If It Walks Like a Duck, Talks Like a Duck, and Looks Like a Duck, then it's Probably Testimonial

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Introduction

The three most prominent current issues in Sixth Amendment jurisprudence in the military are determining whether a hearsay statement is testimonial or nontestimonial, whether lab reports should be considered testimonial, and whether nontestimonial statements implicate the Confrontation Clause at all. The Court of Appeals for the Armed Forces (CAAF) decided cases addressing the first two issues last term, and the Supreme Court clarified the third. This article addresses each issue in turn, after briefly describing the Sixth Amendment background.

Background

The Sixth Amendment Confrontation Clause landscape changed abruptly in 2004 with the Supreme Court opinion in *Crawford v. Washington*.[1] Prior to *Crawford*, the test for admitting a hearsay statement satisfying the Confrontation Clause was provided by *Ohio v. Roberts*.[2] Under *Roberts*, a hearsay statement could be admitted if the proponent could show that it possessed adequate indicia of reliability.[3] Indicia of reliability could be shown in one of two ways. First, if the statement fit within a firmly rooted hearsay exception, it would satisfy the Confrontation Clause.[4] Second, if it didn't fit within a firmly rooted hearsay exception, it could still satisfy the Confrontation Clause and be admitted if it possessed particularized guarantees of trustworthiness.[5] Particularized guarantees of trustworthiness could be shown using a nonexclusive list of factors such as mental state or motive of the declarant, consistent repetition, or use of inappropriate terminology.[6] Most importantly, when analyzing particularized guarantees of trustworthiness, the proponent was limited to considering only the circumstances surrounding the making of the statement, i.e. extrinsic evidence was not permitted.[7]

Crawford divides hearsay statements into two categories, testimonial and nontestimonial.[8] Testimonial statements can only be admitted if the declarant is unavailable and there has been a prior opportunity for cross examination.[9] Nontestimonial hearsay statements by contrast can be admitted if they meet the requirements of the rules of evidence.[10] The critical issue is determining whether a statement is testimonial or nontestimonial; however, the Supreme Court has never provided a comprehensive definition of these terms.[11] In *Crawford* itself the Court provided some clues, describing three types of core testimonial statements: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3)

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[1] 541 U.S. 36 (2004).

[2] 448 U.S. 56 (1980).

[3] *Id.* at 66.

[4] *Id.*

[5] *Id.*

[6] Idaho v. Wright, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); United States v. Ureta, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

[7] *Wright*, 497 U.S. at 819–24. This can be confusing, since this limit on extrinsic evidence only applies to the Confrontation Clause analysis. Once a statement meets the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. *See Ureta*, 44 M.J. 290.

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

[9] *Id.* at 68.

[10] The issue of whether the Confrontation Clause applies to nontestimonial statements at all in light of *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) is discussed later in this article.

[11] The Court specifically states in *Crawford*, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68.

statements made under circumstances that would cause a reasonable witness to believe they could be used later at trial.[12] The Court also made it clear that statements made to law enforcement would likely be considered testimonial, whereas statements made to casual acquaintances would likely be considered nontestimonial.[13]

Approximately two years after *Crawford*, the Court decided *Davis v. Washington*, where it provided additional guidance for determining whether a statement is testimonial or nontestimonial, at least in the context of police interrogations.[14] The Court in *Davis* held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[15]

Davis and *Crawford* are the only Supreme Court cases that make any effort to explain the meaning of the terms testimonial and nontestimonial, therefore lower courts have spent considerable time and energy analyzing those two cases and attempting to develop workable definitions.

Testimonial v. Nontestimonial

This year there were three significant military cases decided on the issue of determining whether a statement is testimonial or nontestimonial. The most significant was *United States v. Rankin*, previewed in last year's symposium article, where the CAAF laid out three factors to consider when deciding if a statement is testimonial.[16] The CAAF then used this new methodology in two subsequent cases to determine that a statement made to a sexual assault nurse examiner (SANE) was testimonial in *United States v. Gardinier*,[17] and that a bank affidavit was nontestimonial in *United States v. Foerster*.[18]

United States v. Rankin[19]

Hospital Corpsman Third Class Rankin began a period of unauthorized absence in 1993, and did not return until more than seven years later.[20] He was convicted of violating Article 86, UCMJ,[21] and sentenced to ninety-one days confinement and a bad conduct discharge (BCD).[22] The government's case consisted of several personnel records documenting appellant's absence, and a single live witness who testified for the purpose of laying the foundation for admission of the documents.[23] There was no witness testimony by anyone with first-hand knowledge of the circumstances surrounding appellant's unauthorized absence.[24] The four documents at issue in this case were: Prosecution Exhibit (PE) 5, a letter from the command to the appellant's mother, notifying her that he was an unauthorized absentee; PE 6, a computer generated document known as a "page 6," that showed the date the unauthorized absence began; PE 10, a copy of a naval message informing recipients that appellant had been apprehended; and PE 11, a copy of a notice for civilian law enforcement to the effect that appellant was a deserter and asking for assistance in apprehending him.[25]

The issue was whether the documents admitted against appellant at trial, over defense objection, to prove the unauthorized absence were testimonial hearsay under *Crawford v. Washington*.[26] The CAAF affirmed the lower court, finding that three of the four documents introduced by the government (PEs 5, 6, and 10) were nontestimonial, and that

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[12] *Id.* at 51–52.

