IN THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,
Appellee,

– versus – USCA Dkt. No. 09-0441/AF

JOSHUA C. BLAZIER, Crim. App. No. 36988
Senior Airman (E-4)
U.S. Air Force
Appellant.

AMICUS CURIAE BRIEF OF

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

In Support of Appellant

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BRIEF OF AMICUS CURIAE
National Association of Criminal Defense Lawyers

TO THE HONORABLE JUDGES OF THE
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ISSUES

I. **WHETHER THE RIGHT OF CONFRONTATION PRECLUDES USING DRUG TESTING LABORATORIES' "LITIGATION PACKAGES" THROUGH SURROGATE EXPERT WITNESSES?**

II. **DOES THE RESOLUTION OF THE CONFRONTATION ISSUE REQUIRE THAT THIS COURT ADDRESS THE "PREPARED IN ANTICIPATION OF LITIGATION" COROLLARY?**

III. **WHETHER OPINIONS UNDER M.R.E. 703, CAN SATISFY THE REQUIREMENTS OF THE CONFRONTATION CLAUSE, WHEN THE UNDERLYING FACTS OR DATA COME FROM A NONTESTIFYING WITNESS?**

STATEMENT OF THE CASE

Amicus accept the Parties respective Statements.

STATEMENT OF FACTS

Amicus accept the Parties facts with the following additions:

1. The Department of Defense's [DoD] urinalysis drug testing program is highly regulated by DoD Directive [DoDD] 1010.1 (1994); DoD Instruction [DoDI] 1010.16 (1994); and here, Air Force Instruction [AFI] 44-120 (2000);

2. The language of MRE 803(6) is substantially different from what Congress adopted in FRE 803(6);[1]

3. The Brooks Drug Testing Laboratory [BDTL] has had demonstrable forensic evidence issues which this Court can judicially note;[2]

4. "The mission of the United States Air Force is to fly, fight and win ... in air, space and cyberspace."[3]

5. The BDTL's mission is: "We deter and detect illicit use of controlled and illegal drugs by military personnel through random urinalysis testing, we report test results and prepare documentation for courts-martial and we develop new methods for drug testing."[4]

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[1] *See* Appendix A-1, *post*.

[2] *See, e.g., United States v. Israel,* 60 M.J. 485 (CAAF 2005); and *United States v. Jackson,* 59 M.J. 330 (CAAF 2004).

[3] From: http://www.airforce.com/learn-about/our-mission/ [accessed: 25 April 2010].

[4] Statement of Kabrena Rodda, Lt Col, USAF, available at: http://www.af.mil/news/story.asp?id=123129827 [accessed: 25 April 2010].

SUMMARY OF ARGUMENT

"Surrogate experts"[5] *per se* violate the Confrontation Clause. Applying MRE 703 as specified in Question (b), is either a *per se* confrontation violation[6] or constitutes a reversion to the *Roberts*'[7] "reliability" test rejected in *Crawford.*[8] It is the surrogate making the "reliability" decision under MRE 703, not the fact-finder[9] and that violates the Confrontation Clause.[10] Any resolution of the Specified Issues must address the "made in anticipation of litigation" corollary to the Confrontation Clause.[11]

Both courts below expressly relied upon the "business records" exception [MRE 803(6)].[12] The conceptual difficulties that they had with confrontation are partially due to the MRE Drafter's material deviations from Congressional intent in enacting FRE 803 – *viz.*, "avoiding collision with constitutional principles."[13]

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[5]*Amicus* defines a "surrogate expert" as one who testifies – not on first-hand knowledge of the facts, but upon the hearsay of other technicians, analysts or experts who are thus shielded from confrontation on the forensic issue involved.

[6]*Davis v. Washington,* 547 U.S. 813 (2006); and *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009). *See,* Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington,* 15 Brooklyn J.L.& Pol'y 791 (2007)[Hereinafter "Mnookin"].

[7]*Ohio v. Roberts,* 448 U.S. 56 (1980).

[8]*Crawford v. Washington,* 541 U.S. 36 (2004).

[9]*Crawford, supra* at 61-62.

[10]*See, United States v. Lawson,* 653 F.2d 299, 302 (7th Cir. 1981), *cert. denied* 454 U.S. 1150 (1982)[evidence may satisfy FRE 703 but still deny confrontation].

[11]*Cf., United States v. Harcrow,* 66 M.J. 154, 161 (CAAF 2008)(Ryan, J., concurring); *Palmer v. Hoffman,* 318 U.S. 109 (1943).

[12]*United States v. Blazier,* 68 M.J. 439, 441 (CAAF 2010).

[13]*Rules of Evidence for United States Courts and Magistrates,* 56 F.R.D. 183, 319 (1972)[addressing legislative history in detail].

Therefore, with respect to the Issues Specified by this Court, *Amicus* respectfully submit that:

a. Dr. Papa, as a surrogate expert, could not satisfy the requirements of the Confrontation Clause;

b. MRE 703 cannot satisfy the Confrontation Clause because the "reliability" of the underlying evidence/data was determined by Dr. Papa, not the fact-finder; and

c. The confrontation error is not harmless beyond a reasonable doubt based on the Record.

ARGUMENT

I. THE RIGHT OF CONFRONTATION PRECLUDES USING DRUG TESTING LABORATORIES' "LITIGATION PACKAGES" THROUGH SURROGATE EXPERT WITNESSES.

A. History.

The right of confronting one's accuser has a long history. It was first granted to U.S. military accused in Article 10, *1786 Articles of War,*[14] five years before the Sixth Amendment was ratified. This Court in *Jacoby* concluded that "confrontation" was a firmly established right under the UCMJ. Furthermore the Court stated: "it is equally clear that the Sixth Amendment guarantees the accused the right to *personally* confront the witnesses against him."[15] *Crawford* agreed: "The common law tradition is one of live testimony in a court subject to adversarial testing...."[16]

Urinalysis testing in the military has existed almost 60 years.[17] Military precedent provides the framework for trying such cases consistent with the Confrontation Clause's demands.[18]

United States v. Ford,[19] was an early urinalysis case. Trial procedure – consistent with confrontation principles – showed that

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[14]Winthrop, *Military Law and Precedents,* 2nd ed. (1920 Reprint ed.),at 973. *See also, United States v. Jacoby,* 29 C.M.R. 244, 249 (CMA 1960), citing this.

[15]29 C.M.R. at 247 [citations omitted; emphasis added].

[16]541 U.S. at 43.

