereinafter *Blazier II*] (citing *Crawford*, 541 U.S. at 53-54). We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Whether admitted evidence constitutes testimonial hearsay is a question of law we review de novo. *United States v.*

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

Blazier, 68 M.J. 439, 442 (C.A.A.F. 2010) [hereinafter *Blazier I*].

After a complete review of the record of trial and briefs from both parties, we conclude Mr. Davenport improperly repeated testimonial hearsay from Mr. Fisher and the appellant's right to confrontation was violated. We further find the error was not harmless beyond a reasonable doubt.

In *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011), the Court of Appeals for the Armed Forces reiterated its holding in *Blazier I* that "a statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (quoting *Blazier I*, 68 M.J. at 442). Thus, "[a] document created solely for an evidentiary purpose . . . made in aid of a police investigation, ranks as testimonial." *Id*. (citing *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2717 (2011) (alterations in original)). The court declared "the focus has to be on the purpose of the *statements* in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for testing." *Id*. at 302 (emphasis in original). The court noted that although those performing initial drug tests may well be "'independent scientist[s]' carrying out 'non-adversarial public dut[ies],' that does not mean that their statements are not produced to serve as evidence." *Id*. (alterations in original).

In *United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013) our superior court, while still applying the test from *Sweeney*, recognized that the current state of the law for determining when a particular statement is classified as testimonial is unclear and "far from fixed."[3] In his partial

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[3] The Court detailed the many tests that various Supreme Court Justices have applied in determining whether a statement is testimonial:

> *Compare Bullcoming*, 131 S.Ct. at 2714 n. 6 (plurality opinion) ("To rank as 'testimonial,' a statement must have 'a primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'" (alterations in original) (quoting *Davis*, 547 U.S. at 822, 126 S.Ct. 2266)), with *Melendez-Diaz*, 557 U.S. at 311, 129 S.Ct. 2527 ("Here . . . the affidavits [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' . . . .") (quoting *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354)), *and Melendez-Diaz*, 557 U.S. at 329, 129 S.Ct. 2527 (Thomas, J., concurring) ("I continue to adhere to my position that 'the 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.'" (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part and concurring in the judgment))), and *Davis*, 547 U.S. at 826-28, 126 S.Ct. 2266 (distinguishing "interrogations solely directed at establishing the facts of a past crime"—which elicit testimonial statements—from interrogations designed to enable law enforcement "to meet an ongoing emergency"—which do not), *and Crawford*, 541 U.S. at 51, 124 S.Ct. 1354 (offering one formulation of testimonial statements as "'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'") (citation omitted), *and Crawford*, 541 U.S. at 52, 124 S.Ct. 1354 ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.").

United States v. Tearman, 72 M.J. 54, 58-59 (C.A.A.F. 2013) (alterations in original).

concurrence, Chief Judge Baker questioned whether Sweeney is still viable in light of the Supreme Court's decision in *Williams v. Illinois*, 132 S.Ct. 2221 (2012), stating, "*Williams* considerably narrows the Supreme Court's previous language, previously adopted by this Court, that 'a statement is testimonial if "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."'" *Tearman*, 72 M.J. at 68 n.7 (Baker, C.J., concurring in part and in the result) (quoting *Crawford*, 541 U.S. at 51-52).

In order to determine whether *Sweeney* is still valid, it is necessary to review the *Williams* case in some detail. In *Williams*, the Supreme Court delivered a highly fractured opinion concerning whether a DNA report created by an independent lab was testimonial and if so, was it nevertheless admissible over a Confrontation Clause objection. Vaginal swabs from a rape victim were sent to Cellmark, a private laboratory, for DNA analysis. Cellmark analysts produced a report indicating male DNA was present from the victim's swabs. These results were then sent to the state laboratory to create a profile. At this time, the alleged rapist's identity was not known. Several months later, a state laboratory created a DNA profile from Williams following his arrest on unrelated charges and placed it in a state database. At trial, a state forensic expert who was not involved in the Cellmark testing testified that she matched the DNA profile produced

by Cellmark with Williams' DNA profile maintained in the state database. The state did not call any witness from Cellmark to testify and did not offer any direct evidence that Cellmark technicians had followed proper procedures while analyzing the DNA so that Williams' DNA profile was actually derived from the semen on the victim's swab. *Id.* at 2230. Williams objected to the expert's testimony, arguing it violated his right to confrontation because the expert witness did not have personal knowledge that the profile produced by Cellmark was based on vaginal swabs taken from the victim. *Id.* at 2231.

Justice Alito wrote for a four-judge plurality and concluded the Confrontation Clause did not preclude the introduction of the state expert's testimony for two reasons. First, the plurality stated that the Confrontation Clause does not apply to "out-of-court statements that are not offered to prove the truth of the matter asserted." *Id.* at 2228. The plurality concluded that the expert's testimony that DNA "found in semen from the vaginal swabs of [the victim]" was not used for the purpose of proving the truth of the matter asserted. *Id.* at 2236. Rather, it served as the premise of the prosecutor's question. The plurality declared, "There is no reason to think that the trier of fact [the trial judge] took [the expert's] answer as substantive evidence to establish where the DNA profiles came from." *Id.* Justice Alito noted, "It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case

even if the expert lacks first-hand knowledge of those facts." *Id.* at 2233.

The plurality then applied an objective test to determine whether the statement was "made for the purpose of proving the guilt of a particular criminal defendant at trial." *Id.* at 2243. The plurality concluded the Cellmark report was not testimonial because "the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When [law enforcement] sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." *Id.* The plurality further opined that "no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no 'prospect of fabrication' and no incentive to produce anything other than a scientifically sound and reliable profile." *Id.* at 2243-44 (quoting *Michigan v. Bryant*, 131 S.Ct. 1143, 1157 (2011)).

Justice Thomas concurred in the judgment that the expert's statements did not violate the Confrontation Clause, but disagreed with the plurality's reasoning. He concluded that [**18] testimony offered to explain the basis for an expert's

opinion is always offered for its truth, but ultimately concurred in affirming Williams' conviction on the basis that the Cellmark report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." Id. at 2255 (citing Bryant, 131 S.Ct. at 1167 (Thomas, J., concurring in judgment)). According to Justice Thomas, the Cellmark report lacked "the solemnity of an affidavit or deposition" because it was not a sworn or certified declaration of fact, nor was it "the product of any sort of formalized dialogue resembling custodial interrogation." Id. at 2260.

Writing for herself and three other justices, Justice Kagan disagreed in total with the rationale offered by the plurality, as well as Justice Thomas' "indicia of solemnity" test, and would have found the testimony violated the Confrontation Clause. She maintained the Cellmark report in *Williams* was identical to the one in *Bullcoming and Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and so "the substance of the report could come into evidence only if Williams had a chance to cross-examine the responsible analyst." *Id.* at 2266-67 (Kagan, J., dissenting). Justice Kagan rejected the proposition that the expert's testimony had not been offered for its truth, noting, "[A]dmission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress." *Id.* at 2269 (emphasis in the original). She also disagreed with

the plurality's conclusion that the DNA report was "to respond to an ongoing emergency, rather than to create evidence for trial," noting that the expert had testified that the DNA report was conducted "'for this criminal investigation . . . [a]nd for the purpose of the eventual litigation'—in other words, for the purpose of producing evidence, not enabling emergency responders." *Id.* at 2274 (omission and alteration in original) (citation omitted).