[13] *Id.* at 53.

[14] Davis v. Washington, 547 U.S. 813 (2006).

[15] *Id.* at 822.

[16] 64 M.J. 348 (2007); Major Nicholas F. Lancaster, *The Framers' Sixth Amendment Prescriptions: Cross-Examination and Counsel of Choice*, ARMY LAW., June 2007, at 20, 28.

[17] 65 M.J. 60 (2007).

[18] 65 M.J. 120 (2007).

[19] *Rankin*, 64 M.J. 348. For a discussion of the Navy-Marine Corps Court of Criminal Appeals opinion in this case, see Lancaster, *supra* note 16, at 24.

although the fourth (PE 11) may have qualified as testimonial, the information it contained was cumulative with information in the other three.[27]

The court began its analysis by reviewing Confrontation Clause jurisprudence after *Crawford*, describing the Supreme Court's division of hearsay statements into two categories, testimonial and nontestimonial, and holding that testimonial statements may not be admitted unless the declarant is both unavailable and there has been a prior opportunity for cross examination.[28] The CAAF then reviewed two of its own Confrontation cases post-*Crawford*, *United States v. Sheurer*,[29] and *United States v. Magyari*.[30] In *Sheurer* the court reasoned that statements made unwittingly to a co-worker were nontestimonial.[31] In *Magyari*, a random urinalysis case, the court determined that the lab report was a nontestimonial business record.[32] The CAAF then reviewed the Supreme Court's opinion in *Davis v. Washington*, which said a statement was nontestimonial when made for the primary purpose of responding to an ongoing emergency rather than for the primary purpose of producing evidence with an eye toward trial.[33] Lastly, the CAAF cites a few federal immigration cases that stand for the proposition that documents simply containing routine unambiguous factual matters and that are not prepared in anticipation of trial, are nontestimonial.[34]

After this background analysis, the CAAF identified three questions relevant in distinguishing between testimonial and nontestimonial hearsay:

> First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?[35]

Applying the three questions to the documents at issue in *Rankin*, the court reasoned that PEs 5, 6, and 10 were not created for the primary purpose of trial.[36] Prosecution Exhibit 5 simply notified appellant's parent that he was AWOL,[37] PE 6 attempted to account for appellant's whereabouts to his unit,[38] and PE 10 was a message to various administrative agencies interested in appellant's transition back to military control.[39] However, PE 11 is similar to an arrest warrant, and therefore arguably has the primary purpose of bringing appellant to trial.[40] Even if PE 11 were considered testimonial, it did not

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[20] *Rankin*, 64 M.J. at 350.

[21] UCMJ art. 86 (2008).

[22] *Rankin*, 64 M.J. at 350.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id* at 353.

[28] *Id.* at 351.

[29] 62 M.J. 100 (2005).

[30] 63 M.J. 123 (2006).

[31] *Scheurer*, 62 M.J. at 105.

[32] *Magyari*, 63 M.J. at 124.

[33] Davis v. Washington, 547 U.S. 813 (2006).

[34] United States v. Rankin, 64 M.J. 348, 352 (2007) (citing United States v. Bahena-Cardenas, 411 F.3d 1067, 1074 (9th Cir. 2005); United States v. Garcia, 452 F.3d 36, 41 (1st Cir. 2006); United States v. Valdez-Maltos, 443 F.3d 910, 911 (5th Cir. 2006)).

