The Missing Link: *Williams v. Illinois* and the Military's Drug Testing Program

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I. Introduction

It seemed like an open and shut case. After PVT Smith's urine tested positive for marijuana, the government charged him with wrongfully ingesting a controlled substance. The young prosecutor had all the necessary witnesses—the Soldier who collected his urine, the evidence officer who took the urine sample to the lab, and an expert from the laboratory that tested the urine. Frankly, the prosecutor was surprised that PVT Smith and his lawyer seemed ready for trial at all.

But PVT Smith's attorney came out swinging. He immediately moved to exclude the government's expert witness, Dr. Lang, from testifying. Dr. Lang worked for one of the military's well-known laboratories, and her expertise was beyond dispute. But that wasn't why PVT Smith's attorney was challenging her. Dr. Lang hadn't tested PVT Smith's urine sample—in fact, she was working at a different laboratory altogether when the sample was tested several months ago. But the expert who did test PVT Smith's sample was out of the country and wasn't available for trial. So the prosecutor asked Dr. Lang to review the urinalysis results and Dr. Lang was confident that the original expert had gotten it right—PVT Smith's urine contained traces of marijuana. And she was prepared to testify to that conclusion. At least, that was the prosecutor's plan, but he was surprised by this turn of events. But what was really surprising was that the prosecutor wasn't prepared for this motion. He should have seen this coming a mile away.

The government routinely relies on expert witnesses to prosecute wrongful drug use cases.[1] Sometimes, the government's case hinges entirely on urinalysis results.[2] In these cases—where there is no other direct or circumstantial evidence of illegal drug use—the prosecutor *must* present expert testimony to establish the reliability of the drug testing procedures.[3] Typically, the government calls a single expert, and the expert may not even be the laboratory technician who tested the Soldier's urine sample.[4] As a result, convicted Soldiers typically raise a Sixth Amendment right to confrontation claim on appeal.[5] In 2010, the Court of Appeals for the Armed Forces (CAAF) decided *United States v. Blazier*, which provided a framework for analyzing the Confrontation Clause in urinalysis cases.[6]

Two years later, the United States Supreme Court addressed—in a non-military context—a rape case where the government used forensic expert testimony to obtain a conviction.[7] In *Williams v. Illinois*,[8] the defendant argued that the government's deoxyribonucleic acid (DNA) expert improperly testified to DNA results when she did not perform the tests or even observe the testing process, in violation of his Sixth Amendment right to confrontation.[9] The Court upheld Williams' conviction, but the Justices were far from unified; the Court produced a plurality opinion, two concurring opinions, a dissenting opinion, and three different rules.[10]

In a 2013 decision, *United States v. Tearman*, the CAAF decided that *Williams* does not offer any guidance in resolving Confrontation Clause challenges in urinalysis cases.[11] In a concurring opinion, however, Chief Justice Baker criticized his colleagues for ignoring *Williams* simply because the Supreme Court did not speak with one voice.[12]

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[1] *See e.g.*, United States v. Tearman, 72 M.J. 54 (C.A.A.F. 2013); United States v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011); United States v. Lusk, 70 M.J. 278 (C.A.A.F. 2011). Under Article 112a, a Soldier who "wrongfully uses" a controlled substance is subject to court-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 37(a) (2012) (hereinafter MCM).

[2] United States v. Campbell, 50 M.J. 154, 159 (C.A.A.F. 1999).

[3] *Id.*

[4] *See* cases cited *supra* note 1.

[5] *Id.* The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend VI.

[6] United States v. Blazier, 69 M.J. 218 (C.A.A.F. 2010) [hereinafter *Blazier II*]. The CAAF actually issued two separate *Blazier* opinions. The CAAF announced its first opinion in March 2010. United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010). [hereinafter *Blazier I*]. Then, after remanding the case for further argument, the CAAF issued *Blazier II*. United States v. Blazier, 69 M.J. 218 (C.A.A.F. 2010).

[7] Williams v. Illinois, 132 S. Ct. 2221 (2012).

[8] *Id.*

[9] *Id.* at 2227-28.

[10] *Id.* at 2244. Justice Alito authored the plurality opinion, to which Chief Justice Roberts, Justice Kennedy, and Justice Breyer joined. *Id.* at 2227. Justices Breyer and Justice Thomas filed separate concurring opinions. *Id.* In the dissent, Justice Kagan spoke for herself, Justice Ginsburg, Justice Scalia, and Justice Sotomayor. *Id. See also infra* notes 53-73 and accompanying text (discussing plurality, concurring, and dissenting opinions).