Analysis

We do not find *Williams* established a new "primary purpose" test for determining when a statement is considered testimonial. Although Williams' conviction was ultimately upheld based on Justice Thomas' concurrence, the Supreme Court's 4-1-4 split provided no clear guidance concerning the extent to which a surrogate expert may testify about testing performed by another analyst. *See Id.* at 2270, 2277 (Kagan, J., dissenting) ("What comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.").[4]

[4] Justice Kagan continued in her dissent: "I call Justice ALITO's opinion 'the plurality,' because that

In *Marks v. United States*, 430 U.S. 188, 193 (1977), the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). "In practice, however, the *Marks* rule produces a determinate holding 'only when one opinion is a logical subset of other, broader opinions.'" *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). Applying *Marks* becomes problematic "[w]hen the plurality and concurring opinions take distinct approaches, and there is no 'narrowest opinion' representing the 'common denominator of the Court's reasoning.'" *Id.* (quoting *King*, 950 F.2d at 781, 782).

Consequently, because Williams does not provide a definitive test for determining when a statement is to be deemed testimonial, we will continue to apply our superior court's holding in Sweeney: "[A] statement is testimonial if 'made

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is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication." *Williams v. Illinois*, 132 S.Ct. 2221, 2265 (2012) (Kagan, J., dissenting).

under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Sweeney, 70 M.J. at 301 (quoting Blazier I, 68 M.J. at 442). Under this standard, we conclude that Mr. Fisher's findings and his statement specifically linking the DNA profile to the appellant by name [**22] were testimonial. When Mr. Davenport repeated Mr. Fisher's testimonial statements to the members, he violated the appellant's confrontation rights.

This case, unlike *Williams*, involved a jury trial[5] and a known suspect, against whom charges had been preferred, and who was in pretrial confinement for the suspected offense prior to the DNA testing. At the time Mr. Fisher created the DNA profiles, he knew the appellant's identity and further knew the results of his analysis would be

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[5] The *Williams* plurality opinion acknowledged "the dissent's argument [regarding whether the statement was made for the truth of the matter asserted] would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury's taking [the state expert's] testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs. Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury." 132 S.Ct. at 2237.

turned over to the AFOSI for potential prosecution.[6] Applying Sweeney, we find the information placed in Mr. Fisher's report "clearly set forth the 'accusation'" critical to the Government's case: that the DNA found in the victim's sample specifically matched the appellant. Mr. Fisher's DNA analysis report is therefore testimonial. *See Blazier I*, 68 M.J. at 443; *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (rejecting the Government's argument that laboratory reports will always be nontestimonial and noting that records and documents such as lab reports may be testimonial if and investigation is already pending against an individual and the

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[6] Whereas the *Williams* plurality opined that it is "beyond fanciful" that "shoddy lab work would somehow produce a DNA profile that just so happened to have the precise genetic makeup of petitioner, who just so happened to be picked out of a lineup by the victim," 132 S.Ct. at 2244, in this case it is not inconceivable that the appellant could argue that sample contamination, sample switching, mislabeling, or fraud could have produced test results matching the appellant's DNA profile to that found in the victim's sample. *See United States v. Sedillo*, 509 F. App'x 676, 681 (10th Cir. 2013) (Briscoe, C.J., dissenting). Whether that in fact occurred is not for this Court to determine; rather it is through confrontation and the crucible of cross-examination that permits the appellant to challenge Mr. Fisher's findings on these matters.

testing is conducted by the Government to discover evidence).[7]

This case is unlike the typical urinalysis trial where a drug testing report is admitted into evidence tying the accused to the tested sample through chain of custody documents. Here, the prosecution did not admit Mr. Fisher's report. As a result, the only evidence the members received linking the male DNA profile found in the victim's swabs directly to the appellant — the penultimate issue in the case — came from Mr. Davenport's testimony.[8] We find as a

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[7] We reach the same conclusion applying the plurality test from *Williams*, as the testimony at trial was offered for the truth of the matter asserted and the appellant was a known suspect at the time the evidence was tested.

[8] Mr. Davenport identified the appellant by name several times during his testimony:

> Q. [Trial Counsel] Let me ask you a general question as . . . it relates to Airman Katso's kit. Having performed the technical review, have you formed an independent professional opinion as to whether Airman Katso's kit was tested per the procedure and protocol required at the lab?
>
> A. [Mr. Davenport] Yes.
>
> Q. And what is that opinion?

A. That the kit was tested per protocol and there were items in that kit that went through the DNA analysis procedure.

. . . .

Q. Do you have an opinion whether DNA profiles were generated for known samples for both [Senior Airman (SrA) CA] and the accused?

A. Yes, they were.

Q. What is your opinion?

A. There were DNA profiles from the known blood of [SrA CA] and Katso.

Q. Directing your attention now to the rectal swab that was taken from [SrA CA]. Based on your review, have you formed an independent opinion whether DNA was present on Airman [SrA CA]'s rectal swab?

A. Yes.

Q. What is that opinion?

A. There was a mixture of DNA profiles consistent with coming from two

individuals from the rectal swabs of [SrA CA]. The non-semen DNA profile matched the DNA profile of [SrA CA]. The remaining partial semen DNA profile is consistent with Katso.

Q. The accused in this case?

A. Yes.

. . . .

Q. And, Mr. Davenport, you said the semen DNA profile, in your opinion, was consistent with the accused, Airman Katso?

A. That's correct.

. . . .

Q. Directing your attention now to the penile head swab that was taken from the accused. Based on your technical review, have you formed an independent opinion whether DNA was present on the accused's penile head swab?

A. Yes.

Q. What is that opinion?

A. On the penile head swabs, there were [sic] a mixture of DNA profiles consistent with two individuals. The one contributor was consistent with Katso and the remaining contributor was consistent with [SrA CA].

. . . .

Q. Now, directing your attention now to penile shaft swab that was taken from the accused. Based on your technical review, have you formed an independent opinion whether DNA was present on the accused's penile shaft swab?

A. Yes.

Q. And what is that opinion?

A. A mixture of DNA profile consistent with coming from two individual ways found on the penile shaft swabs. One contributor was consistent with Katso and the remaining contributor is consistent with [SrA CA].

. . . .