[35] *Rankin*, 64 M.J. at 352.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 353.

contain any information not found in other documents properly admitted, therefore its admission was harmless beyond a reasonable doubt.[41]

After using the three questions to find that three of the four documents were nontestimonial, the court went on to conduct the Confrontation analysis from *Ohio v. Roberts*,[42] to conclude that the documents were properly admitted under the business records exception to the hearsay rules.[43] This opinion is important for Judge Advocates because it provides the CAAF's framework for analyzing whether a statement is testimonial or nontestimonial. It is also the last case where CAAF affirmatively requires the *Roberts* analysis for nontestimonial hearsay. Shortly after laying out the three factors in *Rankin*, the CAAF used its framework to decide *United States v. Gardinier*.[44]

United States v. Gardinier[45]

The Sixth Amendment issue in *Gardinier* was whether statements a child sex abuse victim made to a SANE were hearsay testimonial under *Crawford*.[46] The CAAF held the child's statements to the SANE were testimonial hearsay and their admission into evidence at the court-martial was error.[47]

Appellant was convicted of indecent acts and indecent liberties with a child under age sixteen and the convening authority approved the sentence to a BCD, three years confinement, and reduction to E-1.[48] The victim was appellant's five-year-old daughter, KG.[49] The day KG reported the acts, she received a medical exam.[50] She was interviewed a couple of days later by a detective and a social worker, and then by a SANE in a second interview.[51] The military judge admitted the "forensic medical form" completed by the SANE and also allowed her to testify about what KG had told her during the interview.[52]

The CAAF used the three factors previously identified in its opinion in *United States v. Rankin*, for distinguishing between testimonial and nontestimonial hearsay to analyze the statements KG made to the SANE.[53] The three factors include: (1) was the statement 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 statement the production of evidence with an eye toward trial?[54] Taking the first and third factors together, the CAAF reasoned that the statements were made in response to government questioning designed to produce evidence for trial.[55] The SANE testified at trial that she conducts examinations for treatment, however, the form itself is called a "forensic" medical examination form.[56] She also asked questions beyond what might be necessary for mere treatment, including questions about what KG had told the police investigators.[57] In addition, the examination was arranged

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[41] *Id.*

[42] 448 U.S. 56 (1980).

[43] *Rankin*, 64 M.J. at 353.

[44] 65 M.J. 60 (2007).

[45] *Id.* The Sixth Amendment issue in the ACCA opinion in this case focused on the military judge's findings supporting a ruling that the child victim was unavailable to testify at trial. *See* United States v. Gardinier, 63 M.J. 531 (Army Ct. Crim. App. 2006).

[46] *Gardinier*, 65 M.J. at 64.

[47] *Id.*

[48] *Id.* at 61.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 62.

[52] *Id.*

[53] *Id.* at 65–66.

[54] United States v. Rankin, 64 M.J. 348, 352 (2007).

[55] *Gardinier*, 65 M.J. at 65–66.

[56] *Id.* at 66.

[57] *Id.*

and paid for by the local sheriff's department.[58] The CAAF determined that the totality of the circumstances indicated the statements made to the SANE were testimonial.[59]

After using its *Rankin* factors to analyze the testimony of the SANE in *Gardinier* and finding it to be testimonial,[60] the CAAF used the same factors to find an affidavit nontestimonial in *United States v. Foerster*.[61]

United States v. Foerster[62]

Sergeant (SGT) Porter was deployed when he discovered somebody was using his identity to cash checks in his name.[63] When he returned to home station he went to the bank and filled out a "forgery affidavit" containing the facts of his situation.[64] Specifically, the sworn affidavit contained the check numbers and amounts he believed were false.[65] This document was required by the bank in order for SGT Porter to get his money back.[66] During the MP and CID investigations, it was determined that Staff Sergeant Foerster had forged SGT Porter's checks while he was deployed.[67] When the time came for trial, SGT Porter had deployed again, and was not available to testify.[68] The government admitted the affidavit over defense objection in the place of SGT Porter's live witness testimony.[69]

The issue was whether an affidavit filled out by a victim of check fraud pursuant to internal bank procedures and without law enforcement involvement in the creation of the document is admissible as a nontestionial business record in light of *Crawford v. Washington* and *Washington v. Davis*.[70] The CAAF held that the affidavit was nontestimonial and properly admissible under the business records exception.[71]

The CAAF used the three factors previously identified in *Rankin*[72] to analyze whether the bank affidavit in this case was testimonial.[73] First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Here there was no governmental involvement in the making of the affidavit at all. The affidavit was made out before appellant had even been identified as the forger, long before there was any request aimed at preparation for trial.[74] Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? The information contained in the affidavit merely cataloged objective facts, specifically the check numbers and amounts, and SGT Porter's signature.[75] Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Looking at the context in which the affidavit was made, it is clear that the purpose of the document was to protect the bank from being defrauded by an account holder.[76] The CAAF acknowledged that the Supreme Court opinion in

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[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] 65 M.J. 120 (2007).

[62] *Id.*

[63] *Id.* at 121.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 122.

[70] *Id.* at 121.

[71] *Id.*

[72] United States v. Rankin, 64 M.J. 348 (2007).

[73] *Foerster*, 65 M.J. at 123.

[74] *Id.* at 123–24.

[75] *Id.* at 124.