[17]*See, United States v. Milton,* 13 C.M.R. 747 (AF Bd.Rev. 1953).

[18]After *Roberts*, *evidentiary* considerations overtook actual *confrontation* and military precedent adopted the *Roberts'* "reliability" test. *Cf., United States v. Magyari,* 64 M.J. 123 (CAAF), *cert. denied* 549 U.S. 890 (2006). But, *Crawford* ended that era. Thus, we advocate returning to "first principles" of military urinalysis law.

[19]16 C.M.R. 185 (CMA 1954).

a laboratory technician testified that he first checked all of the equipment and then performed the *preliminary* testing. Next, a biochemist who did the comparative analysis, testified that it was morphine. That process satisfied the Confrontation Clause, a process that the government now opposes.

Urinalysis was again at issue in *United States v. Spencer.*[20] There a surrogate analyst testified and Spencer moved to strike his testimony because "the technicians who had run the test were not in court to confront the accused."[21] In reversing the conviction, the Army Court stated:

> Trial counsel should have followed the method employed in *United States v. Ford*, [*supra*] wherein the laboratory technician ***who ran the tests*** ... was called as a witness, gave his professional qualifications ... described the steps and procedures taken by him, and that he delivered the end product ... to the toxicologist. With that foundation, the toxicologist's opinion ... was received as admissible with a properly proved foundation.[22]

Shortly after *Spencer* the Army Court was confronted with the precise argument now being made 54 years later:

> The Government urges that the report of chemical tests, plus the testimony of the toxicologist in charge, as to the normal procedures is an adequate substitute for the technicians who ... actually made the tests.[23]

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[20]21 C.M.R. 504 (Army Bd.Rev. 1956).

[21]*Id.* at 508.

[22]*Id.* at 510.

[23]*United States v. Bates,* 22 C.M.R. 413, 414 (Army Bd.Rev. 1956).

The Court had no difficulty ***rejecting*** that argument citing *Palmer.*[24]

Melendez-Diaz still mandates this:

> Documents kept in the regular course of business may ordinarily be admitted at trial despite hearsay status. [citation omitted] But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman* [citation omitted] made that clear.[25]

A year later that Court addressed the surrogate expert issue in *United States v. Westcott,*[26] involving a blood-alcohol report. The Court found that admitting the report was error and held that under *Palmer* "the testimony of the [surrogate], based thereon was likewise inadmissible."[27]

In 1975, the Army and Air Force promulgated a Joint Publication, *Military Criminal Law Evidence.*[28] Chapter 26, Part III, dealt with "Scientific Evidence." Had the procedures therein been followed below, there would be no Confrontation Clause issues. That Pamphlet addressed *inter alia* foundational requirements, *e.g.,* "the proponent must make an affirmative showing that the instrument

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[24]*Id.*

[25]129 S.Ct. at 2358. "Production of evidence for use at trial" is ***the*** function of the BDTL: "we report test results and prepare documentation for courts-martial...." *See* footnote 4, *supra. See also,* Dr. Papa's testimony that BDTL's "purpose" is: "To produce forensically defensible results for the military to use in legal proceedings." JA 35-6.

[26]23 C.M.R. 468 (Army Bd.Rev. 1957).

[27]*Id.* at 469-70.

[28]DA Pam 27-22; AF Pam 111-8 (August 1975). A copy of the relevant portion is attached in our Appendix.

used in the test was in proper working order."[29] It then stated: "The proponent must qualify his witness as an expert with respect to the subject-matter of the very test ***which he conducted***."[30] It then required that "the proponent must show that the person ***who conducted the test used the proper procedures***."[31] Finally, it noted:

> In some cases, the proponent will have to call one witness to establish the test results and another witness to interpret those results.[32]

The Pamphlet provided an evidentiary roadmap for Trial Counsel in a manner that satisfied the Confrontation Clause. The personnel who actually conducted the testing were the "experts" who testified. Or, as one Court observed: "the defendant enjoys a Sixth Amendment right to be confronted with the chemist ***in person***."[33] *Jacoby* came to the same conclusion fifty years ago.[34] The Pamphlet incorporated *Barber v. Page:*[35]

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.

Finally, this Court pre-*Roberts* rejected prosecution efforts to admit *forensic* laboratory reports holding that they were:

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[29] *Id.* at ¶ 26-17.

[30] *Id.* at ¶ 26-18 [emphasis added].

[31] *Id.* at ¶ 26-19 [emphasis added].

[32] *Id.* at ¶ 26-20.

[33] *Thomas v. United States,* 914 A.2d 1, 5 (DC Ct.App. 2006), *cert. denied* 552 U.S. 895 (2007).

[34] *See* text accompanying n. 15, *supra.*

[35] 390 U.S. 719, 725 (1968).

> A common kind of record that may be prepared in the course of business, but not be part of the operation of the business so as to qualify as a business entry, is that made for the purpose of litigation [citing *Palmer, supra*].[36]

That is still the law as *Melendez-Diaz* demonstrates.[37]

B. The Purpose of Confrontation.

> [T]he primary goal of the Confrontation Clause is to ensure the reliability of evidence.[38]

Crawford teaches that "reliability" for *confrontation* is not the same as reliability for hearsay purposes. *Amicus* respectfully submit that this provides a logical starting point.

> [T]he Sixth Amendment's Confrontation Clause places the emphasis on what the government *should* do: provide criminal defendants with the right to "be confronted with the witnesses against him."[39]

That was the issue in *Jacoby* – written interrogatories were submitted "over the accused's objection that she was thereby denied her constitutional right to be confronted by the witnesses against her."[40] The Confrontation Clause's purpose was to *prevent* a system of criminal prosecutions where witnesses submit written statements or reports, *e.g.,* a "litigation package,"[41] and made out of the

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[36]*United States v. Miller,* 49 C.M.R. 380, 382 (CMA 1974).

[37]129 S.Ct., at 2358. *See also, United States v. Murphy,* 23 M.J. 310, 311 (CMA 1987).

[38]Metzger, *Cheating the Constitution,* 59 Vand. L. Rev. 475, 501 (2005) [hereinafter "Metzger."]

[39]Smith, *Crawford's Aftershock: Aligning the Regulation of Nontestimonial Hearsay With the History and Purpose of the Confrontation Clause,* 60 Stanford L. Rev. 1497, 1511 (2008).

[40]29 C.M.R. at 245.

[41]*See, United States v. Carrott,* 25 M.J. 823, 824 (AF CMR 1988).

presence of the accused and fact-finder.