[11] *Tearman*, 72 M.J. at 59 n.6.

[12] *See id.* at 69 (Baker, C.J., concurring).

This Article agrees. No court can adequately address these kinds of cases without grappling with *Williams*.[13]

This Article is divided into five sections. The first section provides a brief overview of the Confrontation Clause. The second section describes the Supreme Court's *Williams* decision. Next the Article discusses the military's urinalysis testing program and then analyzes the CAAF's opinion in *United States v. Blazier*. Finally, the Article concludes that the CAAF's interpretation of *Williams* is incorrect; a close reading of the Supreme Court's decision, in fact, strongly suggests that key components of the *Blazier* framework are no longer good law.

II. The Confrontation Clause

The Sixth Amendment guarantees that an accused has a right to "confront" (i.e. cross-examine) the witnesses against him at trial.[14] The right to confrontation is not unlimited, however.[15] In *Crawford v. Washington*,[16] the U.S. Supreme Court held that the Confrontation Clause only applies to "testimonial" hearsay statements.[17] The government, therefore, cannot introduce a testimonial hearsay statement into evidence unless the accused has an opportunity to cross-examine the witness during trial or that witness is unavailable.[18]

Since *Crawford*, testimonial evidence has become the cornerstone of the Court's Confrontation Clause jurisprudence.[19] To be considered testimonial, the Supreme Court held in *Crawford*, a reasonable person (upon hearing the statement) would "believe that the statement would be available for use at a later trial."[20] Some statements, the Court held, are always testimonial, including prior trial testimony, affidavits, and statements that suspects make to police officers during formal interrogation sessions.[21] Beyond these few examples, however, the Court did not provide a more comprehensive definition of the term "testimonial."[22]

The Supreme Court eventually developed a "primary purpose" test to evaluate whether a statement is testimonial.[23] In *Davis v. Washington*,[24] the Court ruled that a statement is testimonial if the primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution."[25] In *Davis*, a woman's 911 call during an ongoing assault was non-testimonial because the primary purpose of the call was to "enable police assistance to meet on ongoing emergency," not to support a future government prosecution.[26] Applying the *Davis* test, a federal circuit court held that statements in autopsy reports are non-testimonial because the medical examiner's office generally performs autopsies regardless of whether the authorities suspect foul play.[27]

The Confrontation Clause also applies to forensic laboratory reports.[28] In *Melendez-Diaz v. Massachusetts*,[29] the Court concluded that the drug analysis reports at issue were "quite plainly affidavits" because they were sworn statements that the government offered at trial to prove that the defendant possessed cocaine.[30] Two years later, in *Bullcoming v. New Mexico*,[31] the Supreme Court made explicit the proposition that the defendant has the right to cross-examine the actual *author* (or creator) of the testimonial document upon which the government is relying to prove the defendant's guilt.[32] In *Bullcoming*, the Court

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[13] *Id.* at 65-66 (Baker, C.J., concurring).

[14] U.S. CONST. amend VI. In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that the right of cross-examination is the centerpiece of defendant's confrontation right. *Id.* at 54.

[15] *See Crawford*, 541 U.S. at 51-53 (describing limits of defendant's confrontation rights).

[16] 541 U.S. 36 (2004).

[17] *Id.* at 53. Under the Military Rules of Evidence (MRE), the government cannot introduce "hearsay" statements into evidence—that is, an out-of-court statement offered at trial for its truth—unless it meets a recognized exception. MCM, *supra* note 1, MIL. R. EVID. 801(a), 802. Before *Crawford*, the government could introduce hearsay statements into evidence without running afoul of the Confrontation Clause so long as the statement had a "sufficient indicia of reliability." *See* Ohio v. Roberts 448 U.S. 56, 68 (1980) (setting forth pre-*Crawford* test for determining Confrontation Clause violations).

[18] *Crawford*, 541 U.S. at 68.

[19] *See* Jessica Smith, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports*, ADMIN. OF. JUSTICE BULL. (Sept. 2012), at 1 (describing Court's post-*Crawford* Confrontation Clause jurisprudence).

[20] *Id.* at 52 (internal citations omitted).

[21] *Id.* at 68.

[22] *Crawford*, 541 U.S. at 68.

[23] Davis v. Washington, 547 U.S. 813, 822 (2006).