[76] *Id.*

Crawford uses the term "affidavit" several times to describe documents considered testimonial hearsay,[77] however the CAAF does not believe the Court intended for every document titled affidavit to be considered testimonial.[78] If there is no governmental involvement in the making of a statement, then it is unlikely to be considered testimonial.[79]

Interestingly, after finding the affidavit to be nontestimonial, the CAAF did not conduct the *Ohio v. Roberts* analysis for admissibility under the Confrontation Clause, but instead proceeded directly to an evidentiary analysis under the hearsay rules. One possible explanation for this absence may be that where nontestimonial hearsay falls within a firmly rooted exception, the Confrontation Clause and hearsay analysis are identical.[80] Another explanation, the possibility that Confrontation Clause analysis may no longer apply to nontestimonial hearsay, will be discussed later in this article.[81]

Laboratory (Lab) Reports

Military courts continued to grapple last term with categorizing lab reports as either testimonial statements or nontestimonial statements admissible under the business records exception to hearsay. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the Army Court of Criminal Appeals (ACCA) each heard cases which presented fact patterns very similar to the situation described in dicta by the CAAF in *United States v. Magyari* as one where a lab report might be testimonial rather than a nontestimonial business record.[82] The NMCCA found a lab report in *United States v. Harcrow* nontestimonial,[83] while the ACCA found a similar lab report in *United States v. Williamson* testimonial.[84] Fortuitously for practitioners, the service court split was short-lived, since CAAF has already overturned *Harcrow* this term.[85] The NMCCA also decided another case very similar to *Magyari*, involving a lab report based on results of a urinalysis.[86]

The question in *Magyari* was whether lab reports from a random urinalysis should be considered testimonial or non-testimonial.[87] Appellant argued that the reports were testimonial, falling under the third *Crawford* category of testimonial statements made in preparation for trial, since the lab technicians would have known that the reports could be used later at trial.[88] The Government argued that the lab reports were business records, and by their nature, non-testimonial.[89] The CAAF found that under the circumstances of this case, i.e. random urinalysis, the lab reports were non-testimonial business records.[90] Importantly, the court refused to say that all lab reports would be considered non-testimonial.[91] In dicta, the court laid out some scenarios where lab reports might be considered testimonial (e.g., where an accused is already under

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[77] *Id.* at 124–25.

[78] *Id.*

[79] *Id.* at 125.

[80] Under the *Ohio v. Roberts* Confrontation Clause analysis, the first question is whether a statement fits within a firmly rooted hearsay exception. 448 U.S. 56 (1980). If so, then the Confrontation Clause is satisfied. In the case of such a firmly rooted hearsay exception, the Confrontation Clause and hearsay analysis would be identical. However, if the statement does not fit within a firmly rooted hearsay exception, then the proponent must show that it possesses particularized guarantees of trustworthiness, using nonexclusive factors from *Idaho v. Wright* and *United States v. Ureta*. 497 U.S. 805 (1990); 44 M.J. 290 (1996). When arguing a statement possesses particularized guarantees of trustworthiness, the proponent is limited to the circumstances surrounding the making of the statement, and cannot use extrinsic evidence of reliability. Once the proponent has satisfied the Confrontation Clause, then extrinsic evidence may be used to satisfy the hearsay rules, i.e. M.R.E. 807, Residual Hearsay. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MILT. R. EVID. 807.

[81] Although this case was decided after *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), and although *Whorton* is cited for its retroactive effect, the CAAF does not mention the fact that the opinion contains language stating nontestimonial hearsay is no longer subject to Confrontation Clause analysis. *Foerster*, 65 M.J. at 122.

[82] United States v. Magyari, 63 M.J. 123 (2006); *see* Lancaster, *supra* note 16, at 25.

[83] United States v. Harcrow (*Harcrow I*), No. 200401923, 2006 CCA LEXIS 285 (N-M. Ct. Crim. App. 2006).

[84] United States v. Williamson, 65 M.J. 706 (Army Ct. Crim. App. 2007).

[85] United States v. Harcrow (*Harcrow II*), 66 M.J. 154 (2008).

[86] United States v. Harris, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

[87] *Magyari*, 63 M.J. at 124.

[88] *Id.* at 126. The Court did not provide a comprehensive definition of "testimonial v. non-testimonial," however, it did identify three forms of core testimonial evidence: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3) statements made under circumstances that would cause a reasonable witness to believe they could be used at trial. Crawford v. Washington, 541 U.S. 36 (2004).

[89] *Magyari*, 63 M.J. at 126.

[90] *Id.* at 124–25.

