## New Developments in Sixth Amendment Confrontation and Jurisdiction

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### Introduction

This year's Sixth Amendment and jurisdiction cases do not break new ground as much as they simply confirm our understanding of the law. In *United States v. Pack*, the Court of Appeals for the Armed Forces (CAAF) decided *Maryland v. Craig*[1] remains the standard for permitting the live remote testimony of a child witness.[2] In *Giles v. California*, the Supreme Court interpreted the forfeiture by wrongdoing doctrine consistently with the language of Federal Rule of Evidence (FRE) 803(6).[3] In *United States v. Hart*, the CAAF used the existing standard to determine when personal jurisdiction over servicemembers comes to an end.[4] One area where there is still uncertainty in Confrontation Clause law is the admissibility of lab reports, and this issue was addressed by the CAAF this term in *United States v. Harcrow*,[5] and by the Air Force Court of Criminal Appeals (AFCCA) in *United States v. Blazier*.[6]

This article begins with a brief overview of current Sixth Amendment Confrontation Clause jurisprudence, before considering two cases from last term that address the admissibility of lab reports in light of the U.S. Supreme Court's decision in *Crawford v. Washington*.[7] Next, it covers Sixth Amendment cases that confirm our understanding of Confrontation Clause law. Finally, it discusses the single jurisdiction case decided by the CAAF last term, *United States v. Hart*, a case that adheres closely to established precedent, yet shows possible cracks in the foundation as a split decision.

### *Crawford* Background

The law governing the admission of hearsay statements changed abruptly with the Supreme Court's decision in *Crawford*.[8] Before *Crawford*, admission of hearsay statements was based primarily on reliability and governed by the analysis laid out in *Ohio v. Roberts*.[9] Under *Roberts*, a hearsay statement could be admitted under the Confrontation Clause if it possessed adequate indicia of reliability.[10] This could be shown by either fitting the statement into a firmly rooted hearsay exception, or showing that it possessed "particularized guarantees of trustworthiness."[11] The latter could be shown using a set of nonexclusive reliability factors from *Idaho v. Wright*,[12] or *United States v. Ureta*.[13] Importantly, when looking at the trustworthiness of a statement, the court was limited to considering the circumstances surrounding the making of the statement, and was not permitted to use extrinsic evidence.[14]

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[1] 497 U.S. 836 (1990).

[2] United States v. Pack, 65 M.J. 381, 382 (C.A.A.F. 2007).

[3] 128 S. Ct. 2678 (2008).

[4] 66 M.J. 273 (C.A.A.F. 2008).

[5] 66 M.J. 154 (C.A.A.F. 2008).

[6] No. 36988, 2008 CCA LEXIS 314 (A.F. Ct. Crim. App. Sept. 8, 2008).

[7] 541 U.S. 36 (2004).

[8] *Id.*

[9] 448 U.S. 56 (1980).

[10] *Id.* at 66.

[11] *Id.*

[12] 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).

[13] 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).

[14] *Wright*, 497 U.S. at 819–24. This can be confusing, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement passed the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the hearsay rules. Another source of

*Crawford* divided the world of hearsay statements into two categories: testimonial and nontestimonial.[15] Testimonial statements can only be admitted if the declarant is unavailable and there has been a prior opportunity for cross-examination. On the other hand, nontestimonial statements are still considered under the Confrontation Clause in the military using the *Roberts* analysis described above.[16] The Supreme Court has made it clear that nontestimonial statements no longer require Confrontation Clause analysis at all;[17] however, the CAAF has yet to follow suit.[18] For the time being, *Roberts* provides the required analysis for nontestimonial statements in the military.[19]

*Crawford* itself did not define the term "testimonial,"[20] and neither did the next Confrontation Clause case decided by the Court two years later, *Davis v. Washington*.[21] Nonetheless, based on the holding and reasoning in both *Crawford* and *Davis*, the CAAF has developed a framework for deciding whether a statement should be considered testimonial or nontestimonial. In *United States v. Rankin*, 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?[22]

Military courts have used the CAAF's three-question *Rankin* analysis to categorize statements as testimonial or nontestimonial in the context of verbal and written statements: however, the issue of lab reports has proven contentious.