Carrott foreshadowed *Crawford* and the issues herein, *viz.*, an Air Force urinalysis case using a surrogate expert. In rejecting similar government arguments, *i.e.*, the "raw data" approach, the Court observed:

> Laboratory personnel assume a quasi-judicial role in determining whether test results have sufficient reliability to support prosecution in a given case. ... The preparation of a litigation package, presumably containing relevant test data as a minimum, *ipso facto* reflects regularity in the processing of the sample tested. Clearly the adoption of a broadly based presumption supported by the premises set forth would ease the prosecution burden considerably. ***However, this is not the direction in which the law is heading.***[42]

That is however, the direction the government is pushing this Court.

C. The Scope of Confrontation.

> The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.[43]
>
> *** * * * ***
>
> Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent as well. Serious deficiencies have been found in the forensic evidence used

[42] 25 M.J. at 825 [emphasis added].

[43] *Melendez-Diaz*, at 2534.

in criminal trials.[44]

This was emphasized in the National Academy of Science's book, *Strengthening Forensic Science in the United States: A Path Forward* (2009), which addressed many of those deficiencies.[45]

One scholar observed pre-*Crawford:* "the prosecution should not be permitted to gain an advantage by substituting hearsay evidence of the declarant's statement for her live testimony."[46] In drug cases the scope is more specific, *viz.*, "the primary purpose [of the testing] was to prove past ingestion of alcohol and drugs ... in furtherance of his criminal conviction."[47]

But as this Court noted in *Israel:* "The reliability of the testing process will always be relevant in drug test cases to establish the admissibility of the test results."[48] Thus the question becomes, why isn't the reliability of the *tester* relevant for confrontation purposes? The answer is that it is, and as *Crawford* states: "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."[49] *Amicus* suggest that this is the basic issue that the government

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[44]*Id.* at 2537.

[45]*See* pp. 134-36, regarding forensic drug testing.

[46]Friedman, *Confrontation: The Search For Basic Principles,* 86 Geo. L.J. 1011, 1012 (1998)[hereinafter "Friedman"]. *See also, Harcrow,* 66 M.J. at 155.

[47]Case Note, *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007), 121 Harv. L. Rev. 1937, 1941 (2008)[hereinafter "Case Note"]. The government relies heavily on *Washington* herein. *Certiorari* was denied at 129 S.Ct. 2856 (2009).

[48]60 M.J. at 490. *Israel* is also significant because the Brooks DTL was involved, to include numerous forensic "problems" and a calibration error, while referring to the reports as the "litigation package." Dr. Papa also testified.

[49]541 U.S. at 61.

misperceives and the courts below ignored.[50] "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[51]

D. "Reliability."

> The *Roberts* test allows a jury to hear evidence, ***untested by the adversary process***, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.[52]

The government is stuck in a *Roberts* rut. "Reliability" here is no longer an *evidentiary* concept – it is a *constitutional* command. The Military Judge erred by focusing on the "business record" exception as a confrontation component. Constitutionally, reliability must now be tested in a "particular manner: by testing in the crucible of cross-examination."[53]

> The expert's in-court testimony was, in essence, "this laboratory report written by someone else, which reports on the tests that were conducted, reliably informs me that the substance is cocaine, and therefore I can reliably inform you that it is cocaine."[54]

Dr. Papa's surrogate testimony was "basically parroting the

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[50] *See, e.g., United States v. Mejia,* 545 F.3d 179, 198 (2nd Cir. 2008) [expert's testimony may satisfy FRE 703, but still violate confrontation].

[51] *Crawford, supra* at 62.

[52] *Id.* [emphasis added]

[53] Case Note, *supra* at 1943. *Accord,* Metzger, *supra* at 506.

[54] Mnookin, *supra* at 824.

conclusion reached in the report itself."[55] But, cross-examining *him* is *not* confrontation under *Melendez-Diaz*:

> Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is "prone to distortion or manipulation," and the testimony at issue here, which is the "result of neutral, scientific testing."
>
> *** * * * ***
>
> This argument is little more than an invitation to return to our overruled decision in *Roberts*....[56]

1. "Business Record" Analysis.

As *Crawford* and its progeny hold, the approach used by the courts below is simply no longer the law. Labeling a lab report as a "business" or "official" record for evidentiary purposes does not eliminate its testimonial character for Confrontation Clause purposes. In *United States v. Oates,*[57] a pre-*Roberts* drug prosecution, laboratory reports were admitted via a surrogate expert. In an exhaustive opinion,[58] that Court observed:

> [D]espite the fact that an extra-judicial statement may satisfy the requirements of a recognized exception to the hearsay rule, the introduction of such a statement may in certain circumstances be barred because that introduction ... would violate the defendant's right to confrontation.[59]

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[55] *Id.*, at 825.

[56] 129 S.Ct. at 2536.

[57] 560 F.2d 45 (2nd Cir. 1977).

[58] It also examines in-depth the legislative history of FRE 803(6) and (8), and the Congressional efforts to avoid tension with the Confrontation Clause, something that MRE 803(6) does not do.

[59] 560 F.2d at 81.

Professor Metzger notes:

> The mere fortuity that these testimonial documents can be squeezed into some definition of a public or business record does not negate the defendant's constitutional right to confrontation ***if the statement is used to prove an essential element of the crime.***[60]

Or, "just because something is a business record does not mean that it is automatically non-testimonial."[61] *Melendez-Diaz* sets the standard – the laboratory analysts "certainly provided testimony *against* petitioner, ***proving one fact*** necessary for his conviction – that the substance he possessed was cocaine."[62]

2. *Magyari* Is Abrogated.

The government's continued reliance on *Magyari* is puzzling,[63] because it has clearly been abrogated. In *Magyari* (as here), "The Government argues that the lab reports are business records and therefore are by definition nontestimonial in nature...."[64] That position is erroneous.[65] One of the cases *Magyari* relied upon for its "non-testimonial" conclusion was *Commonwealth v. Verde*, 827 N.E.2d 701, 705-706 (Mass. 2005), [63 M.J. at 127]; (relying on

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[60]Metzger, *supra* at 509 [emphasis added].

[61]Note, *The Crawford Confusion Marches On: The Confrontation Clause and Hearsay Laboratory Drug Reports*, 73 Mo. L. Rev. 583, 598 (2008)[hereinafter "Crawford Confusion"].