[91] *Id.* at 127.

investigation, and where testing is initiated by the prosecution to discover incriminating evidence).[92] The court even cited civilian cases where lab reports were considered testimonial, including where the government sought to admit DNA evidence in a rape case, and an affidavit prepared by hospital personnel in a DUI case.[93] The *Magyari* dicta played a key role in two lower appellate court cases decided last term.[94]

United States v. Harcrow[95]

Lance Corporal Harcrow was found guilty of use and manufacture of various illegal drugs among other offenses.[96] The Navy Criminal Investigative Service and local law enforcement officials arrested him at his house in Stafford County, Virginia, pursuant to a warrant issued on probable cause that he was manufacturing methamphetamine at his residence.[97] While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine.[98] The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and were found to contain heroin and cocaine residue.[99] The government introduced the lab reports against the appellant at trial.[100]

The confrontation issue was whether the forensic lab reports constituted testimonial hearsay prohibited by the Sixth Amendment.[101] The NMCCA held the lab reports were nontestimonial hearsay admissible under the business records exception.[102] The NMCCA primarily relied on a CAAF opinion from last term, *United States v. Magyari*, which holds that in the case of random urinalyses, the lab reports are nontestimonial.[103] The court also cites two cases from other jurisdictions in support of its holding that lab reports are nontestimonial.[104]

Unfortunately, the CAAF opinion in *Magyari* doesn't say that lab reports are always nontestimonial. In fact, that opinion goes on to suggest circumstance where a lab report might be testimonial.[105] The circumstances suggested by the CAAF are similar to the circumstances in *Harcrow*. In *Magyari*, the CAAF wrote, "lab results or other types of routine records may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence."[106] In this case, the evidence was discovered as part of a search executed in conjunction with arresting the appellant, and was sent to the lab for the purpose of developing evidence to use against him at trial.[107]

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[92] *Id.*

[93] *Id.* (citing People v. Rogers, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004); Las Vegas v. Walsh, 91 P.3d 591, 595 (Nev. 2004), *modified by* 100 P.3d 658 (Nev. 2004)).

[94] United States v. Harcrow (*Harcrow I*), No. 200401923, 2006 CCA LEXIS 285 (N-M. Ct. Crim. App. 2006); United States v. Williamson, 65 M.J. 706 (Army Ct. Crim. App. 2007).

[95] *Harcrow I*, 2006 CCA LEXIS 285.

[96] *Id.* at *1–2.

[97] *Id.* at *4–5.

[98] *Id.* at *5.

[99] *Id.* at *15.

[100] *Id.* at *15–16.

[101] *Id.* at *15.

[102] *Id.* at *17.

[103] United States v. Magyari, 63 M.J. 123 (2006).

[104] *Harcrow I*, 2006 CCA LEXIS 285, at *17 (citing Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005); People v. Johnson, 18 Cal. Rptr. 3d 230 (Cal. Ct. App. 2004)).

[105] *Magyari*, 63 M.J. at 127.

[106] *Id.*

[107] *Harcrow I*, 2006 CCA LEXIS 285, at *15.

This case is unpublished, and therefore not useful as precedent, which is appropriate since it was recently overturned by the CAAF.[108] The ACCA faced similar facts this term in *Williamson*, with the additional benefit of the CAAF's *Rankin* framework for deciding whether a statement is testimonial or nontestimonial, and found a lab report testimonial.[109]

United States v. Williamson[110]

Sergeant Williamson was convicted of wrongful possession with intent to distribute over three pounds of marijuana, based on his possession of a FedEx package containing three bundles of marijuana he mailed to himself while on leave in New Orleans.[111] He mailed the package from El Paso, where it was detected by DEA agents using a drug dog.[112] Agents effected a controlled delivery to the address on the package in New Orleans and executed a search warrant fifteen minutes later.[113] After seizing the package, it was sent to the United States Army Criminal Investigation Laboratory (USACIL), where the substance contained in the three bundles was confirmed to be marijuana.[114] At trial, the government admitted the lab report over defense objection. The military judge admitted the lab report under the business records exception to the hearsay rules.[115]

The issue was whether the forensic lab report produced by USACIL at the request of the government after appellant had been arrested constituted testimonial hearsay.[116] The ACCA held the forensic lab report did constitute testimonial hearsay where the lab report was requested after local police had arrested appellant.[117]

The court, after briefly reviewing Supreme Court and CAAF caselaw on the Confrontation right since *Crawford*, analyzed the facts of this case primarily using the three factors the CAAF enunciated in *Rankin*.[118] First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?[119] Clearly the testing was done and the report produced in response to a specific request by law enforcement.[120] The lab report was limited to the identity and amount of the tested substance, however, the purpose of the testing was to produce incriminating evidence for use at trial.[121] The court pointed out that this circumstance was described by the CAAF in *Magyari* as a situation where a lab report would likely be considered testimonial, i.e. prepared at the request of the government, while appellant was already under investigation, for the purpose of discovering incriminating evidence.[122] Critical to the court's reasoning was the fact that the testing was done after appellant had been arrested.[123]

In addition to *Harcrow* and *Williamson* discussed above, which involved language in *Magyari* suggesting that a lab report might sometimes be considered testimonial, another case was decided last term more directly addressing an issue left open by *Magyari*.[124] *Magyari* itself involved a lab report from a random urinalysis, and held that in the case of a random

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[108] United States v. Harcrow (*Harcrow II*), 66 M.J. 154 (2008).