[24] *Id.*

[25] *Id.* To determine the primary purpose, a reviewing court must objectively evaluate the statements and actions of the parties at the time the statement was made. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

[26] *Davis*, 547 U.S. at 828. The Court reasoned that the victim "was not acting as a *witness*" for Sixth Amendment purposes when she called 911. *Id* (emphasis in original). "No 'witness' goes into court to proclaim an emergency and seek help." *Id.*

[27] *See* United States v. James, 712 F.3d 79, 98 (2nd. Cir. 2013) (describing autopsy procedure under New York state law).

[28] Smith, *supra* note 19, at 2.

[29] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

[30] *Id.* at 310. The Court overturned the defendant's conviction because the defendant had a right to cross-examine a laboratory analyst who tested the suspected narcotics that were found in his car when the defendant was arrested. *Id.* at 311.

[31] Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

[32] *Id.* at 2714.

overturned a defendant's driving under the influence (DUI) conviction because the trial judge improperly admitted the defendant's blood alcohol test results even though the State's expert witness played no role in the testing process.[33]

III. *Williams v. Illinois*

Williams v. Illinois is the Supreme Court's latest case applying the Confrontation Clause to a case involving forensic scientific evidence.[34] The Supreme Court has issued fractured opinions in prior cases.[35] Three different tests for defining testimonial evidence emerged from the Court's opinions and no single test received majority support.[36]

A. Factual Background

In early 2000, an Illinois hospital performed a sexual assault exam on a female rape victim and sent vaginal swabs to the Illinois State Police (ISP) crime lab for testing.[37] After confirming the presence of semen, the ISP lab sent the samples to a laboratory in Maryland (Cellmark) for further DNA testing.[38] Cellmark developed a male DNA profile from the vaginal sample and generated a report for the ISP lab, which then entered the profile into the State of Illinois' DNA database.[39] At this time, Sandy Williams ("Williams") was not a suspect in the rape.[40]

Several months later, Williams was arrested for an unrelated offense and an Illinois court ordered him to submit a blood sample.[41] The ISP lab created a DNA profile from Williams' blood sample and entered his profile into the state database.[42] The ISP laboratory analyst, Sandra Lambatos, eventually ran a computer search and determined that the Cellmark-created DNA profile matched Williams' DNA profile.[43] Williams was arrested and charged with sexual assault.[44]

At trial, the State offered Lambatos as an expert witness in forensic DNA analysis.[45] She testified that Williams' DNA profile matched the Cellmark profile.[46] The State did not call an analyst from Cellmark, however, to explain how its laboratory obtained the male DNA profile from the victim's vaginal swabs.[47] Lambatos testified that she did not play any role in the Cellmark testing process.[48]

The trial judge found Williams guilty of sexual assault.[49] On appeal, Williams argued that he should have had the right to cross-examine a laboratory analyst from Cellmark because the Cellmark report was testimonial.[50] Specifically, Cellmark created its report in response to a state police request and the report was meant to serve as evidence in a future criminal prosecution.[51]

B. The *Williams* Decisions

The Supreme Court affirmed Williams' conviction.[52] The four-justice plurality, per Justice Alito, concluded that the Cellmark report was non-testimonial.[53] Justice Thomas agreed, but he disagreed with the plurality's testimonial analysis.[54] Justice Kagan spoke for the four dissenting justices; she determined that the Cellmark report was

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[33] *Id.* at 2710-12. The Court ruled that the defendant could not effectively cross-examine the State's "surrogate" expert about whether the testing analyst followed the appropriate procedures for testing the defendant's blood. *Id.* at 2715-16. Furthermore, the State did not establish or even assert the testing analyst was "unavailable," as *Crawford* requires. *Id.* at 2715.

[34] *Sweeney*, 72 M.J. at 65-66 (Baker, C.J., concurring).

[35] *Williams*, 132 S. Ct. at 2227, 2244.

[36] Smith, *supra* note 19, at 2.

[37] *Williams*, 132 S. Ct. at 2229 (plurality opinion).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2230.

[47] *Id.* at 2267 (Kagan, J., dissenting). The State did not introduce the Cellmark report into evidence at trial. *Id.* at 2230 (plurality opinion).

[48] *Id.* at 2235 (plurality opinion).

[49] *Id.* at 2231.

[50] *See id.*

[51] *See id.*

[52] *Williams*, 132 S. Ct. at 2228 (plurality opinion).