[62]129 S.Ct. at 2533 [emphasis added]. Justice Scalia's dissent in *Maryland v. Craig*, 497 U.S. 836, 865 (1990), noted that "the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said." That is the situation regarding Dr. Papa below.

[63]*See* Government "Final Brief" previously filed herein.

[64]63 M.J. at 126.

[65]*See generally,* Froehlich, *The Impact of* Melendez-Diaz v. Massachusetts *on Admissibility of Forensic Test Results at Courts-Martial,* Army Lawyer (February 2010) 24, 31 [hereinafter "Froehlich"].

Roberts)[66] the case relied upon by the Massachusetts Appellate Court in *Melendez-Diaz*, and *overruled* by the Supreme Court. Furthermore, *Magyari's* continued reliance on *Roberts* and MRE 803(6), were rejected by *Melendez-Diaz.* Specifically, "the *Magyari* court's view that lab results of random urinalyses are admissible as nontestimonial business records no longer seems tenable."[67] Finally, *Magyari* failed to address *Palmer's* "prepared in anticipation of litigation" principle.

E. The "Testimonial" Tango.

Since *Crawford,* military courts have generally danced around the confrontation issues created by the procedural *methodology* used by military prosecutors in urinalysis cases. After *Palmer* but before *United States v. Murphy,*[68] Trial Counsel generally got the "litigation package" admitted as a business or official record under *Roberts.* *Murphy* required the prosecution as a *matter of proof* to utilize "[e]xpert testimony interpreting the [forensic] tests...."[69] But that did not involve *confrontation* – only the exigencies of proof.

United States v. Green,[70] added clarity but again was an *evidentiary* case, *i.e.,* requiring the military judge to be the

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[66] *Id.*

[67] *Id.* at 32.

[68] 23 M.J. 310 (CMA 1987).

[69] *Id.* at 312.

[70] 55 M.J. 76 (CAAF 2001).

"gatekeeper" as to the reliability of the expert testimony.[71] *Green* still fell under the penumbra of the *Roberts'* reliability approach, but had nothing to do with confrontation.

1. "Testimonial."

> [C]ourts should ask whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution.[72]

The Court clarified the definition of "testimonial" in *Davis.* Statements "are testimonial when ... the primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution."[73] *Davis* ratified Friedman's conclusion that a "statement is testimonial if it transmits information for use in litigation."[74] The complete litigation package does just that – transmit information from the BDTL "for use in litigation."

Thus the initial "testimonial" inquiry focuses on the *nature* of the evidence, *viz.,* information proving "past events potentially relevant" to prosecution. That was the sole purpose of the litigation package; proving that Blazier illegally used drugs. *Melendez-Diaz* confirmed this prong when it held that the analysts "provided testimony ... *proving one fact* necessary for his

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[71] *Id.* at 80.

[72] Friedman, *Grappling With the Meaning of "Testimonial,* 71 Brooklyn L. Rev. 241, 243 (2005)[hereinafter "Grappling"].

[73] 547 U.S. at 822.

[74] Grappling at 249.

conviction – that ... he possessed ... cocaine."[75]

2. Government Involvement.

The second prong in assessing whether evidence is testimonial is the involvement of the government in creating evidence.

> [T]he core idea of *Crawford* is that when the state procures evidence expected to be used as substantive evidence incriminating a criminal defendant, that evidence is testimonial.[76]

Mnookin goes on to conclude: "forensic science evidence produced for a specific case should be testimonial even if ... it may not accuse a specific person."[77] Thus even if the BDTL employees do not know the identity of the urine's source being tested, it is forensic evidence establishing a past fact (illegal drug use), to be used in a specific case.[78]

More recently Judge Shanes concluded: "*Crawford* teaches that government involvement is typically a key component to testimonial hearsay."[79] *Melendez-Diaz,* has now ratified these observations as government personnel and laboratories did the drug testing there and here.

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[75]129 S.Ct. at 2533. This was not a novel proposition, as the *Oates'* Court held: "here the [surrogate] chemist's report and worksheet ... were crucial. The purpose for which they were offered was to prove an essential element of the government's case." 560 F.2d at 83 [citations omitted].

[76]Mnookin at 831.

[77]*Id.* at 849.

[78]If the results are below the DoD cutoff level and reported as negative, it is irrelevant that they cannot identify the urine's source. The right of confrontation will not be triggered without a prosecution.

[79]Shanes, *Confronting Testimonial Hearsay: Understanding the New Confrontation Clause,* 40 Loy. U. Chi. L.J. 879, 892 (2009)[footnote omitted].

3. Offered to Prove An Element of the Crime.[80]

> The fact in question is that the substance found in the possession of Melendez-Diaz ... was, as the prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial.[81]

In discussing *Melendez-Diaz,* another commentator observed:

> [A]ny scientific report that contains a certification by an analyst that a scientific test was done properly, in accordance with accepted protocols and procedures, and that the results are accurate, may as a threshold matter constitute testimonial evidence under the Confrontation Clause.[82]

Judge Shanes notes: "*Davis* teaches that a statement must be examined by its ***content*** to determine whether it is testimonial."[83]

Furthermore, *Amicus* submit that confrontation will be denied when laboratory documentation and reports are used (without declarants) to establish testing methodology and equipment; error rates; or the tester's experience, education, work performance or other qualifications.[84]

While this Court in its original opinion concluded that the "cover memorandum" of the litigation package was testimonial, the decision respectfully does not go far enough to include the

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[80]*See also, Oates, supra* at 83.

[81]129 S.Ct. at 2532. *See also, United States v. Martinez-Rios,* 595 F.3d 581, 585-86 (5th Cir. 2010); and *State v. March,* 216 S.W.3d 663, 666 (Mo.) *cert. dismissed* 552 U.S. 945 (2007)["offered to prove an element of the crime charged...." cocaine]. For an analysis of *March*, *see* Crawford Confusion, *supra.*

[82]Gershman, *Confronting Scientific Reports Under Crawford v. Washington,* 29 Pace L. Rev. 479, 495 (2009).

[83]Shanes, *supra* at 892.

[84]Metzger, at 480.

remainder of the BDTL litigation package. That, with the possible exception of chain of custody documentation,[85] is just as "testimonial" as the cover memorandum and is being used to prove a past fact – Blazier's drug use.