[109] United States v. Williamson, 65 M.J. 706 (Army Ct. Crim. App. 2007).

[110] *Id.*

[111] *Id.* at 707.

[112] *Id.* at 708.

[113] *Id.* at 709.

[114] *Id.* at 710.

[115] *Id.* at 711.

[116] *Id.* at 707.

[117] *Id.* at 718.

[118] *Id.* at 717–18.

[119] United States v. Rankin, 64 M.J. 348 (2007).

[120] *Williamson*, 65 M.J. at 718.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 717.

[124] United States v. Harris, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

urinalysis, the lab report is a nontestimonial business record.[125] In *United States v. Harris*, the NMCCA considered a lab report from a urinalysis based on probable cause.[126]

United States v. Harris[127]

Aviation Electrician's Mate Second Class Harris was arrested for trespassing by local police after he was discovered digging in his neighbor's yard in the pouring rain, wearing only a pair of muddy shorts.[128] One of his explanations for his unusual behavior was that he was "digging for diamonds."[129] After he admitted to using crystal methamphetamine, he was ordered to undergo a command directed urinalysis based on probable cause.[130] His urinalysis result came back positive and was introduced against him at trial.[131]

The Sixth Amendment issue was whether the Navy Drug Lab Report on a command directed urinalysis admitted against appellant constituted testimonial hearsay.[132] The NMCCA held the lab report was nontestimonial, and its admission did not violate appellant's confrontation rights under the Sixth Amendment.[133] The court reasoned that although the CAAF opinion in *Magyari*[134] was limited to cases of random urinalysis, the result is the same here in the case of a command directed urinalysis because the lab procedures are the same regardless of the origin of the sample.[135] More specifically, urinalysis samples are processed by the Navy lab in batches of 100, and given a separate identification number, such that there is no way for any lab technician to know which sample is being tested.[136] The lab employees do not know whether prosecution is anticipated or whether the sample is from a random urinalysis.[137] Therefore, urinalysis lab reports from testing processed in the way it is done at the Navy lab are nontestimonial hearsay admissible under the business records exception.[138]

The first two current issues in military Confrontation Clause jurisprudence discussed in this article are focused on categorizing statements as testimonial or nontestimonial. The third and final issue addresses what analysis is required once a statement has been identified as nontestimonial.

Do Nontestimonial Statements Implicate the Confrontation Clause?

Crawford v. Washington clearly overruled *Ohio v. Roberts* where it applied to testimonial statements, however, the opinion left open its effect on nontestimonial statements.[139] Since *Crawford* was decided in 2004, the CAAF has used *Ohio v. Roberts* as the standard for Confrontation Clause analysis of nontestimonial statements.[140] This was based primarily on language in *Crawford* itself, interpreted as a favorable view of the continued vitality of *Ohio v. Roberts* in this situation.[141]

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[125] United States v. Magyari, 63 M.J. 123 (2006).

[126] *Harris*, 65 M.J. 594.

[127] *Id.*

[128] *Id.* at 596.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 599.

[133] *Id.* at 600.

[134] United States v. Magyari, 63 M.J. 123 (2006).

[135] *Harris*, 65 M.J. at 600.

[136] *Id.*

[137] *Id.* There may also be administrative reasons for urinalysis unrelated to punitive action, e.g. fitness for duty examinations.

[138] *Id.*

[139] Crawford v. Washington, 541 U.S. 36, 68 (2004).

[140] *See, e.g.*, United States v. Scheurer, 62 M.J. 100 (2005); United States v. Rankin, 64 M.J. 348 (2007).

[141] "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68.