[53] *Id.* The Court actually affirmed Williams' convictions on two independent grounds. *Id.* at 2228. The plurality first concluded that the State did not offer the Cellmark DNA results into evidence for their truth—i.e. the report was not *hearsay*. *Id.* In the Court's view, the State's expert simply testified the two DNA profiles—she didn't vouch for the scientific validity of the Cellmark profile and her expert opinion didn't depend on the validity of the Cellmark profile. *Id.* at 2239. Therefore, the State used the Cellmark for a *non-hearsay* basis—as a basis for the expert's comparison of two different samples. *Id.* Even assuming the Cellmark report did qualify as hearsay, however, the plurality concluded that it was non-testimonial. *Id.* at 2227.

[54] *Id.* at 2259-62 (Thomas, J., concurring).

testimonial, but she applied an altogether different test for defining a testimonial statement.[55]

1. The Plurality Opinion: The Targeted Individual Test

To qualify as testimonial, the plurality held a statement must have the primary purpose of "accusing a *targeted* individual of engaging in criminal conduct."[56] When Cellmark produced its DNA report, Williams had not been charged with a crime; in fact, he was not even a suspect in the sexual assault case.[57] The real purpose of the Cellmark report, Justice Alito declared, was to "catch a dangerous rapist who was still at large."[58] At the time Cellmark produced its report, it could not have possibly known that Williams would be inculpated in the rape.[59] In that respect, this lab report was more akin to a domestic violence victim's 911 cry-for-help, the primary purpose of which is to obtain immediate police assistance for an ongoing emergency (in this case, the possibility of future sexual assaults).[60]

2. The Dissenting Opinion: The Evidence Test

Justice Kagan criticized Justice Alito for adopting a novel and far more restrictive test for evaluating testimonial evidence.[61] The correct test according to Justice Kagan is the one to which the Court has previously adhered. This test looked at whether the primary purpose of the statement is to establish "past events potentially relevant to later prosecution."[62] That is, a testimonial statement is "meant to serve as evidence in a potential criminal trial."[63] In this case, Cellmark extracted a DNA profile from semen that was found inside a rape victim, documented its findings in a formal report, and forwarded its report to the state police lab that requested DNA testing.[64] This report was clearly meant to serve as evidence in a potential rape trial of the specific male whose DNA profile matched the Cellmark profile.[65] The fact that Williams himself was not a suspect at the time was legally irrelevant.[66]

3. Justice Thomas's Concurring Opinion: The Formality Test

In Justice Thomas's view, the Confrontation Clause only reaches "formalized testimonial statements that are characterized by solemnity."[67] They include affidavits, depositions, and statements made to police during formal custodial interrogations.[68] The Cellmark report was non-testimonial because it "lacks the solemnity of an affidavit or deposition."[69] First, no one at Cellmark certified that the DNA testing results were accurate.[70] Second, the reviewers who signed the report did not claim to have performed the DNA testing.[71] Finally, the reviewers did not even certify that the actual testers had followed standard DNA testing protocol.[72] Unlike his colleagues, Justice Thomas believes that a functional-based "primary purpose" analysis is unworkable in practice.[73]

IV. The Military's Urinalysis Program

To understand the potential impact of *Williams* in military drug prosecutions, one needs to understand how the military's urinalysis program generally operates.

The military's urinalysis program has three primary purposes: (1) deterring drug use among servicemembers; (2) maintaining military readiness and fitness; and (3) separating

[55] *Id.* at 2272-75 (Kagan, J., dissenting). The dissenting justices also disagreed with the plurality's hearsay analysis. *See id.* at 2264-72 (concluding State offered Cellmark report into evidence to prove that DNA results originated from semen found inside victim's vaginal swabs).

[56] *Id.* at 2243 (plurality opinion).

[57] *Id.* at 2243.

[58] *Id.*

[59] *Id.* at 2243-44.

[60] *See id.* at 2242-43 (analogizing purpose of Cellmark report to purpose of victim's 911 call in *Davis. Washington*); *see also Davis*, 547 U.S. at 2268 (describing circumstances of victim's 911 call).

[61] *Id.* at 2273. "Where that test comes from is anyone's guess," Justice Kagan dismissively wrote regarding the Targeted Individual Test. *Id.*

[62] *Id.* 2273-74 (surveying post-*Crawford* Confrontation Clause jurisprudence).

[63] *Id.* at 2273.

[64] *Id.* at 2264.