Q. And finally, Mr. Davenport, directing your attention now to the swab that was

matter of fact the record of trial does not definitively establish that Mr. Davenport had first-hand knowledge as to whom the known DNA sample or its corresponding profile belonged. He was able to identify the appellant by name only by repeating the testimonial statement contained in Mr. Fisher's report that directly linked the appellant to the generated DNA profile. Without this connection, Mr. Davenport could testify that in his expert opinion the two DNA profiles Mr. Fisher created by purifying, quantifying, and copying the DNA found in the swabs he analyzed matched one another in certain respects, but consistent with the Confrontation Clause, Mr. Davenport could not identify the appellant by name. *See United States v. Ayala*, 601 F.3d 256, 275 (4th Cir. 2010) ("[T]he question when applying Crawford to expert testimony is 'whether

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> taken from the accused's scrotum. Based on your technical review, have you formed an independent opinion whether DNA was present on the accused's scrotum swab?
> A. Yes.
>
> Q. What is that opinion?
>
> A. A mixture of DNA profiles from at least two individuals was found on the scrotum swabs. One contributor is consistent with Katso and the remaining contributor is consistent with [SrA CA].

the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.'" (quoting *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009)).

We disagree with the Government's premise that *Blazier II* controls the outcome of this case. In *Blazier II*, our superior court acknowledged that an expert witness may review and rely upon the work of others, to include laboratory analysis, without violating the Confrontation Clause, so long as that expert reaches his or her own opinions in compliance with Mil. R. Evid. 702 and Mil. R. Evid. 703. *Blazier II*, 69 M.J. at 224-25. Thus, Mr. Davenport could rely on Mr. Fisher's creation of various DNA profiles to conduct and testify about his own statistical testing (following steps 3-7 above) concerning the likelihood of a match between the DNA profiles. What he could not do, though, was to "act as a conduit for repeating testimonial hearsay." *Id.* at 225. Mr. Davenport did so by repeating testimonial statements contained in Mr. Fisher's report, namely that the DNA profile found on the evidentiary samples from SrA CA specifically came from the appellant. Mr. Davenport could not form an independent conclusion that the known DNA in the analysis he reviewed came from the appellant because his review was limited to repeating statistical comparisons performed after Mr. Fisher had already done all the hands on work necessary to properly prepare the samples for the machine-

generated portions of the analysis.[9] Because Mr. Davenport repeated testimonial hearsay to the factfinder, the appellant's right to confront Mr. Fisher was violated.

Constitutional Error

Having found constitutional error, we must determine whether it is harmless beyond a reasonable doubt. We conduct this review de novo. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). In the context of an erroneous admission of testimonial hearsay, the question is not whether the evidence is legally sufficient to uphold a conviction without the erroneously admitted evidence; rather, "'[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). As the party who benefited from this constitutional error, the Government bears the burden of establishing that it had no causal effect upon the findings. *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004). To do

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[9] Although trial counsel included the phrase "in your independent opinion," or some version thereof in the key questions he asked Mr. Davenport, simply inserting such phrases into a question does not transform an exchange containing testimonial hearsay into something else where a predicate fact presumed in the question's wording is, itself, testimonial hearsay.

so, the Government must exclude the "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy*, 375 U.S. at 86-87. *See also Kreutzer*, 61 M.J. at 300 (holding the Government was required to demonstrate there was no reasonable possibility that the presence of two testimonial statements contributed to the contested findings of guilty).

To say that a constitutional error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as contained in the record. *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007) (citing *Yates v. Evatt*, 500 U.S. 391, 403 (1991) overruled on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991)). In this light we will not affirm the appellant's conviction unless the Government convinces us beyond a reasonable doubt that the "constitutional error was not a factor in obtaining that conviction." *Kreutzer*, 61 M.J. at 298-99. In *Harrington v. California*, 395 U.S. 250, 254 (1969), the Supreme Court stated the test for harmless error could be satisfied where there is overwhelming evidence of guilt. Among the factors we consider are: (1) The importance of the testimonial hearsay to the Government's case; (2) Whether the testimonial hearsay was cumulative; (3) The existence of other corroborating evidence; (4) The extent of confrontation permitted; and (5) The strength of the Government's case. *Sweeney*, 70 M.J. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673,

684 (1986)). Applying those *Van Arsdall* factors to the case before us, we find the admission of the testimonial hearsay was not harmless beyond a reasonable doubt.

The Government's case was based on the strength of SrA CA's identification of the appellant, circumstantial evidence regarding text and online communications the appellant had with SrA CA throughout the day and evening leading up to the assault, the appellant's demeanor and answers he gave AFOSI investigators in response to questions about his previous interaction with, or knowledge of, SrA CA, and Mr. Davenport's testimony matching the appellant's DNA with DNA found on the victim. The Government's case was not without its problems, however. SrA CA testified that she and the appellant were not close acquaintances, having only met two weeks before her birthday. He did not accompany SrA CA to dinner nor was he at the dormitory dayroom when she had several drinks before leaving for an off-base bar. Although the appellant was at the bar, his arrival was not coordinated with SrA CA, and he did not leave with her that evening. In fact, other witnesses testified that he went to another Airman's off-base apartment before returning to base to play video games with two other Airmen. No witnesses observed the appellant entering or leaving SrA CA's room. After SrA CA identified the appellant, AFOSI arrived at the appellant's room to question him within an hour of her report. However, the appellant was so

unresponsive due to his own alcohol consumption he had to be given medical attention before he could be questioned.

SrA CA stated she had almost no recollection of what happened after leaving the dayroom and arriving at the bar. While others testified to seeing SrA CA sitting on the appellant's lap at the bar, she does not remember seeing the appellant or talking with him that evening. Her last clear memory was leaving the dayroom and then waking in her bed when she felt someone having sexual intercourse with her. She testified that although there was little light in the room she was able to see his features "like a black and white photo" and was able to identify the appellant through touch and/or sight of certain items he was wearing, including a beanie cap, glasses, a coat, and a pair of jeans. However, the investigating agent also testified that no forensic evidence matching the appellant, to include hairs or clothing fibers, was found in SrA CA's room.

Based on the totality of the evidence presented, we find the Government has failed to demonstrate that the DNA evidence played an insignificant role in the Government's case, and that the testimonial hearsay was an important piece of evidence leading to the appellant's conviction.[10] We

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[10] Trial counsel indicated to the military judge that the identity of SrA CA's attacker would be an issue in the case and that confirmation of her

are therefore not convinced beyond a reasonable doubt that the constitutional error was not a factor in obtaining that conviction. *See Kreutzer*, 61 M.J. at 299. We cannot turn a blind eye to the evidentiary power of DNA testimony for purposes of incriminating and exonerating suspects. Shelton, Donald E., *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the "Polybutadiene" Meets the "Bitumen*," 18 WIDENER L.J. 309, 321-22 (2009) ("Although the forensic use of nuclear DNA is barely 20 years old, DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged. DNA enjoys this preeminent position because of its reliability and the fact that, absent fraud or an error in labeling or handling, the probabilities of a false positive are quantifiable and often miniscule."). We are convinced there is a reasonable possibility, if not probability, the DNA evidence contributed to the appellant's conviction and was certainly not "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Othuru*, 65 M.J. at 377 (quoting *Yates*, 500 U.S. at 403). Consequently, we are compelled to set aside Charge I and its Specification.

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identification of the appellant through the DNA testing would be "a substantial piece of evidence."