The next Supreme Court Confrontation case following *Crawford* was *Davis v. Washington* which again provided unclear guidance on whether nontestimonial statements require Confrontation Clause analysis.[142] The holding in *Davis* described when a statement made during police interrogation would qualify as testimonial, and found the statement in *Hammon v. Indiana* to be testimonial, while the statement in *Davis v. Washington* was nontestimonial.[143] For *Hammon*, that was the end of the line, the statement should not have been admitted; however for *Davis*, presumably the confrontation analysis in *Roberts* was still required. Yet the Court did not analyze the statement under *Roberts* at all, but simply affirmed the judgment of the Washington state Supreme Court.[144] In addition to its failure to analyze the nontestimonial statement in *Davis* under *Roberts*, there was language in the Court's opinion that would tend to the conclusion that the Confrontation Clause only applies to testimonial statements.[145]

Following *Davis*, some courts required Confrontation analysis for nontestimonial statements and others did not.[146] The CAAF has stayed with the *Ohio v. Roberts* analysis for nontestimonial statements.[147] As recently as *United States v. Rankin*, decided in January 2007, the CAAF was clear in its direction that *Roberts* is the standard for Confrontation Clause analysis of nontestimonial hearsay.[148]

Last year's symposium article[149] previewed *Whorton v. Bockting*, a Supreme Court case that contained language making it clear that nontestimonial statements do not implicate the Confrontation clause.[150] Even though the Supreme Court guidance seems clear, CAAF is not necessarily bound by the language in *Whorton*, meaning that until CAAF speaks on the issue, military courts may still engage in the *Ohio v. Roberts* Confrontation Clause analysis when faced with a nontestimonial hearsay statement.[151] The CAAF has not directly addressed the issue since *Whorton* was decided in February 2007. However, there is reason to believe when the issue is squarely presented, CAAF will follow Supreme Court precedent.[152]

Whorton v. Bockting[153]

Mr. Bockting was convicted of sexual assault on his six-year-old step-daughter.[154] At trial, the court determined the child was too distressed to testify, and allowed her mother and a police detective to testify about her out-of-court statements

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[142] Davis v. Washington, 547 U.S. 813 (2006).

[143] *Id.* at 822.

[144] *Id.* at 834.

[145] *Id.*

> We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.
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> The answer to the first question was suggested in *Crawford*, even if not explicitly held:
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> "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." [Crawford v. Washington, 541 U.S. 36, 51 (2004)].
>
> A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.

Id. at 823–24.

[146] *See, e.g.*, United States v. Tolliver, 454 F.3d 660 (7th Cir. 2006) (*Davis*, 547 U.S. 813, holds that nontestimonial hearsay is not subject to the Confrontation Clause). *But see* Harkins v. State, 143 P.3d 706 (Nev. 2006) (nontestimonial statements are subject to analysis under *Ohio v. Roberts*, 448 U.S. 56 (1980)).

[147] United States v. Rankin, 64 M.J. 348 (2007).

[148] *Id.*

[149] Lancaster, *supra* note 16, at 28.

[150] Whorton v. Bockting, 127 S. Ct. 1173 (2007).

[151] *See* H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25, 35.

[152] *See id.*

[153] *Whorton*, 127 S. Ct. 1173.

[154] *Id.* at 1178.

regarding the assaults.[155] On direct appeal, the Nevada Supreme Court found admission of the child's statements constitutional under *Ohio v. Roberts*.[156] While awaiting decision by the 9th Circuit on a subsequent habeas petition denied by the district court, *Crawford v. Washington* was decided, changing the landscape of Confrontation Clause analysis.[157] The 9th Circuit ultimately reversed, holding that *Crawford* was a watershed rule requiring retroactive effect to cases on collateral review.[158] The Supreme Court thought otherwise, holding that *Crawford* is not retroactive to cases already final after direct review.[159]

In its analysis of whether the procedural rule announced in *Crawford* is a watershed rule requiring retroactive application,[160] the Court stated:

> Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.[161]

This seems like a pretty clear statement indicating nontestimonial statements no longer require Confrontation Clause analysis at all.

Nontestimonial Hearsay in the Military After *Whorton*

As stated above, the CAAF has not squarely addressed the applicability of confrontation analysis to nontestimonial statements since *Whorton* was decided. However, subsequent opinions provide clues to how it might decide the issue whenever it is squarely presented.[162] In *Foerster*, after finding the bank affidavit to be nontestimonial, the CAAF proceeded directly to the evidentiary analysis for the affidavit's admissibility, without ever mentioning the Confrontation Clause analysis required for nontestimonial statements in line with *Rankin*.[163] This omission would be more telling, except that the Confrontation Clause and evidentiary analyses are identical for statements that qualify as firmly rooted hearsay exceptions. It is only hearsay statements that do not qualify as firmly rooted exceptions, thus requiring particularized guarantees of trustworthiness analysis, that require a slightly different analysis under the Confrontation Clause than under the rules of evidence.[164] Nonetheless, in contrast to its previous opinions involving nontestimonial hearsay statements,[165] there is no mention of Confrontation Clause analysis once the statement is found to be nontestimonial.[166]

In addition to the CAAF opinion in *Foerster*, Judge Stucky, concurring in the result in a case called *United States v. Cucuzzella*, specifically cites *Whorton* and the fact that nontestimonial statements may be admitted even if they do not possess adequate indicia of reliability.[167] This means that nontestimonial statements do not require Confrontation Clause

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[155] *Id.*

[156] *Id.* at 1178–79.