[65] *Id.* at 2275. Justice Kagan also criticized Justice Alito's attempt to analogize the Cellmark report to a victim's 911 call for help. *Id.* at 2274. Justice Kagan noted that the local police waited nine months after the rape before sending the victim's vaginal swabs to Cellmark for DNA testing—"hardly the typical emergency response," she wrote. *Id.*

[66] *Id.* at 2274.

[67] *Id.* at 2259 (Thomas, J., concurring).

[68] *Id.* at 2260.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 2261. Because, for instance, a person may make a statement to a police officer *both* to resolve an emergency *and* to assist in a future criminal prosecution, the primary purpose test "gives no principled way to assign primacy to one of those purposes." *Id.* Justice Thomas also agreed with the dissenting justices that the Targeted Individual Test "lacks any grounding in constitutional text, in history, or in logic." *Id.* at 2262. Justice Breyer also filed a separate concurring opinion. Although he agreed with the plurality's ultimate result, he criticized both the plurality and the dissent for failing to devise a comprehensive rule for how to apply the Confrontation Clause to crime laboratory reports. *See* 132 S. Ct. at 2244-55 (Breyer, J., concurring) (discussing proposed approach).

servicemembers who knowingly misuse drugs.[74] Although a court-martial is one possible outcome of a positive drug test, notably it is not listed as one of the primary purposes of the DoD program.[75] Most positive drug tests, in fact, do not result in criminal prosecution.[76]

Every active-duty servicemember is randomly drug tested at least once per year.[77] After obtaining a urine sample, the Soldier's unit ships the specimen to one of the military's forensic laboratories for testing.[78] Before shipment, the unit collections officer completes the chain-of-custody portion of the specimen custody document, DD Form 2624.[79] The specimen custody document accompanies the samples to the lab.[80]

The lab subjects each urine specimen to a standard three-step testing process.[81] In every case, the lab enters the test results on the specimen custody document.[82] The results are recorded on Block G, and an analyst signs and dates Block H, certifying that the results "were correctly determined by proper laboratory procedures, and that they are correctly annotated."[83]

Upon command request, the lab provides copies of the complete testing results and all supporting documents.[84] These include the completed specimen custody document and the machine-generated results of the three tests—the so-called "raw data."[85] The lab also prepares a cover memorandum to accompany each drug testing report.[86] The cover memorandum summarizes the urinalysis test results and records the specific concentration of each illegal drug found.[87] It also lists the corresponding Department of Defense (DoD) cutoff levels for each drug.[88] Finally, a laboratory official certifies at the bottom of the memorandum that the test results are scientifically reliable.[89]

V. The *Blazier* Approach

As noted above, Soldiers who are convicted of drug offenses on the basis of urinalysis results typically raise a Confrontation Clause challenge on appeal.[90] In the wake of *Crawford* and *Melendez-Diaz*, the CAAF's decision in *United States v. Blazier* has had the most far-reaching impact in this area of the law.[91]

In *Blazier*, a Soldier's urine tested positive for methamphetamine and THC in two different tests.[92] At the command's request, the Air Force laboratory provided copies of both drug testing reports.[93] The command specifically noted in writing that the reports were "needed for court-martial use."[94] The lab provided both reports, along with two separate cover memorandums that described the testing results.[95] The certifying official, Dr. Vincent Papa, signed each memorandum under oath, confirming the "authenticity of the attached records."[96]

Dr. Papa testified at trial as an expert witness in forensic toxicology.[97] He concluded that Blazier's urine samples tested positive for methamphetamine and marijuana, based on his training and experience, his knowledge of the lab's testing procedures, and his review of the drug testing reports.[98] He also repeated verbatim the information listed in the cover memorandums—the test results, the concentration

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[74] U.S. DEP'T OF DEF., INSTR. 1010.01, para. 4 (12 Sept. 2012) [hereinafter DODI 1010.01].

[75] DODI 1010.01, *supra* note 74, para. 4; *see also Tearman*, 72 M.J. at 65 n.4 (Baker, C.J., concurring) (summarizing recent DoD drug testing statistical report).

[76] *See Tearman*, 72 M.J. at 65 n.4 (summarizing DoD data).

[77] DODI 1010.01, *supra* note 75, enclosure 3, para. 2.c.

[78] *See* Major David Edward Coombs, *United States v. Blazier: So Exactly Who Needs an Invitation to the Dance?*, ARMY LAW., July 2010, at 19 (describing military's drug testing procedure).