Housebreaking

For the same reasons we must set aside Charge I, we are likewise required to set aside Charge II's allegation of housebreaking. The only direct evidence linking the appellant to being inside SrA CA's room to carry out the sexual attack is her testimony and the corroborative DNA evidence. Based on the entire record, we are persuaded that, as above, the inadmissible use of the DNA testimony was a factor in obtaining the conviction on Charge II.

Failure to State an Offense

The appellant was also charged with unlawfully entering SrA CA's dwelling in violation of Article 134, UCMJ, although that specification did not allege the terminal element. *See United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). After a thorough review of the trial record, we do not find the missing element was extant on the record or essentially uncontroverted. Therefore, the appellant was not placed on sufficient notice of the alleged crime and consistent with the requirements established in *Fosler* and *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), we are compelled to set aside and dismiss Charge III and its Specification.

Conclusion

The findings of guilty and the sentence are set aside and dismissed. A rehearing is authorized.

MARKSTEINER, Senior Judge (concurring):

I concur with Chief Judge Roan's analysis and conclusion, but I write separately in order to ensure I have framed the issue on which I believe this case ultimately turns — the standard we are to apply when addressing the prejudice caused by Confrontation Clause errors.

I also write separately to respectfully note my disagreement with our dissenting colleague's conclusion as to prejudice. He essentially says the DNA evidence was not important because the appellant did not contest that he and Senior Airman (SrA) CA had sex; rather his defense was limited to consent or mistake of fact as to consent. Had the defense not objected to Mr. Davenport's testimonial hearsay at the outset, I would find this conclusion more persuasive. However, as the case played out, once the military judge ruled against the appellant on the admissibility of Mr. Davenport's statement linking the sample he tested to the appellant, it would have been beyond benign futility — indeed it would likely have been affirmatively detrimental to the appellant's case — to argue the appellant did not have sex with SrA CA. Accordingly, to the extent the appellant resorted to litigating consent, the sequence of events strongly suggests that he did so only because the trial judge's decision to admit Mr. Davenport's testimonial hearsay left him no alternative.

With regard to the standard we apply, if I were to evaluate the case now before us on factual and legal sufficiency grounds, I would have little hesitation affirming the findings and sentence for many of the reasons trial counsel addressed in closing argument. The record contains evidence that the appellant was interested in SrA CA, that with knowledge of her intention to get drunk on her birthday he followed her movements and eventually connected with a very intoxicated SrA CA at a bar later that night. When SrA CA's friend tried to remove her from the appellant's lap to take her home, the appellant resisted, telling the friend, "I'll take care of her." The friend ultimately removed SrA CA, but the appellant continued to follow up on SrA CA's activities using social media until she stopped responding to posts sometime after 0253 hrs, when the appellant posted to her Facebook page: "hay [****]...u had a good night.. ..u were allll f[**]kered up..no f[**]kin doubt.. hope u got home safe ... thank tiff for me."

Approximately two hours later, the victim awakened to someone violating her. She testified that although there was little light in the room she was able to see his features "like a black and white photo" and was able to identify the appellant through touch and visual recognition of certain items he was wearing, including a beanie cap, glasses, a coat, and a pair of jeans. Later, when questioned about his activities the night of the assault, the appellant was, to even an untrained interrogator, evasive and

demonstrably untruthful in his responses. The video of his interrogation was entered into evidence.

Read in isolation, the "harmlessness beyond a reasonable doubt" test as articulated in *Harrington v. California*, 395 U.S. 250, 254 (1969), could be understood to be a less exacting standard than that which we must apply. In *Harrington*, the Supreme Court stated the test for harmless error could be satisfied where there is overwhelming evidence of guilt. *Id*. Harrington, a Caucasian, was convicted along with three non-Caucasians, for their participation in an attempted robbery and murder. The Court reviewed the case to determine whether the admission of two of the participants' written confessions implicating the appellant, over his objection at trial, constituted a non-harmless Confrontation Clause violation. Discussing the issue, the court recounted the evidence against Harrington at trial:

> Petitioner made statements which fell short of a confession but which placed him at the scene of the crime. He admitted that [another participant] was the trigger man; that he fled with the other three; and that after the murder he dyed his hair black and shaved off his moustache. Several eyewitnesses placed petitioner at the scene of the crime. But two of them had previously told the police that four [African-Americans] committed the crime. [One

> of the participants in the crime, who testified at trial] placed [Harrington] in the store with a gun at the time of the murder.
>
> . . . .
>
> . . . Harrington himself agreed he was there. Others testified he had a gun and was an active participant. [The participants' whose confessions were admitted] did not put a gun in his hands when he denied it. They did place him at the scene of the crime. But others, including Harrington himself, did the same. Their evidence, supplied through their confessions, was of course cumulative.

Id. at 252-54 (footnote omitted).

The Court went on to reemphasize its admonition, previously noted in *Chapman v. California*, 386 U.S. 18 (1967), "against giving too much emphasis to 'overwhelming evidence' of guilt." *Harrington*, 395 U.S. at 254. Further confirming its position, the Court noted, "We do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it." *Id.*

Although the case against the appellant was certainly solid, it was not as overwhelming as was the case against *Harrington*, at least up until the

point at which the trial judge admitted Mr. Davenport's testimony. On the contrary, the primary point to which Mr. Davenport testified was that DNA evidence established what amounts to a near mathematical certainty that the appellant — not just a nameless sample he tested for comparative purposes — had sex with SrA CA. The demonstrative exhibits trial counsel used during closing argument underscored this point.

Moreover, the weight of authority represented in the other cases construing "harmlessness" in this context, as referenced by the Chief Judge above, confirms that in order for us to affirm the conviction we must find not merely that the Government would have secured a conviction absent the wrongly admitted evidence. Rather, we may not affirm if there is a "'reasonable *possibility*'" that the erroneously admitted evidence "'*might have* contributed to the conviction.'" *United States v. Blazier*, 69 M.J. 218, 227, (C.A.A.F. 2010) (quoting *Chapman*, 386 U.S. at 23) (emphasis added).

On the facts of this case as presented, I believe it is simply impossible to *unring* the DNA evidence bell in a fashion that would enable us to find no reasonable possibility that Mr. Davenport's testimony might have contributed to the conviction. I therefore respectfully concur.

ORR, Senior Judge (concurring in part and dissenting in part):

I concur with the majority's conclusion that Mr. Davenport's testimony amounted to testimonial hearsay. I also agree that the specification of Charge III fails to state an offense and must be set aside. However, for the reasons I discuss below, I would affirm the findings of guilt for Charge I and Charge II and their respective specifications.

We review de novo whether a constitutional error is harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). In assessing constitutional error, the question is not whether the admissible evidence is sufficient to uphold a conviction but "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). Among the factors we consider are: (1) The importance of the testimonial hearsay to the prosecution's case; (2) Whether the testimonial hearsay was cumulative; (3) The existence of other corroborating evidence; (4) The extent of confrontation permitted; and (5) The strength of the prosecution's case. *United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

After the military judge properly admitted the portions of Mr. Davenport's testimony describing the process he used in analyzing the DNA samples and that Senior Airman (SrA) CA's sample contained semen, the only issue in dispute was whether the

sexual activity was consensual. The crux of the appellant's argument is the portion of Mr. Davenport's testimony explaining that the appellant's DNA matched the semen found in SrA CA's sample led to his conviction. I disagree. Given SrA CA's fresh complaint and identification of the appellant as her attacker, this case was not about whether the appellant and SrA engaged in sexual intercourse. The sole issue before the panel members was whether SrA CA consented to the sexual activity.