The admission of lab reports as nontestimonial business records has received significant attention in military courts. The *Crawford* opinion itself contains language suggesting that business records are by nature nontestimonial.[23] Nonetheless, courts have categorized lab reports as testimonial in some situations.[24] *United States v. Magyari* was the first CAAF case to address this issue.[25] In *Magyari* the CAAF held that in the case of random urinalyses, lab reports are nontestimonial and may be admitted as business records.[26] Although the lab reports at issue in *Magyari* were held nontestimonial, the opinion mentions other situations where a lab report might be considered testimonial.[27] This term, the CAAF decided *United States*

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confusion in military case law 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.

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

[16] The last time the CAAF addressed the issue was in *United States v. Rankin*, where it clearly required the *Roberts* analysis for a nontestimonial statement. 64 M.J. 348 (C.A.A.F. 2007).

[17] *See* Whorton v. Bockting, 549 U.S. 406 (2007).

[18] *See Rankin*, 64 M.J. 348.

[19] This issue was discussed at length in last year's symposium article. *See* Lieutenant Colonel Nicholas F. Lancaster, *If It Walks Like a Duck, Talks Like a Duck, and Looks Like a Duck, Then It's Probably Testimonial*, ARMY LAW., June 2008, at 16, 24–27.

[20] 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.

[21] 547 U.S. 813 (2006). The Court 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.

*Id.* at 822.

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

[23] *See Crawford*, 541 U.S. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.").

[24] *See, e.g.*, United States v. Williamson, 65 M.J. 706 (A. Ct. Crim. App. 2007); United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008).

[25] 63 M.J. 123 (C.A.A.F. 2006).

[26] *Id.* at 124–25.

[27] *Id.* at 128.

*v. Harcrow*, which directly presents the situation considered in dicta in *Magyari*.[28] *Harcrow* involved a lab report not produced as the result of a urinalysis, and under the circumstances the CAAF found the report to be testimonial.[29]

Where *Magyari* and *Harcrow* represent opposite ends of the lab report admissibility continuum, *United States v. Blazier* presents an issue closer to the middle.[30] *Blazier* involves two urinalysis lab reports. One was a random urinalysis and is clearly covered by *Magyari*, however, the other was based on probable cause, and is not as clearly nontestimonial.[31] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) considered the issue of probable cause urinalyses recently in *United States v. Harris*, and determined that *Magyari* still applies because the testing procedures for random and probable cause urinalyses are identical.[32] The opinion in *Blazier* considers the issue in more detail, and compares the facts and reasoning in *Magyari* with the facts and reasoning in *Harcrow* before deciding in agreement with the NMCCA that both lab reports should be considered nontestimonial.[33] The difference between *Harris* and *Blazier* is that there was a strong dissent in *Blazier*, laying out the reasons probable cause urinalyses should be considered testimonial.[34] This is a significant issue in Confrontation Clause law, highlighted by the fact there is currently a case on the Supreme Court docket that considers the issue of how to categorize forensic lab reports.[35]

### ***United States v. Harcrow***[36]

*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.[37] 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.[38]

Lance Corporal (LCpl) Harcrow was found guilty of use and manufacture of various illegal drugs among other offenses.[39] 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.[40] While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine.[41] The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and found to contain heroin and cocaine residue.[42] The Government introduced the lab reports against LCpl Harcrow at trial and the defense counsel did not object.[43] This trial took place prior to *Crawford v. Washington*[44] but reached the

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[28] United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008).

[29] *Id*.

[30] No. 36988 2008 CCA LEXIS 314 (A.F. Ct. Crim. App. Sept. 8, 2008).

[31] *Id.* at *2.

[32] 66 M.J. 781 (N-M. Ct. Crim. App. 2008).

[33] *Blazier*, No. 36988, 2008 CCA LEXIS 314, at *7.