[157] *Id.* at 1179.

[158] *Id.* at 1180.

[159] *Id.* at 1184.

[160] The general rule on retroactivity of new rules comes from *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* says a new rule applies retroactively in a collateral proceeding only if the rule is substantive or is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of a criminal proceeding. *Id.* In order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and must alter the understanding of the bedrock elements essential to the fairness of a proceeding. *Id.*

[161] *Whorton*, 127 S. Ct. 1173, 1183. *Crawford*'s impact on criminal procedure is equivocal. *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely. Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts* analysis.

[162] *See* United States v. Foerster, 65 M.J. 120 (2007); United States v. Cucuzzella, 66 M.J. 57 (2008).

[163] *Foerster*, 65 M.J. 120.

[164] *See supra* note 78.

[165] *See, e.g.*, United States v. Scheurer, 62 M.J. 100 (2005); United States v. Rankin, 64 M.J. 348 (2007).

[166] *Foerster*, 65 M.J. at 125.

[167] *Cucuzzella*, 66 M.J. 57, *16–17 (2008) (Stuckey, J., concurring) (citing Whorton v. Bockting, 127 S. Ct. 1173, 1183 (2007)).

analysis before admission, but instead, only require analysis under the rules of evidence.[168] He also cites *Whorton* for the proposition that *Crawford* overruled *Roberts*.[169]

Interestingly, the ACCA also seems to recognize Supreme Court guidance in this area; however when it says nontestimonial statements do not require Confrontation Clause analysis, it cites the language in *Davis* rather than the more clear language found in *Whorton*.[170] In both *United States v. Diamond* and *United States v. Crudup*, ACCA cites language from *Davis* indicating that nontestimonial hearsay is not subject to the Confrontation Clause.[171]

The fact that the last clear statement by the CAAF on the issue, contained in *Rankin*, even though decided before the Supreme Court's opinion in *Whorton*, is that nontestimonial hearsay statements require Confrontation Clause analysis under *Ohio v. Roberts* suggests that *Roberts* is still good law in the military. That said, however, it seems clear that CAAF will follow the Supreme Court and explicitly declare that the Confrontation Clause does not apply to nontestimonial statements whenever that issue is finally squarely presented for its decision. Military practitioners should be aware that the issue exists. However, they should analyze nontestimonial statements under the rules of evidence without undue concern for Confrontation Clause issues.

Preview: *Harcrow* & *Pack*

Two cases decided in the current term deserve brief mention in this symposium, although a more complete treatment will wait for next year. *United States v. Harcrow* was mentioned above as the CAAF case that overruled the NMCCA in finding a lab report nontestimonial despite the fact that the evidence in the report was sent to the lab after being seized at the appellant's home during his arrest.[172] The case is important as the first CAAF case to find a lab report inadmissible as a testimonial statement rather than admissible as a nontestimonial business record.

United States v. Pack is a case involving remote live testimonial by a child victim witness.[173] The CAAF held that the Supreme Court opinion in *Crawford* did not effect its earlier opinion in *Maryland v. Craig*, which laid out the standards for remote live testimony of child abuse victims.[174]

Conclusion

Last term was notable for both what it contained and what it omitted. The CAAF gave military practitioners factors to use when determining whether a statement is testimonial or nontestimonial, and then used its own analysis to find a statement to a SANE testimonial and a bank affidavit nontestimonial. The service courts continue to struggle with whether lab reports should be considered testimonial or nontestimonial, however it now seems clear that outside the urinalysis context, many lab reports prepared in anticipation of trial will be considered testimonial. While appellate courts provided guidance on when a hearsay statement may be considered testimonial, they did not address the appropriate analysis for statements found to be nontestimonial. Judge Advocates are still waiting for definitive guidance on following Supreme Court precedent making it clear that nontestimonial statements do not implicate the Confrontation Clause.

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[168] *Id.*

[169] *Id.*

[170] United States v. Diamond, 65 M.J. 876, 883 (Army Ct. Crim. App. 2007); United States v. Crudup, 65 M.J. 907, 909 (Army Ct. Crim. App. 2008).

[171] *Diamond*, 65 M.J. at 883 (citing Davis v. Washington, 126 S. Ct. 2266, 2274 (2006)); *Crudup*, 65 M.J. at 909 (citing *Davis*, 126 S. Ct. at 2274).

[172] United States v. Harcrow (*Harcrow II*), 66 M.J. 154 (2008).

[173] United States v. Pack, 65 M.J. 381 (2007).

[174] *Id.* at 385.