While trial defense counsel ably argued to the military judge that Mr. Davenport's testimony was testimonial in nature, he took a completely different approach during his cross-examination of Mr. Davenport before the members. Rather than implying that Mr. Davenport was simply repeating Mr. Fisher's initial findings or attempting to show that the DNA findings were not accurate, trial defense counsel instead emphasized that the DNA results could not indicate whether the sexual interactions were consensual or where they might have taken place. In fact, during her findings summation, trial defense counsel's fleeting reference to DNA consisted of the following:

> Now, another thing that they gave you was a whole bunch of numbers and all these things with DNA evidence. We barely had any questions for the DNA expert because ultimately his boy parts were on her girl parts. Her girl

> parts were on his boy parts. That doesn't tell us anything else.
>
> It doesn't tell us whether or not she was consenting. It doesn't tell us whether or not she was actively engaging in intercourse. It doesn't tell us where the sex occurred. Nobody can tell us where the sex occurred except for what Airman [CA] remembers after [she] blacked out for four or five hours. That didn't tell you much of anything.

Given the facts and circumstances of this case, trial defense counsel chose to focus their strategy on whether SrA CA was in fact substantially incapacitated as the Government contended, whether she consented to sexual intercourse with the appellant, and whether her complaints were the product of her regretting her decisions. Trial defense counsel's approach was reasonable under the circumstances and we will not second guess this decision. However, it does diminish the argument that he was materially prejudiced by his inability to cross-examine the original analyst. Having viewed the entire record and balancing the *Van Arsdall* factors, above, I am convinced that Mr. Davenport's repetition of testimonial hearsay was harmless beyond a reasonable doubt. Therefore, I must respectfully dissent.

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES

[v.]

AB JOSHUA KATSO
319th Communications Squadron (AMC)
Grand Forks AFB, ND

RULING: DEFENSE MOTION TO EXCLUDE DNA LAB REPORT AND ITS FINDINGS

3 May 2011

On 29 Apr 11, the defense filed a motion in limine to prevent the government from seeking to introduce as evidence a DNA report and its findings indicating that the Accused's DNA was present on a rape examination performed on the alleged victim in this case as a violation of the Accused's right to confront witnesses under the 6th Amendment of the U.S. Constitution. On 30 Apr 11, the government filed a written response urging this court to deny the defense motion.

Upon consideration of the defense motion and the government's response thereto, all attachments, the testimony of the expert witness and arguments by

counsel, I make the following findings of fact and conclusions of law.

FACTS

1. On 22 December 2010, a charge and specification was preferred against the Accused alleging that he committed aggravated sexual assault against SrA [CA], in violation of Article 120, UCMJ. The Charge alleges that the sexual act occurred on or about 11 December 2010 while SrA [A] was substantially incapacitated. A charge of burglary and a charge of unlawful entry were also preferred.

2. The Air Force Office of Special Investigations (AFOSI) conducted an investigation into the matter. In conjunction with their investigation, Sexual Assault Forensic Evidence (SAFE) kits were collected on both SrA [A] and the Accused. DNA was then extracted from the following swabs which were taken with the Sexual Assault Collections Kit: penile shaft swab, scrotum swabs, penile head swabs and debris collection swabs. These DNA extractions were then examined by US Army Criminal Investigation Laboratory (USACIL) to determine that DNA mixtures from both SrA [A] and the Accused were found on each of the swab samples collected from the Acccused's SAFE kit. Results from this testing purport a match between the Accused's DNA profile with the semen retrieved from SrA [A's] SAFE kit.

3. On 14 February 2011, the charges and specifications were referred to this court-martial.

4. The testing of the evidence submitted by AFOSI was done by Mr. Robert M. Fisher, Forensic Biologist, Serology/DNA Division, at USACIL. Until 28 Apr 2011, Mr. Fisher was a named witness on the Government's witness list and was expected to testify regarding the analysis of the evidence collected. On Tuesday, 26 Apr 11, Mr. Fisher notified counsel that he would be unavailable to participate in a witness interview until approximately Tuesday, 3 May 11, due to a family emergency and would be out of town. In subsequent conversations with Mr. Fisher, he indicated he would be unable to travel to testify at the court-martial until Thursday, 5 May 11 at the earliest. In lieu of requesting a delay in this case, the Government substituted Mr. Fisher on their witness list with Mr. David Davenport, Forensic DNA Examiner, from USACIL. Mr. Davenport did not perform the majority of the tests in this case, but he did perform the technical review of the case prior to publication of the final report.

5. Mr. Davenport explained his role as technical reviewer at the motion hearing as having done reviewed the data and computer calculations of Mr. Fisher, as well as reviewing the case from beginning to end. Also, as part of the review, Mr. Davenport himself took raw data from the instrument, and analyzed it to ensure he reached the same results and conclusions as Mr. Fisher had prior to Mr. Fisher publishing the final report on 28 Jan 11. Following the technical review, Mr. Fisher published the final report.

6. The Government .seeks to call Mr. Davenport as its DNA expert in its findings case in chief to explain DNA, the reliability and general acceptance of DNA testing and DNA testing at USACIL. Additionally, the Government will elicit Mr. Davenport's own independent opinions concerning the DNA testing in this particular case, the findings/results in this case and the frequency statistics related to those findings. Mr. Davenport's opinions will be based on his training and experience, and his review of the entire case, to include: his review of the testing procedure, results and conclusions of Mr. Fisher (including his report), and the results of the testing and conclusions he personally reached in performing his role as the technical reviewer.

7. The Government is not seeking to have Mr. Davenport repeat any testimonial conclusions or affidavits created by Mr. Fisher about Mr. Fisher's opinions of the testing.

LAW

8. "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S. Const., Amendment VI. Generally speaking, testimonial hearsay, including such hearsay contained in affidavits and cover memoranda to reports produced by drug testing/forensic laboratories, is inadmissible against an Accused at a court-martial. See Crawford v. Washington, 541 U.S. 36 (2004); Melendez-Diaz v.

Massachusetts, 129 S.Ct. 2527 (2009); and, United States v. Blazier (Blazier I), 68 MJ 439 (C.A.A.F. 2010).

9. The United States Supreme Court in U.S. v. Melendez-Diaz, 129 S.Ct. 2527 (2009) addressed the propriety under the confrontation clause of the Sixth Amendment of admitting a sworn, out- of-court certification from a laboratory official identifying a substance found in the defendant's vehicle as cocaine. The court held, "Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." Id. at 2532. In a footnote, the majority specifically addressed chain of custody evidence, noting, "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." *Id*. fn. 1.