[34] *Id.*

[35] *See* Commonwealth v. Melendez-Diaz, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished), *cert. granted*, 2008 U.S. LEXIS 7205 (U.S. Oct. 6, 2008) (No. 07-591).

[36] 66 M.J. 154 (C.A.A.F. 2008). The lower court opinion in this case can be located at *United States v. Harcrow*, No. 200401923, 2006 CCA LEXIS 285 (N-M. Ct. Crim. App. 2006) (unpublished).

[37] *Harcrow*, 66 M.J. 154.

[38] *Id.* at 155.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 156.

[44] *Id.*

NMCCA after *Crawford* was decided. The NMCCA held the lab reports were admissible as nontestimonial business records under *Crawford*.[45]

The issue for the CAAF's decision was whether the lower court erred by finding that the state forensic laboratory reports were nontestimonial hearsay under *Crawford*.[46] The CAAF held that the laboratory reports in this case were testimonial hearsay evidence not admissible as business records, but the error was harmless beyond a reasonable doubt. [47]

The court first addressed whether the *Crawford* issue had been waived since the defense counsel had not objected to admission of the reports at trial.[48] Since *Crawford* was not decided at the time of trial, and there is a presumption against the waiver of Constitutional rights, the court found that the issue was not waived.[49] Instead, the court found that the issue had been forfeited, triggering a plain error analysis.[50] To succeed under a plain error analysis, appellant would have to show that (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right.[51]

The CAAF easily concluded there was error in that the lab reports constituted testimonial hearsay.[52] The court used its three factor analysis from *United States v. Rankin*, including: (1) whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry, (2) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters, and (3) whether the primary purpose of making or eliciting the statement was the production of evidence with an eye toward trial.[53] 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"[54] In *Harcrow*, the evidence was discovered as part of a search executed in conjunction with arresting LCpl Harcrow, and was sent to the lab for the purpose of developing evidence to use against LCpl Harcrow at trial.[55] The documents produced by the lab referred to LCpl Harcrow as the "suspect."[56] Accordingly, the court found that the lab reports were testimonial and that their admission was error.[57]

The CAAF then considered whether the error was plain or obvious. The court cited *Johnson v. United States*,[58] for the proposition that when the law at the time of trial differs from the law at the time of appeal, the law at the time of appeal governs. The CAAF determined that the error was plain and obvious.[59] The CAAF cited its decision in *Magyari* and noted that the facts of this case were clearly anticipated by the dicta in that case suggesting other situations where a lab report might be considered testimonial.[60]

Lastly, the CAAF looked for prejudice. Since this case involves constitutional error, the standard for prejudice is whether the Government has shown that the error was harmless beyond a reasonable doubt.[61] The court found there was plenty of other evidence without the lab reports, including admissions by the accused, and the observations by the arresting

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[45] *Id.*

[46] *Id.* at 155.

[47] *Id.*

[48] *Id.* at 156–58.

[49] *Id.* at 158.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 155.

[53] *Id.* at 158–59 (citing United States v. Rankin, 64 M.J. 348 (C.A.A.F. 2007)).

[54]. *Id.* at 159 (citing United States v. Magyari, 63 M.J. 123, 127 (C.A.A.F. 2006)).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] 520 U.S. 461 (1997).

[59] *Harcrow*, 66 M.J. at 159.

[60] *Id.*

[61] *Id.* at 160.

officers.[62] Therefore, although the lab reports should not have been admitted, the error was harmless beyond a reasonable doubt, and the decision of the NMCCA was affirmed.[63]

In light of *Harcrow*, Judge Advocates need to determine early on whether a lab report is likely to be categorized as testimonial. If so, counsel will need to bring the lab technicians who tested the evidence to testify in court about the results, rather than bringing a single representative from the lab and admitting the report as a nontestimonial business record.