[79] Fort Meade Forensic Toxicology Drug Testing Laboratory, Tour Our Lab, https://iftdtl.amedd.army.mil/ftmd/Tour.html (last visited May 25, 2015) (summarizing laboratory's normal drug testing procedure).

[80] *Id.*

[81] *Id.* The lab subjects each sample to an immunoassay-based test to separate positive samples from negative samples. *Id.* Then, the presumptively positive samples undergo an identical re-test. *Id.* Finally, the lab performs a final Gas Chromatography / Mass Spectrometry (GC / MS) test, considered the "gold standard" of tests within the forensic field. Coombs, *supra* note 78, at 19. If the GC / MS test confirms the earlier two results, the lab reports the sample as positive. *Id.*

[82] Fort Meade Lab, Tour Our Lab, *supra* note 79.

[83] *See Tearman*, 72 M.J. at 57-58 (describing relevant sections of DD 2624)

[84] Fort Meade Forensic Toxicology Drug Testing Laboratory, Litigation Support, https://iftdtl.amedd.army.mil/ftmd/Tour.html (last visited May 25, 2015).

[85] Fort Meade Lab, Litigation Support, *supra* note 84; *see also Blazier I*, 68 M.J. 439, 440 (describing typical contents of drug testing report).

[86] *Id.*

[87] *See Blazier I*, 68 M.J. at 440 (describing cover memorandum); *see also Sweeney*, 70 M.J. 296, 299 (describing similar cover memorandum).

[88] *Id.*

[89] *Blazier I*, 68 M.J. at 440.

[90] *See* cases cited *supra* note 1.

[91] *See Sweeney*, 70 M.J. at 301-03 (describing impact of *Blazier* opinions).

[92] *Blazier I*, 68 M.J. at 440. After his first sample came back positive, Blazier denied to authorities that he knowingly used any illegal substances, and he agreed to provide a second urine sample. *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Blazier II*, 69 M.J. at 221.

[98] *Id.* at 226.

levels of each substance, and the DoD cutoff levels.[99] Dr. Papa acknowledged that he did not test either urine sample or observe either testing process.[100] The government did not call either testing analyst.[101] Over the accused's objection, the military judge admitted both drug testing reports into evidence as non-testimonial business records.[102]

The CAAF reached two major conclusions in *Blazier*. First, the cover memorandums contained testimonial hearsay.[103] They were made under "circumstances which would lead an objective witness to believe that the statement[s] would be available for use at a later trial."[104] As the Court reasoned, Blazier's command specifically requested the reports to court-martial him for drug-related offenses after already learning that the test results were positive.[105] Furthermore, the cover memorandum stated that "certain substances were confirmed present in appellant's urine at concentrations *above the DOD cutoff level*," which is exactly what the government intended to prove at trial to obtain a conviction.[106] The military judge, therefore, should not have admitted the cover memorandums into evidence nor should Dr. Papa have been permitted to testify to statements contained in the memorandums.[107]

Nevertheless, the CAAF ruled that an expert has the right to present an independent opinion based on training, experience, and a review of the evidence, so long as the expert does not *repeat* testimonial hearsay evidence into the record.[108] In *Blazier*, Dr. Papa offered an independent opinion about Blazier's urine results and the accused had the opportunity to cross-examine him about the validity of that opinion.[109] Except for repeating the statements in the cover memorandum, Dr. Papa's testimony did not violate the accused's confrontation rights.[110]

The CAAF reaffirmed and extended its *Blazier* analysis in *United States v. Sweeney*.[111] In *Sweeney*, the court held that Blocks G and H of the specimen custody document are testimonial.[112] Block G (the certification) is testimonial because it functions as an "affidavit-like statement of evidence" that formally certifies the drug testing results contained in Block H.[113] Not only does Block G certify the results, but it also certifies that the Block H results are scientifically valid.[114] As in *Blazier*, the *Sweeney* court also concluded that the cover memorandum was testimonial.[115] In Sweeney's particular case, the command did not request the lab reports until *after* the accused was charged, which further buttressed the CAAF's view that the document was meant to serve as evidence at a court-martial against Sweeney.[116] Lastly, the CAAF reaffirmed that *Blazier's* "available for use at a later trial" test is the proper test for evaluating whether a statement is testimonial.[117]

VI. The *Blazier* Approach: A Critique

The CAAF has made it very clear that the Supreme Court's *Williams* decision does not have any precedential value in military urinalysis cases.[118] In *United States v. Tearman*, the CAAF bluntly declared "We do not view *Williams* as altering either the Supreme Court's or this Court's Confrontation Clause jurisprudence."[119] Quite notably, the CAAF did not even discuss the *Williams* case in *Tearman*; the Court buried its only reference (the above quotation) in a footnote.[120] The CAAF has never again cited the *Williams* case.[121]

The CAAF's position has a tempting simplicity because the *Williams* Court did not produce a majority opinion.[122]

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[99] *Id.*

[100] *Blazier I*, 68 M.J. at 440.