10. Consistent with that holding, U.S. v. Blazier (Blazier II) reiterated, "[w]here testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross examination, or (2) unavailable and subject to previous cross examination." 69 MJ 218, 222 (C.A.A.F. 2010). That holding means the Confrontation Clause is still not satisfied even if: (1) an expert testifies in lieu of the declarant of the testimonial hearsay and is subject to cross-examination, or (2) the testimonial hearsay is

reliable. (Id. at 222- 23; see also Crawford, 541 US at 51 and 61, and Melendez-Diaz[,] 129 S.Ct. at 2537 n. 6 and 2536).

11. Since Melendez-Diaz, the Air Force Court has ruled that Melendez-Diaz does not require that every person who participated in the analysis of a chemical test sample be made available for confrontation purposes as a prerequisite to admission of a scientific testing report such as the one in the present case. See United States v. Skrede, 2009 WL 4250031 (A.F.C.A.).

12. With regard to the testimony of experts, trial judges decide preliminary questions concerning the relevance, propriety and necessity of expert testimony, the qualification of expert witnesses, and the admissibility of his or her testimony. See M.R.E. 104(a).

13. M.R.E. 703 outlines the requirements that may serve as the basis for the expert's testimony. M.R.E. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

14. The language of the rule is broad enough to allow three types of bases: facts personally observed by the expert; facts posed in a hypothetical question; and hearsay reports from third parties. United States v. Reveles, 42 M.J. 388 (1995), held that expert testimony must be based on the facts of the case. This includes facts presented out of court if they are "of a type reasonably relied upon by experts in the particular field" (even if inadmissible). U.S. v. Sims, 514 F.2d 147, 149 (9th Cir. 1975). "The rationale in favor of admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. This relates directly to one of the functions of the expert witness, namely to lend his special expertise to the issue before him." Sims at 149.

15. The elements of the foundation for an expert relying upon hearsay reports from third parties include the source of the third party report; the facts or data in the report; if the facts are inadmissible, and a showing that they are nonetheless of the type reasonably relied upon by experts in the particular field. In United States v. Traum, 60 M.J. 226 (C.A.A.F. 2004), the C.A.A.F. emphasized that the key to evaluating the expert's basis for her testimony is the type of evidence relied on by other experts in the field.

[16]. Expert witnesses may review and rely upon the work of others, including laboratory testing conducted by others, so long as they reach their own

opinions in conformance with M.R.E. 702 and 703. See Blazier II, 69 M.J. at 224-25; US v. Moon, 512 F.3d. 359, 362 (7th Cir. 2008), and United States v. Washington, 498 F.3d 225, 228-32 (4th Cir. 2007). As mentioned above, there exists a danger of smuggling in inadmissible hearsay or repeating testimonial hearsay. Blazier II at 225. "An expert witness need not necessarily have personally performed a forensic test in order to review and interpret the results and data of that test." Id.; citing Rector v. State, 681 S.E.2d 157, 160 (Ga. 2009), and Smith v. State, 28 So.3d 838, 855 (Fla. 2009).

[17]. Ultimately, "[t]hat an expert did not personally perform the tests upon which his opinion is based is explorable on cross-examination, but that goes to the weight, rather than the admissibility, of that expert's opinion." Id. at 225; citing United States v. Raya, 45 MJ 251, 253 (CAAF 1996).

[18]. In Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993), the Supreme Court held that nothing in the Federal Rules indicates that "general acceptance" is a precondition to admission of scientific evidence. The rules assign the task to the judge to ensure that expert testimony rests on a reliable basis and is relevant. The judge assesses the principles and methodologies of such evidence pursuant to Rule 104(a).

[19]. The Supreme Court discussed a nonexclusive list of factors to consider in admitting scientific evidence, which included:

> (1) Whether the theory or technique can be and has been tested;
>
> (2) Whether the theory or technique has been subjected to peer review and publication;
>
> (3) Whether the known or potential rate of error is acceptable;
>
> (4) Whether the theory/technique enjoys widespread acceptance.

ANALYSIS

[20]. In the case at hand, the defense contends that the evidence at issue in this motion--namely, the results of the DNA testing of the Accused's samples--must be excluded from admission because the primary tester of the samples, Mr. Fisher, would not be present in court as the sponsoring witness of the testing and report findings. The government's expert witness in this case, Mr. Davenport, is expected to be proffered as an expert in field of forensic DNA testing and examination. Specifically, Mr. Davenport, consistent with M.R.E. 702, has shown aptitude to possess specialized knowledge, education, experience, and training in which he provides to the trier of fact an opinion based upon scientific data

which is the product of reliable principles and methods of which he applied the methods reliably to the facts of this case.

[21]. The defense argues to support its motion that the admission of any human-generated portions of the DNA report are testimonial in nature because they were authoring a forensic report. Specifically, the defense focuses heavily on the portions of the DNA testing that require the analyst to examine the samples and move them to various locations for additional testing. Once the testing indicates a particular result, the analyst then moves it onto the next stage of the testing, ultimately culminating in evaluation of the test sample for a computer-generated statistical analysis. In addition, the defense relies heavily upon the fact that the reports were generated in preparation for trial. However, the mere fact that some portions of the DNA report were human-generated is not dispositive as to the nature of a document proffered for evidence in a court-martial. The fact that a scientific testing methodology or result may have some forensic value does not immediately render it testimonial as are sworn affidavits. Instead, the reports' method of preparation, their use, and the case law outlining the rules for such evidence is the determining factor.

[22]. Accepting what appears to be the defense's contention that only the individual who performed the testing and report could testify without risking a 6th Amendment confrontation clause violation, then the rules controlling expert witness testimony would

be virtually rendered a hollow rule. Such is also inconsistent with the recent holdings of Blazer, Melendez-Diaz, and their progeny.

[23]. This court agrees with the defense assertion that an expert witness may not simply repeat inadmissible hearsay or conclusory statements made via affidavits or drug-testing report cover memoranda as seen in the recent-urinalysis testing report litigation outlined above. Such would be improper hearsay smuggling of which there is no exception. However, in this case, Mr. Davenport has based his opinion not upon the report "summary" page which simply provides an overview and conclusion of the tests. Rather, Mr. Davenport was integral in the strict and rigorous testing process itself, the method of DNA testing performed generally and in this case specifically, and based his opinion upon the data generated by the scientific tests.

[24]. The Defense fails to mention, much less distinguish the fact that both Blazier and U.S. v Blazier II, provide for the admissibility of machine-generated data contained in the forensic report.

[25]. Further, consistent with Daubert, Mr. Davenport outlined the scientific methodology utilized in this case, testifying that it is the most commonly accepted and scientifically sound type of testing DNA [] utilized. Further, this type of testing has been subjected to peer review over many years and is widely accepted as the primary means of

conducting DNA testing. This testing is highly reliable, has an extremely low rate of error, particularly when conducted by the stringent laboratory testing safeguards utilized by USACIL, and the techniques employed are universally accepted within the scientific community.

[26]. Some of the Daubert factors include:

> (1) Whether the theory or technique can be and has been tested;
>
> (2) Whether the theory or technique has been subjected to peer review and publication;
>
> (3) Whether the known or potential rate of error is acceptable;
>
> (4) Whether the theory/technique enjoys widespread acceptance.