### *United States v. Blazier*[64]

Senior Airman (SrA) Blazier's urine was tested as part of a random urinalysis on 5 June 2006.[65] Several weeks later, after being questioned by the Air Force Office of Special Investigations (AFOSI), SrA Blazier consented to another urinalysis on 10 July 2006.[66] He was found guilty by an officer panel of negligent dereliction of duty and wrongful use of ecstasy, methamphetamine, and marijuana, and sentenced to a bad conduct discharge, forty-five days confinement, and reduction to E-3.[67] At trial, his counsel objected to admission of both urinalyses; however, the military judge found the lab reports to be nontestimonial and admitted them under the business records exception.[68]

The AFCCA considered whether the results of both urinalyses should have been admitted as nontestimonial business records. In a 2–1 ruling the AFFCA held that the military judge did not abuse his discretion and that the lab reports were properly admitted as business records.[69] The AFCCA reasoned that since the testing procedures were the same for both samples, and identical to the procedure the CAAF considered favorably in *Magyari*, the lab reports were properly admitted as business records.[70] An objective look at the totality of the circumstances indicated that the statements contained in the lab reports involved nothing more than a routine and objective cataloguing of unambiguous factual matters.[71]

The result in this case is the same as in a NMCCA case discussed in last year's symposium article:[72] the urinalysis lab report based on probable cause was nonetheless considered nontestimonial and admissible under the business records exception. However, this opinion contains a well-considered concurrence and dissent.[73] Judge Jackson concurred with the result as to the random urinalysis, but dissented on the consent urinalysis. He reasoned that the majority focused too much on the viewpoint or intent of the declarant (lab technicians).[74] Instead, or in addition, he looked at the Government's purpose in securing the consent urinalysis.[75] Judge Jackson argued that even though the lab technicians may have been neutral (cataloguing unambiguous factual matters), the Government's purpose was gathering evidence for use at trial.[76] The statements were prepared at the request of AFOSI for the potential prosecution of appellant, requested while appellant was being investigated, functioned as the equivalent of testimony on the identification of the THC found in appellant's urine, and used at trial to prove appellant had used marijuana.[77]

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[62] *Id.*

[63] *Id.* at 155.

[64] United States v. Blazier, No. 36988, 2008 CCA LEXIS 314 (A.F. Ct. Crim. App. Sept. 8, 2008).

[65] *Id.* at *2.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at *6–7.

[70] *Id.* (citing United States v. Magyari, 63 M.J. 123, 127 (C.A.A.F. 2006)).

[71] *Id.* at *5 (citing United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008)).

[72] *See* Lancaster, *supra* note 19 (discussing United States v. Harris. 66 M.J. 781 (N-M. Ct. Crim. App. 2008)).

[73] *Blazier*, No. 36988, 2008 CCA LEXIS 314, at *7–12.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at *9.

This case is important for Judge Advocates because it sets up the arguments for and against urinalysis lab reports admissibility as nontestimonial business records, an issue military courts have been struggling with since *Crawford* was decided in 2004. The CAAF decided the random urinalysis issue in *Magyari* in 2006,[78] and considered lab reports on evidence outside the urinalysis context this term in *Harcrow*;[79] however, the CAAF has yet to address admission of a urinalysis lab report in a probable cause situation.

The Supreme Court is scheduled to decide a case directly addressing the issue whether forensic lab reports should be considered testimonial or nontestimonial business records this term in *Melendez-Diaz v. Massachusetts*.[80] Some of the arguments advanced in the briefs for *Melendez-Diaz* are identical to those accepted by the NMCCA and AFCCA in *Harris* and *Blazier*, as well as those made in dissent by Judge Jackson.[81]

Aside from the two cases discussed above considering how lab reports should be categorized, the remaining Confrontation Clause cases generally confirm our understanding of existing law. The case of *United States v. Pack* addresses the continued viability of the *Maryland v. Craig* standard for allowing remote live testimony by a child victim/witness.