F. Rejecting the "Raw Data" Illusion.

Data are facts and if used to establish a past event which constitutes an element of the offense, are testimonial. The drum that the government beats is the Fourth Circuit's *Washington,* decision (pre-*Melendez-Diaz*).[86] But, *Washington* flies in the face of the Confrontation Clause:

> [T]he court fashioned a "machine-generated" exception that enabled it to circumvent the constitutional right to confrontation and the evidentiary ban on hearsay in a single stroke.[87]

To claim that "raw data" is not testimonial ignores the obvious. Such data is produced by machines/instruments that are designed, built, calibrated, programmed and operated by humans, who in turn collect and interpret the data produced. The purpose of gathering the data, *i.e.,* forensic testing, was to *detect* the presence of drugs. Once that data is obtained it is measured for

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[85]*Amicus* offers this reservation as it does not appear that Blazier contested the chain of custody, and because of footnote 1, in *Melendez-Diaz,* 129 S.Ct. at 2532. Where, *e.g.,* there is an irregular or break in the chain-of-custody, those documents may become testimonial.

[86]While touted as a "raw data" case by the *Washington* majority and the government here, its facts demonstrate that the data was *not* "raw" and the moniker of "raw data" is erroneous. As footnote 3 of the decision states, "it was the machine, not the technicians, which concluded that the blood contained PCP and alcohol." 498 F.3d at 231. *Washington* is simply ***not*** a "raw data" case.

[87]Case Note, *supra* at 1940.

a quantitative value, and then compared against a data base of known substances. All of that requires human input.

The "raw data" in *Washington* was just the opposite, *viz.,* conclusory data, similar to a *Breathalyzer* printout. As the majority's opinion notes:

> The most the technicians could have said was that the ***printed data*** from their chromatograph machines showed that the blood contained PCP and alcohol. The machine printout is ***the only source*** of the statement...."[88]

That is *not* "raw data" logically, legally or scientifically. It is the end result, *viz.,* proof of a past fact [that on the date /time the blood was drawn] the blood contained alcohol and PCP at a certain level as determined by a government "machine," operated by a government employee. In other words, *testimonial.*

We suggest that the "raw data" argument[89] grafts an exception to the Confrontation Clause that simply is not there, but also *sub silentio* amounts to a return to the *Roberts'* "reliability" approach.

The "raw data" argument is a regurgitation of the "neutral fact" argument of years past. Judge Perry of this Court commented:

> The establishment of the identity of a prohibited substance in a narcotics prosecution is not a "neutral fact." It is an

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[88]498 F.3d at 231.

[89]Aside from *Washington's* "raw data" mischaracterization, the Court returned to a *Roberts'* reliability assessment when it held that the reliability of the machine, calibration, etc., was simply an issue of "authentication" under FRE 901(b)(9)[498 F.3d at 231]. That is what *Crawford* said could not be done: "Dispensing with confrontation because testimony is obviously reliable...." *Crawford, supra* at 62.

> essential part of the Government's burden of proof. ... It was the defendant's "fundamental" right to have the person who performed the analysis testify before the court so that he or she could be sworn and subjected to cross-examination, the scrutiny of the court, and confrontation by the accused.[90]

Furthermore, the worksheets, graphs, etc., herein are more than "raw data," they are "reports of factual findings...."[91] *Davis* indirectly addressed the "raw data" approach when it held, "This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial."[92]

Melendez-Diaz ended the "raw data" discourse:

> Respondent first argues that the analysts are not subject to confrontation because they are not "accusatory" witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence.[93]

The test is simple: was the data generated "under circumstances which would lead an objective witness reasonably to believe that the statement [data] would be available for use at a later trial."[94] Everything about the DoD and Air Force's drug testing program beginning with their stringent chain-of-custody and GC/MS

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[90]*United States v. Strangstalian,* 7 M.J. 225, 244 (CMA 1979)(Perry, J., concurring in part, dissenting in part). *See also,* Metzger, *supra* at 504. *Accord,* Mnookin, *supra* at 831; and Imwinkelreid, *"This Is Like Déjà Vu All Over Again:" The Third Constitutional Attack on the Admissibility of Police Laboratory Reports in Criminal Cases,* 39 N.M. L. Rev. 303 (2008).

[91]*Oates, supra* at 67.

[92]547 U.S. at 822, n.1.

[93]129 S.Ct. at 2533. *See also, id.,* at 2536 rejecting "neutral scientific testing" argument.

[94]*Id.* at 2532.

confirmation requirements, is geared for one thing: "use at a later trial."

G. Confronting Fraud, Incompetence and Bad Practices.

> Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent as well. Serious deficiencies have been found in the forensic evidence used in criminal trials.[95]

Justice Scalia states the reasons for face-to-face confrontation. Using surrogate experts not only precludes cross-examining the analyst, but also defeats the core purpose of confrontation in the area of scientific evidence – exposing bad or fraudulent science or techniques. This is not an abstract hypothetical. Rather, it is the reality of forensic science that there are charlatans involved.[96] While the government hopes to hide behind professional surrogates, *Amicus* suggest that this Court end this process.[97] To understand the practical importance of confrontation, we ask this Court to consider the following.

> [G]overnment forensic laboratories are not immune from problems of dishonesty, sloppiness, poor training, bias, unsound methodology, and scientific or other error.[98]

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[95] *Melendez-Diaz, supra* at 2537.

[96] *See, e.g., United States v. Figueroa,* 55 M.J. 525, 527 (AF CCA 2001), where a BDTL "technician" "consistently and regularly violated standard operating procedures and accepted forensic practices regarding forensic documents, and that, while the studied test results were analytically sound, they had been 'forensically compromised.'"

[97] We do not suggest that surrogates cannot be used in *bona fide* evidentiary situations where confrontation is not an issue. And, absent death, witnesses can be deposed world-wide. *Cf.*, Article 49, UCMJ.

[98] *Thomas,* 914 A.2d at 15. A footnote to the above quotation cites numerous specific examples.

In examining the "myth of reliability" courts tend to bestow on scientific evidence, Professor Metzger observes:

> Possible sources of error abound. The scientific methodology may be unsound. The testing equipment may malfunction. The testing specimen may be contaminated, either deliberately or inadvertently. The chain of custody may be broken, so that substances are linked to the wrong defendants. The tester may err in conducting the forensic examination or in interpreting the test results. Clerical errors may occur in the transcription and recording of forensic test results, and tester dishonesty may produce deliberate misrepresentation of test results.[99]

She goes on to state:

> Moreover, laboratory error and operator error exist even with the most well-established or unassailable scientific method. Many courts naïvely assume that laboratory workers are professionals with a great deal of training and little motive to falsify their reports. To the contrary, forensic accuracy is limited by "the limitations of the technician." [footnotes omitted].[100]

1. Fraud.

Pierce v. Gilchrist,[101] addresses a forensic chemist at a police crime lab who "fabricated inculpatory evidence and disregarded exculpatory evidence...."[102] Professor Metzger observes:

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[99]Metzger, *supra* at 492.