[27]. To each of these questions, the answer provided by the USACIL expert witness was in the affirmative. The type of DNA testing at issue has been tested for years and is widely accepted in peer review and publication as the most prevalent and reliable type of testing in existence. The error rate is extremely low and utilizes some of the quantification methods published by the Federal Bureau of lnvestigation. True, as the government points out, Mr. Fisher would have been a more ideal witness because his testimony likely would have permitted

the entire DNA report with his conclusory summary sheets and opinions. However, the government has not proffered or sought admission of the portions of the report that reference Mr. Fisher's opinions. Rather, the government has merely elicited independent testimony of Mr. Davenport wherein he reviewed the data and tests performed and formulated his own opinion. This is precisely the type of testimony that the law controlling expert witness testimony envisioned. Indeed, this is the type of testimony that is routinely permitted on a regular basis in drug urinalysis testing that surrounds the case law the defense cites. Hence, this case is akin to the testimony and admission of urinalysis reports proffered by an expert witness who was not involved in the testing process in the least, provided the "cover page" memorandum concluding the results of the tests is excised.

[28]. So long as Mr. Davenport does not become a conduit of inadmissible testimonial hearsay, Mr. Davenport may give his independent opinion concerning the reliability of testing procedures used in this case, the findings/results in this case and the frequency statistics related to those findings/results. The fact that the expert is relying, in part, on work conducted by Mr. Fisher does not render Mr. Davenport's opinion testimony inadmissible, but rather is explorable during his cross-examination. But this aspect goes directly to the weight of the evidence and not to its admissibility.

CONCLUSION

[29]. As discussed above, the type of evidence the Government intends to elicit from Mr. Davenport does not violate the Confrontation Clause and is permissible consistent with the law controlling utilization of expert witnesses.

WHEREFORE, the defense motion to exclude the testimony and Accused's DNA test report is DENIED.

// signed //
MATTHEW D. VAN DALEN, Lt Col, USAF
Military Judge

Excerpts from the testimony of David M. Davenport at the suppression hearing:

> Q [by government counsel]. . . . And so, the DNA examiner takes it from the processing all the way through the fourth step of DNA—at least is what you have told us so far—all the way through the fourth DNA analysis; is that right?
>
> A. That's right.

Tr. 201.

> Q [by defense counsel]. . . . So, who looks at the results of what's going on? Is that the analyst who is doing that?
>
> A. Yes.
>
> Q. Is the raw data that's generated from a computer machine?
>
> A. No.
>
> Q. No. Is it that the analyst that's actually having to perform these tests and take down his results?
>
> A. Correct.

Q. Now, I want to flip for a second and talk about your technical review. When you are doing a technical review, you don't have any of that evidence?

A. Correct.

Q. You don't pull the evidence out of evidence processing?

A. No.

Q. You are actually not checking the results, but you are checking that the notes that the analysts have match what—you are checking that the two files match, right?

A. I'm checking to see that first of all, was protocol followed.

Q. Okay.

A. Did they do all three steps? Did they record their steps properly? Were the positive and negative controls tested? Did they have the lot numbers written down? And then, I look to the results that they came up with, with those three tests, to see if they were accurately reflected on the report.

Q. So, if there were mistakes that were made continuously throughout, there were mistakes in the notes and also mistakes that were made in testing, and mistakes that were actually also reported—recorded on the report, excuse me, if all those things were still all messed up, but they were consistently messed up, would you be able to catch that?

A. So, for example, if they see a color change and then, just don't write down they saw a color change, I am not going to be able to tell that they are being dishonest.

Q. Okay. Another hypothetical, if something is dropped on the floor, would you be able to speak to what happened for that specific incident in this process?

A. What we are trained to do, is if that happens, is to document it. We write down that we dropped the item on the floor. We have to document that. If someone did that and didn't write it down, I wouldn't have any knowledge of that.

Q. The same thing, if somebody sneezed on a sample. Is that something that you are supposed to document as well?

A. Well, no, because we wear masks. And so, we don't sneeze around samples, but we don't have to document sneezes. And, the reason for that is because every person who works at USACIL has submitted their DNA profiles. And so, we know everyone's DNA profile who is in the building. So, if at the end of all this, I get a DNA profile that doesn't match anybody, then I can look at that foreign DNA profile and compare it to the database of all of the DNA profiles of people in the building. And, if I see my own DNA profile, then I have got to report it. So, I mean, there are ways to find out if your own DNA gets on a sample.

Q. Okay. And here is a shorter question. If there is some deviation from the standard that is not documented when someone is performing a specific analysis, if you are not that analyst, would you be able to speak to that at all?

A. No.

Tr. 220-23.

Q [by defense counsel]. If there were some anomalies as to the testing that were not documented, you would not be able to answer any questions that I had about that, would you?

A. No.

Q. If I have any questions about some qualifications or discrepancy reports of Mr. Fisher, the man who actually was the analyst for the testing, about his history or prior errors that he had had at the lab, would you be able to answer any of those questions?

A. Um, I think I have seen one of his incident reports from last year, but, no more than that.

Tr. 227.

Q [by defense counsel]. Were you with Mr. Fisher throughout this testing procedure?

A. No.

Q. Did you conduct any of your own tests on any of the samples or the evidence in this case?

A. No.

Q. Is there any portion of this entire analysis process that is subjective, that requires not a machine to analyze something, but is individual, their knowledge, their basis, and them looking at something to make a determination?

A. Yes, I wouldn't use the word subjective. But, I would say that someone is doing that on their own, based on how they were trained and based on the laboratory protocol.

Q. If we had questions about anything with in this specific case, would you be able to explain the thinking of analyst Robert Fisher in making certain determinations?

A. Of course not.

Q. Unless it is documented, would you know anything about the contamination in this case or any unusual occurrences?

A. Well, you look at the results and you look at the quality control samples that we use in the DNA process, the reagent length that I spoke about earlier and the known DNA sample that were carried through. So, I can look at that

portion and see that those worked properly. I can look at the known profile from a female and see it's a female DNA profile that was obtained. I can—

Q. Sir, do you know anything about—would you be able to talk about the contamination or any unusual occurrences in this case if there is not an MFR or some other documentation?

A. When you say contamination—

Q. Any type of mistake or an error that he could have made?

WIT: You have to be more specific than that.

Q. Let's go back to—

[Objection by government counsel]: Your Honor, I think it has been asked and answered. I think her point is well made. I think she said you can speak for Mr. Fisher or what Mr. Fisher did. He said, 'of course not.' I think that is the point that she was trying to make for purposes of motion at least?

Tr. 228-30.

Q [by the military trial judge]. . . . [T]he defense's last line of questioning with respect to, I think it was with an eye towards cross contamination, using a known sample and somehow cross contamination an unknown sample. Is that possible?

A. Sure.

Q. How is that possible?

A. You would have to physically go in and take the DNA from the known sample and put it into the tubes the question sample.