### *United States v. Pack*[82]

*United States v. Pack* confirms for Judge Advocates that *Maryland v. Craig* still provides the correct analysis for live remote testimony of child witnesses following the Court's decision in *Crawford v. Washington*.[83] Over defense objection, a military judge allowed a ten-year-old victim of sexual assault to testify from a location outside the courtroom via one-way closed-circuit television, after making findings on the record required by Military Rule of Evidence (MRE) 611(d) and *Craig*.[84]

The question presented was whether, in light of *Crawford*, appellant was denied his Sixth Amendment right to confront his accuser when the military judge allowed the victim to testify from a remote location via one-way closed-circuit television.[85] The CAAF held that even after *Crawford*, *Craig* continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional.[86]

In *Craig*, the Supreme Court held that in the case of a child witness, one-way closed-circuit testimony could satisfy the Confrontation Clause if the judge found it necessary to protect the welfare of the child; the child witness would be traumatized not by the courtroom generally, but by the presence of the defendant; and that the emotional distress suffered by the child would be more than de minimis.[87]

In *Crawford v. Washington*, the Court held that testimonial hearsay cannot be admitted unless the declarant is unavailable and there has been a prior opportunity for cross-examination.[88] *Crawford* was concerned specifically with out of court statements, rather than face-to-face confrontation at trial; however, the opinion traced the roots of the confrontation right and rejected reliability as the test for admissibility.[89] Specifically, the opinion rejected the *Ohio v. Roberts* reliability test for the admissibility of testimonial hearsay statements.[90] The opinion in *Craig* also focused on reliability, but it addressed reliability in the context of the adversarial process as a whole.[91]

Gunnery Sergeant Pack argued that since *Crawford* rejected reliability as the test, and required instead a particular method of confrontation, i.e. cross-examination, the foundation of *Craig* had been undermined and should no longer apply as the test for child witness remote live testimony.[92] The opinion in *Crawford* was written by Justice Scalia, who also authored a strong dissent in *Craig*. It is clear from reading the two opinions that Justice Scalia believes face-to-face confrontation is

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[78] United States v. Magyari, 63 M.J. 123 (C.A.A.F. 2006).

[79] 66 M.J. 154 (C.A.A.F. 2008).

[80] *See* Commonwealth v. Melendez-Diaz, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished), *cert. granted*, 2008 U.S. LEXIS 7205 (U.S. Oct. 6, 2008) (No. 07-591).

[81] *See id.* Brief for the Petitioner; *id.*Brief for the Respondent.

[82] 65 M.J. 381, 382 (C.A.A.F. 2007).

[83] *Id.* at 382 (citing Crawford v. Washington, 541 U.S. 36 (2004)).

[84] *Id.* (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d) (2008) [hereinafter MCM]; Maryland v. Craig, 497 U.S. 836 (1990)).

require. However the opinion in *Crawford* does not mention *Craig*, and overruling by implication is generally disfavored.[93] As such, CAAF held that *Crawford* did not overrule *Craig*. Therefore, *Craig* still controls child witness testimony by remote live means.[94]

This opinion is important for Judge Advocates because it validates the use of MRE 611(d) and Rule for Court-Martial (RCM) 914A, in combination with *Craig* as a guide for the findings necessary by the military judge in order to allow remote live testimony by a child witness.[95]

While the CAAF confirmed the post-*Crawford* viability of *Craig* in *Pack*, in *Giles v. California* the Supreme Court interpreted the doctrine of forfeiture by wrongdoing consistent with FRE 804(b)(6).[96]

### *Giles v. California*[97]

*Giles v. California* was the first opportunity for the Supreme Court to squarely consider the doctrine of forfeiture by wrongdoing after *Crawford*, which mentioned the principle as a situation where the Confrontation Clause would not require cross examination.[98]