[100]*Id.* at 494. *See also, id.* at 495-96, cataloguing numerous forensic lab "problems." *See generally,* Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs,* 86 N.C. L. Rev. 163 (2007).

[101]359 F.3d 1279, 1281 (10th Cir. 2004)[civil suit for wrongful imprisonment].

[102]*Id.* at 1283-84, describes a litany of other problems with that chemist.

> The renowned Innocence Project of Cardozo Law School has demonstrated that forensic fraud, forensic error, and "bad science" were significant factors in the first seventy wrongful convictions that were reversed when the Innocence Project used DNA to exonerate those innocent persons. [footnote omitted].[103]

That is the problem with the government's "surrogate" expert concept. It shields from confrontation and the fact-finder "the limitations of the technician."[104]

2. Altering Data.

How does one "confront" a piece of paper with altered (changed/forged/manipulated/mistaken) data on it? This is not a remote BDTL problem. In *Jackson, supra,* a BDTL employee "mistakenly identified a specimen as positive," when in fact it was negative.[105] Dr. Papa was again their surrogate expert. Yet, he admitted that there had been **15** prior incidents at the BDTL where the "Chief of the Confirmation section ... had altered data regarding the testing process."[106] He also admitted that another BDTL employee had been "decertified." While *Jackson* was a *Brady* case, this Court noted:

> [T]he [undisclosed] report provided evidence of potential errors in the testing process that was more compelling than the other information used ... in cross-examination of Dr. Papa.[107]

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[103]Metzger at 491-92.

[104]*Id.* at 494.

[105]59 M.J. at 332.

[106]*Id.* at 333.

[107]*Id.* at 335.

Professor Metzger states: "state crime laboratory workers can, and do, engage in long-term, systemic and deliberate falsification of evidence in criminal cases."[108] She cites the example of the West Virginia State Crime Laboratory where a serologist, not only altered data, but committed virtually every kind of forensic fraud imaginable – and then went to another crime lab.[109]

3. DNA.

The military is not exempt from forensic fraud. In *United States v. Luke,*[110] this Court dealt with DNA problems and altered documentation at the Army's Criminal Investigation Laboratory [USACIL].[111] *See also, Mitchell v. Gibson,*[112] involving fraudulent forensic DNA testimony by a government expert.

One commentator concluded:

> [DNA analysis] provides no affirmation that the DNA in question has been adequately gathered, examined, and maintained, nor whether testimony regarding DNA will be truthful or accurate. DNA's reputation for scientific precision is in fact unwarranted.[113]

Professor DiFonzo, looking at the F.B.I.'s DNA lab, noted: "A

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[108]Metzger at 499. For a more recent example, *see,* NY Inspector General, *Report of Investigation of the Trace Evidence Section of the New York State Police Forensic Investigation Center* (December 2009)[falsification of documents]. Available at: http://www.ig.state.ny.us/reports/reports.html [scroll down to October-December 2009; accessed 5 May 2010].

[109]*In re W.Va. State Crime Laboratory,* 438 S.E.2d 501, 503-04 (W.Va. 1993).

[110]63 M.J. 60 (CAAF 2006), *further review,* 64 M.J. 192-94 (CAAF 2006).

[111]*See also, United States v. Carlson,* 67 M.J. 693 (N-M CCA 2009), *rev. denied* (CAAF 2010)[unpub][same USACIL DNA examiner issues].

[112]262 F.3d 1036, 1044 (10th Cir. 2001)[*habeas corpus* granted].

[113]DiFonzo, *The Crimes of Crime Labs,* 34 Hofstra L. Rev. 1, 2 (2005) [hereinafter "DiFonzo"].

technician failed to follow proper procedures for two years, omitting quality-control checks designed to prevent foreign material from contaminating lab samples."[114]

4. Data Interpretation.

One of the issues not addressed by either *Washington, supra,* nor the government in advocating its flawed "raw data" premise is that the technician could negligently or intentionally misinterpret evidence. As noted in the West Virginia case, the serologist "consistently interpreted marginal or ***nonexistent*** scientific evidence as inculpatory."[115] Absent confrontation of the data "creator," an accused is denied his right of confrontation.

5. Perjury.

Ragland v. Kentucky,[116] involved a F.B.I. forensic scientist: "During cross-examination at trial, [she] admitted that her testimony at the *Daubert* hearing was false...."[117] The F.B.I. employed another lying forensic analyst:

> In May 2004, FBI analyst [J.B.] pleaded guilty to a criminal charge of making false statements regarding her failure to follow protocols in approximately 100 DNA analyses.[118]

See also the many cases of forensic chemist Joyce Gilchrist,[119] and

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[114] *Id.* at 5.

[115] 438 S.E.2d at 514 [emphasis added].

[116] 191 S.W.3d 569, 580 (KY, 2006).

[117] She was subsequently indicted for "false swearing" and later plead guilty. *Id.* at 581.

[118] DiFonzo, at 5-6.

[119] *See, e.g., Bryson v. Gonzales,* 534 F.3d 1282, 1283-84 (10th Cir. 2008); and *Pierce v. Gilchrist, supra.*

forensic serologist, Fred Zain.[120] Regarding Mr. Zain, the West Virginia Supreme Court noted that he had a "long history of falsifying evidence in criminal prosecutions."[121]

6. Work Sheets/Lab Notes.

The West Virginia Court noted Zain "had falsely reported results on worksheets that could not be supported by data on the laboratory notes...."[122] Absent the opportunity to confront and cross-examine the analysts, not only was the Appellant denied his right of confrontation, but cross-examination of the surrogate was a futile adventure.

7. Bad Scientific/Laboratory Practices.

One of the issues contributing to the reversal in *Ragland, supra,* was the fact that the F.B.I. forensic scientist used unverifiable techniques.[123] While Dr. Papa was cross-examined as an "expert" below, the question must revert back to the inability to confront those doing the actual testing.