Q. Okay.

A. But, step number two of the DNA process, when we find out how much DNA we have is all done at the same time. And so, up to that point, you have purified DNA, but you don't know how much you have. So, if you want to go in and maliciously put in where it is not supposed to be, I guess you don't know how much to put in to put in that point, because you don't know how much DNA you are dealing with.

Tr. 237-38.

Excerpts from the pretrial colloquy:

> [Military Judge (MJ)]: All right, are there any matters that this court will rule on, presumably this evening, at some point before tomorrow morning's start that the government would believe would be case dispositive if it went against the government? Specifically, the only one that I'm thinking of is the DNA results. But, I don't believe that would be case dispositive.
>
> [Government Trial Counsel (TC)]: Your Honor, probably the suppression motion which would lead to the—if it goes so far as to exclude the SANE kit that was conducted. And then also, the DNA results, both of those we would argue that we would have a grounds to at least consider a 62 appeal based on—if you give me just a moment—
>
> MJ: Government counsel, would you not still have the testimony of [the alleged victim,] Senior Airman [A,] in this case?
>
> TC: We would, Your Honor, but the identity would be an issue. She said that it was a dark room. She identified Katso, but the defense would challenge that so the confirmation of that identity

through the DNA testing would be a substantial piece of evidence.

MJ: Well, certainly, it would be substantial.

Tr. 316-17.

Excerpts from the trial testimony of Odessa L. Cyprian:

Q [by government counsel]: Airman Cyprian, did it seem that Airman [A, the alleged victim,] was still under the stress of the event that just—the event that had just happened?

A. Yes.

Q. Yes?

A. Yes.

Q. And you said you were on the phone. She was still crying?

A. Uh-huh.

Q. Can you talk about that again?

A. I was on the phone with the police. She was still hysterically crying. As I was on the phone with the police and

not talking to her, she said out of nowhere, 'I think it was Katso.'

Tr. 710-11.

Excerpts from the testimony of David M. Davenport during trial on the merits:

Q [from government counsel]. . . . [O]nce the [DNA examiner's] report is written, what's done after that?

A. After the report is written, before it can be released back to the agency that submitted the evidence, it has to go through a two-step review process. The first step is called a 'technical review' where the technical reviewer will look at the case file from the beginning picking up from evidence processing all the way to end which is the report.

Tr. 1134.

Q. [from government counsel]. . . . Was a complete DNA analysis performed on the sexual assault examination kit from the alleged victim in this case, Airman [A]?

A. Yes.

Q. Was a complete DNA analysis performed on the sexual assault examination kit of the accused in this case, Airman Katso?

A. Yes.

Q. Were you involved in both of these cases?

A. My involvement in these cases was the technical reviewer.

Q. If I understood your testimony earlier, a case in front of the DNA examiner goes all the way up to writing a report and then that report goes to technical reviewer, right?

A. Actually, the entire case file including the report goes to technical reviewer.

Q. Okay. Thank you for that clarification. Very generally speaking, what takes place at the technical review stage?

A. At technical review, what I'm looking for is to make sure that the evidence came into the laboratory and was properly documented. I'm looking to see that the serology results that

were obtained by the DNA—by the analyst are properly reflected in the report. I'm looking to see that I agree with what is written in the report as far as how the interpretation was done. In addition to this, when a DNA profile is generated, it's generated as a computer file. What I do as a technical reviewer is, I will take that computer file and take it to my desk where I put it into a computer program where it labels everything in the DNA profile. And what I'm doing here is I'm doing my own independent interpretation of these computer files. So I'll make my own independent interpretations of the computer files to make sure that I come to the same conclusion as to the original analyst who worked the case.

Q. What's the beginning of the tech review?

A. I start with looking at the documents that were submitted by the agency to make sure that the tag numbers are properly reflected on the report, to make sure that the items that were submitted are actually listed on the report, and I'll going through that entire process.

Q. And then the very end is reviewing the report of the examiner with the case file?

A. That's correct.

Q. Did you review the analysis of both kits in this case from beginning to end?

A. Yes.

Q. . . . Having performed this review, have you formed an independent professional opinion as to whether Airman [A]'s kit was tested per the procedure and protocol as you described earlier is there at USACIL?

A. Yes.

Q. What is that opinion?

A. That opinion—my opinion is that semen was identified on the vaginal swabs and the rectal swabs and the debris collection swabs from [A]'s kit.

Q. . . . Having performed the technical review, have you formed an independent professional opinion as to whether Airman Katso's kit was tested per the procedure and protocol required at the lab?

A. Yes.

Q. And what is that opinion?

A. That the kit was tested per protocol and there were items in that kit that went through the DNA analysis procedure.

Q. Is it your opinion that all the early stages of the examiner followed the appropriate protocol on both kits?

A. Yes.

Q. . . . [D]o you have an independent opinion concerning the receipt of the evidence at the lab and inventorying of both kits?

A. The evidence in the laboratory was received properly. And when I say 'properly,' there were no issues with the evidence when it was received. It was received in a sealed condition.

Q. And that's your opinion based on your review?

A. Yes.

Q. How about the inventorying of the kits?

A. The inventory of the kits was done properly.

Q. Again, your independent review based on your—independent opinion based on your review of the case file?

A. Yes.

* * *

Q. . . . Based on your technical review, have you formed an independent opinion as to whether the known samples of Airman [A] and the accused were analyzed properly?

A. Yes.

Q. And what is that opinion?

A. The known samples were analyzed properly. They were cut at serology and taken forward through the NDA process to get a DNA profile.

Q. And that's your opinion based on your technical review?

A. Yes.

* * *

Q. . . . Based on your review, have you formed an independent opinion whether DNA was present on Airman [A]'s rectal swab?

A. Yes.

Q. What is that opinion?

A. There was a mixture of DNA profiles consistent with coming from two individuals from the rectal swabs of [A]. The non-semen DNA profile matched the DNA profile of Allison. The remaining partial semen DNA profile is consistent with Katso.

Q. The accused in this case?

A. Yes.

Tr. 1137-43.

Q [by government counsel]. . . . Based on your technical review, have you formed an independent opinion whether DNA was present on the accused's penile head swab?

A. Yes.

Q. What is that opinion?

A. On the penile head swabs, there were a mixture of DNA profiles consistent with two individuals. The one contributor was consistent with Katso and the remaining contributor was consistent with [A].

* * *

Q. . . . Based on your technical review, have you formed an independent whether DNA was present on the accused's penile shaft swabs?

A. Yes.

Q. And what is that opinion?

A. A mixture of DNA profile consistent with coming from two individual ways found on the penile shaft swabs. One contributor was consistent with Katso and the remaining contributor is consistent with [A].

* * *

Q. . . . Based on your technical review, have you formed an independent opinion whether DNA was present on the accused's scrotum swab?

A. Yes.

Q. What is that opinion?

A. A mixture of DNA profiles from at least two individuals was found on the scrotum swabs. One contributor is consistent with Katso and the remaining contributor is consistent with [A].

T. 1145-47.

Q [by defense counsel]. [Y]ou weren't the one that actually tested those first two steps in that process, were you?

WIT: The first two steps of?

Q. The serology and the DNA analysis—

A. Correct.

Tr. 1148-49.