**NAVY-MARINE CORPS TRIAL JUDICIARY**

**WESTERN JUDICIAL CIRCUIT**

U N I T E D S T A T E S )

) GENERAL COURT-MARTIAL

V. )

) Bench Brief

SNM ) Testimonial Hearsay

Corporal ) Report of DNA Testing

U. S. Marine Corps )

) 9 MAY 17

1. **Nature of Motion.**

The defense moves this Court to hold the DNA report to be testimonial hearsay as defined by the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), and further defined by the Court of Appeals of the Armed forces in *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008), *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009), *U.S. v. Blazier* 68 M.J. 439 (2010)[[1]](#footnote-1), *United States v. Tearman*, 72 M.J. 54, 61, (C.A.A.F. 2013), *United States v. Porter*, 72 M.J. 335,(C.A.A.F. 2013) and the Sixth Amendment to the United States Constitution.

3. **Discussion.**

(a) Summary of Law.

In *United States v. Harcrow*, the appellant was convicted of, inter alia, wrongful use of cocaine and wrongful possession of heroin. 66 M.J. 154, 156 (C.A.A.F. 2008). On appeal, the central issue was whether laboratory reports prepared by the Virginia Division of Forensic Science were testimonial hearsay under *Crawford*. *Id*. In the wake of *Crawford* and *Magyari*, the Court identified a number of nonexclusive factors that are relevant in distinguishing between testimonial and non-testimonial hearsay made under circumstances that would cause an objective witness to reasonably believe that the statement would be available for use at a later trial, including: (1) was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry, (2) did the “statement” involve more than a routine and objective cataloging of unambiguous factual matters, and (3) was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial. *Id*. at 158.

In the Supreme Court case of *Melendez-Diaz*, police officers seized bags of cocaine that allegedly belonged to the petitioner. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009). The Supreme Court found the “certificates of analysis” concerning the results of testing fell within the core class of testimonial statements because they were affidavits made for the sole purpose of establishing or proving some fact of consequence at trial. The Supreme Court found the certificates were affidavits that acted as solemn declarations or affirmations made for the purpose of establishing or proving some fact, and were functionally identical to live, in court testimony, and did exactly what a witness would do on direct examination. *Melendez-Diaz*, 129 S. Ct. at 2532.

4. **Conclusion.**

Allowing the final report as evidence is in essence permitting a witness back in the deliberation room with the members. Similar to a “formal affidavit-like statement[[2]](#footnote-2)” yet unlike other witness testimony is permitted to be directly referenced and reviewed multiple times by the members in written form. This may be especially damaging as part of the report may not have been directly testified to in open court yet the members are permitted to read and draw additional information out of the testimonial document that was not elicited from the witness by either the government or defense.

Major

Detailed Defense Counsel

1. *United States v. Katso*, 74 M.J. 273 (C.A.A.F. 2015) favorably sites to *Blazier* concerning what is testimonial and nontestimonial statements , specifically in reference to a DNA report. However *Katso* was more focused on the appropriate witness and his testimony and not the lab report’s admissibly. [↑](#footnote-ref-1)
2. *United States v. Sweeney*, 70 M.J. 296, 304, (C.A.A.F. 2011) [↑](#footnote-ref-2)