In *Israel, supra,* this Court acknowledged a "calibration error" at the BDTL,[124] a basic component of most forensic science testing. As Professor DiFonzo further notes, DNA test results were contaminated or misinterpreted in St. Paul, MN; Seattle, WA; and at

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[120]*See, e.g., State v. Zain,* 538 S.E.2d 748, 750 *et seq.* (W.Va. 1999), *cert. denied* 529 U.S. 1042 (2000); and *Ex Parte Davis,* 957 S.W.2d 9, 13 (Tx.Crim.App. 1997)[perjured testimony], *cert. denied,* 523 U.S. 1023 (1998).

[121]438 S.E.2d 501, 503.

[122]*Id.* at 513.

[123]191 S.W.3d at 574 *et seq.*

[124]60 M.J. at 489. *See also,* DiFonzo, *supra* at 76.

the Virginia Division of Forensic Science.[125] Finally in a recent article, the authors demonstrate both the pervasiveness of the problem and its devastating impact:

> This study[126] found that in the bulk of these trials of innocent defendants – 82 cases or 60% – forensic analysts called by the prosecution provided invalid testimony at trial – that is, testimony with conclusions misstating empirical data or wholly unsupported by empirical data.[127]

Confrontation may not be a perfect panacea for exposing forensic fraud or incompetence, but actual confrontation (versus a surrogate) will, as Justice Scalia suggests, "weed out" fraudulent and incompetent analysts.[128]

II. THE RESOLUTION OF THE CONFRONTATION ISSUE REQUIRES THAT THIS COURT ADDRESS THE "PREPARED IN ANTICIPATION OF LITIGATION" COROLLARY.

A. Anticipation.

Palmer rejected an effort to get a railroad accident report into evidence as a business record. The Court concluded that the reports were "calculated for use essentially in the court, not in the business. ***Their primary utility is in litigating***, not in

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[125]DiFonzo, *supra* at 78. *See also,* the NY IG Report discussed at n. 108.

[126]Conducted by the authors.

[127]Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions,* 95 Va. L. Rev. 1, 2 (2009).

[128]*See also,* NACDL, *Principles and Recommendations to Strengthen Forensic Evidence and Its Presentation in the Courtroom,* (2010), available at: http://www.nacdl.org/sl_docs.nsf/issues/crimelab_resources/$FILE/NACDLStrengtheningForensicAustin.pdf [last accessed: 6 May 2010].

railroading."[129] In *Palmer,* the "business" was railroading, in *Blazier,* it is to "fly, fight and win...."[130]

Military law encompasses *Palmer's* restriction. The MCM (1951), ¶ 144(d), at 268 stated:

> Neither the official record nor the business entry exception to the hearsay rule renders admissible in evidence writings or records made principally with a view to prosecution, or other disciplinary or legal action, as a record of ... alleged unlawful or improper conduct.[131]

Professor Friedman expresses the rationale in confrontation terms:

> [T]he prosecution cannot present as evidence against a criminal defendant a statement made with the intention that it be so used unless the accused has had an opportunity to examine the witness.[132]

In *United States v. Miller,*[133] this Court held a drug case's laboratory report inadmissible because it was "made for the purpose of litigation."[134]

The Court in *United States v. Strangstalian,*[135] retreated to a pure "reliability" test over a vigorous dissent by Judge Perry, who

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[129]318 U.S. at 114 [emphasis added].

[130]*See* footnote 3, *supra.*

[131]*See also, Legal and Legislative Basis: Manual for Courts-Martial United States* (1951), at 230, citing *Palmer.*

[132]Friedman at 1043.

[133]49 C.M.R. 380 (CMA 1974).

[134]*Id.* at 382, citing *Palmer, supra.*

[135]7 M.J. 225 (CMA 1979).

contended that *Palmer* controlled.[136] But in *Harcrow, supra,* Judge Ryan observed: "evidence is not admissible as a business record ***if it is made in anticipation of litigation***."[137]

Professor Metzger explains:

> [I]t is difficult to imagine statements that are more paradigmatically testimonial than forensic certificates by police laboratory workers. ... Any objective (or marginally competent) crime lab employee knows that the result of forensic analysis will be available for use at a later trial.[138]

Blazier's litigation package was testimonial and was prepared "in anticipation of litigation" by BDTL employees *at the request* of the Legal Office prosecuting him. *Melendez-Diaz* removes all doubt as to the ***inadmissibility*** of those documents absent confrontation: "Our decision in *Palmer v. Hoffman* ... made that clear."[139]

B. The M.R.E. 803(6), "Problem."

Part of the post-*Crawford* military urinalysis litigation disarray has non-*Crawford* origins. The *Military Rules of Evidence* were promulgated in 1980,[140] a product of the Joint Service Committee on Military Justice Working Group [MJWG].[141] They were cognizant of Article 36(a), UCMJ's "consistency" requirement. Then Major Lederer noted that he was directed by his superior to draft

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[136]*Id.* at 238 (Perry, J., concurring in part, dissenting in part).

[137]66 M.J. at 161 (Ryan, J., concurring)[emphasis added].

[138]Metzger at 504 [footnote omitted].

[139]*Melendez-Diaz,* at 2538.

[140]Exec.Order 12,198 (12 March 1980).

[141]Lederer, *The Military Rules of Evidence: Origins and Judicial Interpretation,* 130 Mil. L. Rev. 5, 11 (1990)[Hereinafter "Lederer].

"the laboratory exceptions."[142] The MJWG representative from this Court *objected* "to modifying Rule[] 803 ... to expand them to laboratory reports and chain of custody receipts...."[143] Professor Lederer explains the end result:

> Drug prosecutions were (and are) a major component of military criminal legal practice. At the time the Military Rules of Evidence were written, a fair degree of litigation time had been devoted to the admissibility of forensic laboratory reports in courts-martial. ***Given the confrontation clause, there was strong reason to doubt that these records had the type of reliability that justified their admission.*** As a practical matter, however, the abolition of these reports was considered unacceptable by the services, and express exceptions for laboratory reports and chains of custody were incorporated into Rules 803(6) and (8)....[144]

However, Congress was quite aware of the *potential* confrontation problems FRE 803(6) could cause in *criminal* cases. That was comprehensively covered by the Court in *Oates.*[145]

As the Record shows both courts below relied upon MRE 803(6).[146] But, from a historical perspective it is clear that MRE 803(6)'s "forensic laboratory reports" and "chain of custody" exceptions were promulgated precisely *because* of anticipated litigation simply for prosecutorial expediency. Admission of the litigation package documentation pursuant to MRE 803(6), violated

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[142] *Id.* at 24, n.70.