Giles shot and killed his ex-girlfriend outside his grandmother's house.[99] There were no eyewitnesses to the shooting; however, his grandmother and a niece heard the shots and ran outside to find Giles standing over the victim with a gun in his hand.[100] At trial, Giles claimed self-defense, though the victim was found with no weapon, and had been shot six times.[101] The Government introduced statements the victim had made to police three weeks earlier after they responded to a domestic violence incident between her and Giles.[102] The statements included that Giles had accused the victim of cheating and had grabbed and punched her as well as threatening to kill her if he discovered her cheating.[103] The Government introduced the statements under a California evidentiary rule that allows admission of out of court statements in a domestic violence context when the declarant is unavailable to testify at trial and the statements are deemed trustworthy.[104] After the trial, *Crawford* was decided, requiring unavailability and a prior opportunity for cross examination for admission of testimonial hearsay

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[85] *Id.*

[86] *Id.*

[87] *Craig*, 497 U.S. 836.

[88] *Crawford*, 541 U.S. 36.

[89] *Id.*

[90] *Id.* (citing Ohio v. Roberts, 448 U.S. 56 (1980)).

[91] *Craig*, 497 U.S. 836.

[92] United States v. Pack, 65 M.J. 381, 382 (C.A.A.F. 2007).

[93] *Id.* at 384, 385.

[94] *Id.* at 382.

[95] *Id.*; *see* MCM, *supra* note 84, MIL. R. EVID. 611(d), R.C.M. 914A; *see also* United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003) (describing how the requirements of MRE 611(d), RCM 914A, and Maryland v. Craig must be synthesized to make the findings necessary before allowing remote live testimony of a child victim/witness).

[96] 128 S. Ct. 2678 (2008).

[97] *Id.*

[98] *Id.*

[99] *Id.* at 2681.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 2682.

[104] *Id.*

statements.[105] The California Court of Appeals considered *Crawford*, but held that admission of the statements in *Giles* did not violate the Confrontation Clause, since the *Crawford* opinion itself recognized the doctrine of forfeiture by wrongdoing.[106] The court found the doctrine was satisfied since Giles had killed the victim, thus making her unavailable to testify against him.[107]

The issue for decision in *Giles* was whether an accused forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.[108] The Supreme Court's opinion focuses on the intent of the accused, and holds that the doctrine of forfeiture by wrongdoing only applies where the accused intended to make the witness unavailable for trial when he committed the wrongful act.[109]

The opinion (written by Justice Scalia) begins by considering whether forfeiture by wrongdoing was a founding era exception to the confrontation right.[110] The *Crawford* decision recognized that there were two exceptions to confrontation recognized at the time of the founding—dying declarations and forfeiture by wrongdoing.[111] Forfeiture by wrongdoing meant admitting the statement of one who was kept away from trial by the efforts of the defendant.[112] The issue is whether the defendant is required to commit a wrongful act for the purpose of keeping the witness from testifying, or if the fact that the witness is prevented by the wrongful act from testifying is enough on its own.[113] Justice Scalia writes that at the time of the founding and since, there has always been an intent requirement.[114] It is not enough that the wrongful act of the accused results in the witness' unavailability.[115] The accused must engaged in conduct designed to prevent the witness from testifying.[116]

Justice Scalia cites common law precedent, *Reynolds v. United States*,[117] and FRE 804(b)(6)[118] for the proposition that the proponent of a statement must show the declarant had the intent to keep the witness from testifying before the statement could be admitted.[119] Both the old cases and historical treatises make clear that the accused must have the purpose of keeping the witness away in mind.[120] The *Reynolds* case relies upon the old cases and common law principles and agrees that intent is required.[121] Federal Rule of Evidence 804(b)(6), approved by the Supreme Court in 1997, clearly includes an intent element: "forfeiture by wrongdoing," applies when the accused "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[122]

The decision in *Giles* was a 6–3 decision, including multiple concurrences and a dissent. [123] The key to the opinion is the requirement for the Government to show that the accused intended to make the witness unavailable when he committed the

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

[106] *Giles*, 128 S. Ct. at 2682 (citing *Crawford*, 541 U.S. at 62).

[107] *Id.*

[108] *Id.* at 2681.

[109] *Id.* at 2693.

[110] *Id.* at 2684–93.

[111] *Id.* at 2682–83.