[101] *Blazier II*, 69 M.J. at 221.

[102] *Id.*

[103] *Blazier I*, 68 M.J. at 443.

[104] *Id. (*internal citations omitted).

[105] *Id.*

[106] *Id.*

[107] *Blazier II*, 69 M.J. at 226.

[108] *Id.* at 224-26. Under MRE 703, the CAAF reasoned, an expert witness may review and rely upon the work of other laboratory analysts so long as the expert reaches an independent opinion. *Id.* at 225; *see also* MCM, *supra* note 1, MIL. R. EVID. 703 (setting forth permissible bases of expert witnesses' opinion in military system).

[109] *Blazier II*, 69 M.J. at 226.

[110] *Id.* at 226-27. The CAAF ultimately reversed Blazier's conviction, but the Court remanded the case for further argument over whether the admissibility of the cover memorandum and Dr. Papa's repetition of the contents of the memorandum were harmless beyond a reasonable doubt. *Id.* at 227.

[111] *Sweeney*, 70 M.J. at 298.

[112] *Id.* at 303.

[113] *Id.* at 304.

[114] *Id.* "Such a formal certification," the CAAF reasoned, "has no purpose but to function as an affidavit." *Id.* at 303.

[115] *Id.* at 304.

[116] *Id.*

[117] *Id.* at 301. "In the *Blazier* cases," the CAAF wrote, "we set forth a straightforward path for analyzing the admissibility of drug testing reports under the Confrontation Clause." *Id.* at 298.

[118] *Tearman*, 72 M.J. at 59 n.6.

[119] *Id.*

[120] *See generally* United States v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011).

[121] *See* United States v. Squire, 72 M.J. 285 (C.A.A.F. 2013) (analyzing standard for evaluating testimonial evidence without referencing *Williams v. Illinois*); *see also* United States v. Porter, 72 M.J. 335 (C.A.A.F. 2013) (analyzing Confrontation Claim in drug testing case without referencing *Williams v. Illinois*).

[122] *Williams*, 132 S. Ct. 2221.

But, a close reading of *Williams* strongly suggests that the CAAF's dismissive view may be incorrect.[123] There are three major reasons why.

First, a majority of the Supreme Court justices did not apply the CAAF's "available for use" test for determining a testimonial statement.[124] The four-justice plurality applied the Targeted Individual Test and Justice Thomas would apply a formality-based test in future cases.[125] In that key respect, the CAAF was wrong about *Williams*—at least one common rationale united five of the Justices.

Even the four dissenting justices in *Williams* made it clear that "primary purpose" of the underlying forensic reports is the most relevant consideration.[126] In *Williams*, the Cellmark report was testimonial because (per Justice Kagan) it was "meant to serve as evidence in a potential criminal trial."[127] That is not the same thing as saying that the Cellmark report was testimonial because it *may* have been *available* for use at trial. As Chief Justice Baker has argued, after *Williams* the CAAF cannot adequately address a Confrontation Clause challenge in a urinalysis case without considering the primary purposes of the military's urinalysis program which does not include criminal prosecution.[128] In short, arguably all nine Supreme Court justices did not endorse the CAAF's "available for use" test as the CAAF applied it in *Blazier.*

Second, a majority of the *Williams* Court would likely conclude that the specimen custody document (specifically Blocks G and H) is non-testimonial. As explained above, DD 2624 is not created to serve as evidence at a particular court-martial against a particular servicemember; rather, the Soldier's unit initiates the document at the outset of the urinalysis process long before it knows the results.[129] In other words, the purpose is to *exonerate* a Soldier of any wrongdoing as much as it is to *inculpate* a particular Soldier for a drug-related offense. Therefore, certainly the Justice Alito-led plurality (applying the Targeted Individual Test) and probably the Justice Kagan-led dissent (applying the Evidence Test) would have ruled differently than the CAAF in *Sweeney*.[130]