[143] *Id.* at 13, n.32.

[144] *Id.*, at 24 [Emphasis added].

[145] 560 F.2d at 68-80. *See also,* 56 F.R.D. 183, 319 (1972).

[146] 68 M.J. at 441.

Appellant's right to Confrontation.

III. OPINIONS UNDER M.R.E. 703, CANNOT SATISFY THE REQUIREMENTS OF THE CONFRONTATION CLAUSE, WHEN THE UNDERLYING FACTS OR DATA COME FROM A NONTESTIFYING WITNESS.

MRE 703 is a rule of *evidentiary* expediency,[147] which must still comply with the Confrontation Clause. We begin with the premise that Dr. Papa's testimony concerning the "cover memorandum" violated Appellant's confrontation right. *Amicus* also note that if that testimony constituted Constitutional error, his own *further testimony* relying only on an evidentiary reliability rule [MRE 703], cannot logically, legally or constitutionally make his "unconstitutional" testimony harmless beyond a reasonable doubt.

The confrontation issue under MRE 703 begins with MRE 702, which *inter alia* mandates a *judicial finding* that "(3) the witness has applied the principles and methods *reliably* to the facts of the case." [emphasis added]. With respect to Dr. Papa's testimony, he could not – without violating the Confrontation Clause – properly testify whether or not the absent laboratory analysts "applied the principles and methods reliably" in their underlying testing and reviews. Not being present, the absent analysts could not be confronted about ***their*** forensic drug testing. The government's position is based upon the premise that the surrogate expert, Dr.

[147] *See* 56 F.R.D. 183, 283 (1972).

Papa, determined that the information was sufficiently reliable;[148] *Roberts* in disguise. But as *Crawford* held, the Sixth Amendment commands "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[149]

Furthermore, the government conflates evidentiary issues with confrontation issues indiscriminately. The proper inquiry is this:

> In criminal cases, a court's inquiry under Rule 703 must go beyond finding that hearsay relied on by an expert meets these standards. ***An expert's testimony that was based entirely on hearsay reports, while it might satisfy Rule 703, would nevertheless violate a defendant's constitutional right to confront adverse witnesses.*** The Government could not, for example, simply produce a witness who did nothing but summarize out-of-court statements made by others. [emphasis added; internal footnote omitted][150]

The underlying question is, whether in a criminal proceeding, the Confrontation Clause supercedes MRE 703? *Amicus* suggest that MRE 703, constitutionally must incorporate the right of confrontation. Congress (and as delegated to the President) cannot ignore or neutralize the Confrontation Clause by a mere rule of evidence. To suggest that MRE 703 can obviate confrontation simply because testimonial hearsay is "of a type reasonably relied upon by

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[148]*See, e.g., United States v. Williams,* 447 F.2d 1285, 1291 (5th Cir. 1971), *cert. denied* 405 U.S. 954 (1972).

[149]*Crawford* at 61.

[150]*Lawson, supra,* at 302; citing *U.S. v. Williams,* 431 F.2d 1168, 1173-74 (5th Cir. 1970), affirmed *en banc*, 447 F.2d 1285 (5th Cir. 1971), *cert. denied,* 405 U.S. 954 (1972). *Accord, United States v. Mejia, supra*, at 198.

experts," is, as Justice Scalia suggested in *Melendez-Diaz,* "little more than an invitation to return to our overruled decision in *Roberts*...."[151]

Melendez-Diaz answers the question:

> Whether or not they qualify as business or official records, the analysts' statements here-prepared specifically for use at petitioner's trial-were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.[152]

Furthermore, utilization of the litigation package information by Dr. Papa under MRE 703, eviscerates the "made in anticipation of litigation" prohibition and will become "a mechanism by which savvy lawyers funnel otherwise inadmissible hearsay evidence to the jury."[153]

Mnookin provides guidance in answering the second Specified Issue:

> [I]f the basis for the expert's testimony is "testimonial," then ***substituted cross-examination*** cannot be constitutionally adequate.[154]

Allowing a surrogate to serve as a conduit for the absent analysts' testimony creates an additional confrontation issue, *viz.,* "there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[155] But, that

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[151]129 S.Ct. at 2536.

[152]*Id.* at 2540.

[153]Mnookin at 802.

[154]*Id.* at 832-33.

[155]*Melendez-Diaz* at 2534.

is precisely what the absent analysts become if MRE 703 thwarts their confrontation.

Finally, in the context of the drug charges against Appellant, the prosecution's "case" was essentially Dr. Papa and the BDTL paperwork. Remove that because of the Confrontation Clause violations and the error cannot be harmless beyond a reasonable doubt – it *was* what convicted Appellant.[156]

CONCLUSION

Military confrontation jurisprudence got side-tracked by *Roberts*. This Court should consistent with *Melendez-Diaz*, reaffirm the *Ford, supra,* approach which satisfies confrontation principles. The sky will not fall on the DoD urinalysis program as a simple amendment to the MCM could adopt the "notice and demand" process approved in *Melendez-Diaz*.[157] Finally, allowing surrogate testimony under MRE 703 is inconsistent with the core principle of confrontation. [7993]

DATED: 13 May 2010 Respectfully submitted,

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[156] *See, United States v. Tirado-Tirado,* 563 F.3d 117, 126 (5th Cir. 2009).

[157] 129 S.Ct. at 2541.

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CERTIFICATE OF FILING AND SERVICE

I, DONALD G. REHKOPF, JR., Esq., hereby certify that an Original and seven [7] copies of the foregoing pleading was sent to the Clerk of Court, 450 E Street, Northwest, Washington, DC 20442-0001 via FedEx, and email[158] to:

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This 13th day of May, 2010.

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[158]Counsel has consent from both Appellant's and Appellee's counsel to serve them electronically.

RULE 24 CERTIFICATIONS

1. This Pleading does ***not*** comply with the type-volume limitations of Rules 24(d) and 26(d) [7,000 words] because it contains **7,993** words, as counted by WordPerfect, Version 11's "Word Count" function;

2. This Pleading complies with the typeface and type style requirements of Rule 37 because it was typed in WordPerfect Version 11's ***Courier New***, monospaced typeface, using 12-point font.

DATED: 13 May 2010

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Comparison of FRE 803(6) and MRE 803(6)

FRE 803(6)

(6) *Records of regularly conducted activity.* — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

MRE 803(6)

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 902(11) or any other statute permitting certification in a criminal proceeding in a court of the United States, unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. ***Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.*** [emphasis added].