[112] *Id.* at 2683.

[113] *Id.*

[114] *Id.* at 2683–84.

[115] *Id.* at 2684.

[116] *Id.*

[117] Reynolds v. United States, 98 U.S. 145 (1879).

[118] FED. R. EVID. 804(b)(6).

[119] *Giles*, 128 S. Ct. at 2687–88.

[120] *Id.* at 2683–93.

[121] *Id.* at 2687–88.

[122] *Id.* at 2687 (quoting FED. R. EVID. 804(b)(6)).

[123] *Id.*

act that rendered the witness unavailable. The California law at issue did not specify this intent requirement, instead only requiring that the witness was in fact unavailable due to the accused's misconduct.[124] In many cases this will make little difference because the Government will often be able to argue that there is some evidence of the accused's intent to make the witness unavailable. One example discussed in the opinion is where an accused engages in a pattern of isolating the victim before committing a criminal act against her.[125] In such cases, there may often be evidence that the accused has purposefully made the victim unavailable as a witness.

The doctrine of forfeiture by wrongdoing is important for Judge Advocates to understand as a means to admit testimonial hearsay evidence that would otherwise be excluded under *Crawford*. The Supreme Court has made it clear that intent is a necessary element of the forfeiture by wrongdoing doctrine as codified in MRE 804(b)(6), taken directly from the Federal Rule of the same nomenclature. Interestingly, the ACCA recently decided a case involving the doctrine, where it cited *Giles* and recognized the intent requirement in the MRE.[126] The case was *United States v. Marchesano*, but it was decided in the current term, so more detailed treatment will await next year's symposium.[127]

The last case discussed in this article conforms to the theme of following established precedent as in *Pack* and *Giles*, but this time in the realm of jurisdiction. *United States v. Hart* recaps the existing requirement for a valid discharge ending personal jurisdiction over a servicemember; however, as a 3–2 decision, it also highlights the fact that the three accepted requirements are not necessarily planted in concrete.[128]

### ***United States v. Hart***[129]

> Two days after Airman First Class Dustin M. Hart received his Discharge from Active Duty (DD Form 214), but before he received separation pay, his command stopped processing the computation of his final pay and revoked his DD Form 214. Several weeks later various drug charges were preferred against him.[130]

Airman First Class (A1C) Hart began working as a confidential informant for AFOSI after confessing to several drug offenses on 2 January 2004.[131] Unbeknownst to AFOSI, a medical evaluation board (MEB) found him unfit for service on 8 January 2004.[132] Although the legal office had sent a memo to personnel asking for A1C Hart to be placed on administrative hold for 120 days, the separations section began his outprocessing sometime in January 2004.[133] On 24 February 2004, A1C Hart finished his outprocessing checklist and provided the information necessary for calculation of his final pay to the finance office.[134] Two days later, an initial calculation of his final pay was entered into the Defense Finance and Accounting System (DFAS).[135] On 3 March, A1C Hart was issued his Department of Defense (DD) Form 214.[136] A few days later, his squadron commander, AFOSI, and the legal office discovered that Hart had received his discharge certificate.[137] The legal office immediately directed finance to stop calculating his final pay, and his squadron commander requested that his DD 214 be revoked.[138] On 9 March 2004, A1C Hart went AWOL and he was arrested and returned to military control on 18 March 2004.[139] Charges were preferred on 23 March 2004.[140] Airman First Class Hart was charged with wrongful possession, and use, and distribution of illegal drugs.[141] Prior to trial the defense made a motion to dismiss for lack of personal jurisdiction.[142] The motion was denied by the trial judge, who found that there had not been a final accounting of pay, since there were steps remaining in the process of calculating A1C Hart's final pay.[143] The Court of Criminal Appeals agreed with the trial judge that there was personal jurisdiction since there was no final accounting of pay.[144]

The CAAF considered whether there is personal jurisdiction over a servicemember who has received his DD 214 and completed outprocessing, but whose final pay had not been delivered.[145] They held that personal jurisdiction continues until the servicemember's final pay or a substantial portion is ready for delivery.[146]

Article 2 of the Uniform Code of Military Justice (UCMJ) says generally that members of the armed forces are subject to military jurisdiction until they have been discharged.[147] The UCMJ does not specifically describe the point in time where

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[124] *Id.* at 2682, 2693.