Third, the cover memorandum would likely be non-testimonial in some cases under a *Williams* analysis. Take, for example, a case where the commander learns about a Soldier's positive test results and requests the full drug testing report from the lab, but the commander has still not decided whether to prefer charges. In this hypothetical case, the cover memorandum is not necessarily *meant* to serve as evidence at a court-martial and is not necessarily *meant* to target the Soldier for prosecution. Therefore, it probably would not qualify as testimonial under either the Targeted Individual Test or the Evidence Test.[131]

Of course, every case is different, which is why the CAAF cannot dismiss *Williams* as an afterthought. In *Sweeney*, for instance, the command preferred charges and *then* requested the cover memorandum.[132] In *Blazier*, the command specifically requested the cover memorandum for "court-martial use."[133] In some cases, like the hypothetical above, the government may request the cover memorandum without having decided to pursue a court-martial. And finally, not every cover memorandum looks the same, which would be important for Justice Thomas because his formality-based analysis is by definition document-specific.[134] What this means is in every case the CAAF should conduct a rigorous analysis—explain how and why *Williams* applies, or why it does not.[135]

VII. Conclusion

So long as the military continues to drug test Soldiers, the military will continue to court-martial Soldiers for wrongful drug use based on urinalysis results. The government will continue to rely on expert witnesses to obtain convictions, and accused Soldiers will continue to raise Confrontation Clause challenges under the Sixth Amendment. In short, the litigants, the military judges, the

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[123] *Williams*, 132 S. Ct. 2221-2277.

[124] *Id.*

[125] *Id. See also supra* text accompanying notes 56-60, 67-73 (describing Formality Test and Targeted Individual Test).

[126] *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting).

[127] *Id.* at 2275 (Kagan, J., dissenting).

[128] *Tearman*, 72 M.J. at 64 (Baker, C.J., concurring).

[129] *See* DoDI 1010.01 *supra* notes 74-75, 77*; see also* accompany text (describing standard military drug testing protocol).

[130] *See supra* text accompanying notes 56-66 (describing Evidence Test and Targeted Individual Test); *see also supra* text accompanying notes 111-117 (describing *Sweeney* opinion).

[131] *Tearman*, 72 M.J. at 64 (Baker, C.J., concurring).

[132] *Sweeney*, 70 M.J. at 304.

[133] *Blazier I*, 68 M.J. at 440.

[134] *See* United States v. Byrne, 70 M.J. 611, 616 (C.G. Ct. Crim. App. 2011) (describing differences between cover memorandum in *Blazier* and *Byrne*); *see also Williams*, 132 S. Ct. 2259 –61 (describing Formality Test).

[135] *Tearman*, 72 M.J. at 68 (Baker, C.J., concurring). In all likelihood, the government would have an easier time obtaining a conviction in some cases. If the specimen custody document and cover memorandum are non-testimonial, as this Article suggests, the government would be able to introduce the test results on both documents into evidence without calling a live witness, plus admit the expert witnesses' independent opinion at trial. The cover memorandum and the specimen custody document would reinforce the expert's testimony, and in turn the expert's testimony would confirm the written forensic reports. Also the defense would be unable to keep out these two documents on Confrontation Clause grounds—and still would not have the opportunity to cross-examine the authors of either document. *See Blazier II*, 69 M.J. at 225 (explaining expert witness can convey substance of non-testimonial hearsay statements but cannot repeat testimonial hearsay statements).

service courts, and the CAAF will continue to confront the issues raised in this Article.

In *Blazier*, the CAAF set forth a useful framework for analyzing Confrontation Clause challenges in urinalysis cases when the government does not produce every laboratory expert involved in the drug testing process, but "useful" does not mean "dispositive." In *Williams*, the U.S. Supreme Court subjected the Confrontation Clause to rigorous analysis—even if the nine Justices did not agree on the analysis. But a close reading of the Justices' opinions suggests that a majority would hold that key components of the *Blazier* framework are no longer good law, if they were confronted with this particular issue in the future. For that reason alone, *Williams* merits close analysis.

But the CAAF has settled on applying the Supreme Court's Confrontation Clause jurisprudence as if *Williams* never existed. This is wrong. The CAAF should reconsider its view of *Williams* and the government should urge the military judges, the service courts, and the CAAF to do so. To quote Chief Justice Baker, "we should get the law right."[136]

[136] *Tearman*, 72 M.J. at 69 (Baker, C.J., concurring).