[125] *Id.* at 2693.

[126] *See* United States v. Marchesano, No. 20060388 (A. Ct. Crim. App. Oct. 2, 2008).

[127] *Id.*

[128] 66 M.J. 273 (C.A.A.F. 2008).

discharge is effective; however, there is a personnel statute that military courts have relied on to answer that question since at least 1985.[148] The statute is 10 U.S.C. sections 1168(a) and 1169 (2000).[149] The three requirements for a valid discharge have been described as follows:

> We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must be delivery of a valid discharge certificate. . . . Second, there must be a final accounting of pay made. This is an explicit command set forth by Congress in 10 U.S.C. section 1168(a). . . . Third, appellant must undergo the "clearing" process required under appropriate service regulations to separate him from military service.[150]

The key to this case was whether there had been a final accounting of pay before appellant's discharge was revoked.[151] Whether there was personal jurisdiction is a question of law reviewed by appellate courts using a de novo standard.[152] However, courts accept the military judge's findings of fact unless they are clearly erroneous or unsupported by the record.[153] Here there was no claim of factual error, and so the military judge's factual findings were accepted.[154] The military judge found that there were at least seven steps required under DFAS and finance office procedures in order to effect a final accounting of pay.[155] In Hart's case, only step one had been accomplished.[156] The military judge also found that the local finance office had twenty days to complete the initial calculations and forward them to DFAS.[157] Here the discharge was

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[129] *Id.*

[130] *Id.*

[131] *Id.* at 274.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* (citing U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge from Active Service (2000)).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 274–75.

[144] *Id.* at 275.

[145] *Id.* at 274.

[146] *Id.*

[147] *Id.* at 275 (citing UCMJ art. 2 (2008)).

[148] *Id.* at 275–76.

[149] 10 U.S.C. §§ 1168(a), 1169 (2000).

[150] *Hart*, 66 M.J. at 276 (quoting United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citations omitted)).

[151] *Id.* at 274.

[152] *Id.* at 276.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 277.

[157] *Id.*

revoked well within the twenty day window.[158]

This was a 3–2 decision, with Chief Judge Effron and Judge Stucky dissenting.[159] The thrust of the dissent was that the court's ruling makes it difficult if not impossible to know with certainty when a discharge has become effective.[160] Even though a servicemember has received a valid DD 214, and completed final outprocessing, including the finance office, they still are not completely released from military status until such time as their final pay is calculated and ready for delivery.[161]

It is important for Judge Advocates to recognize the continued validity of the three requirements from *King*: delivery of a valid DD 214, final accounting of pay, and a clearing process.[162] However, it is equally important for Judge Advocates to recognize that this was a split decision (3–2), where one vote could cause a different result in a future case.

## Conclusion

This term included cases that generally confirmed our understanding of existing law, rather than significant change. The only exception was the admissibility of lab reports considered in *United States v. Harcrow* and *United States v. Blazier*, an issue that may ultimately be decided in the near future by the Supreme Court in *Melendez-Diaz v. Massachusetts*.

The CAAF confirmed that *Maryland v. Craig* is still good law after *Crawford*, and the Supreme Court interpreted the doctrine of forfeiture by wrongdoing consistently with the plain language of FRE 804(b)(6), which is identical to MRE 804(b)(6). *United States v. Hart* continued the trend by adhering to established precedent for determining the existence of personal jurisdiction. However, the split decision in that case also demonstrates the potential flexibility of appellate jurisprudence.

[158] *Id.*

[159] *Id.* at 277–80.

[160] *Id.*

[161] *Id.* at 279.

[162] United States v. King, 27 M.J. 327, 329 (C.M.A. 1989).