

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
KERN, YOB and MAGGS<sup>1</sup>  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Private E1 LARRY E. HENDERSON, JR.**  
**United States Army, Appellant**

ARMY 20090613

Headquarters, U.S. Army Maneuver Support Center and Fort Leonard Wood  
Charles D. Hayes, Military Judge  
Colonel Steven E. Walburn, Staff Judge Advocate (pretrial)  
Lieutenant Colonel Michael A. Cressler, Acting Staff Judge Advocate (post-trial)

For Appellant: Colonel Mark Tellitocci, JA; Lieutenant Colonel Matthew M. Miller, JA; Captain Shay Stanford, JA; Captain Brent A. Goodwin, JA (on brief).

For Appellee: Major Christopher B. Burgess, JA; Major LaJohnne A. White, JA; Captain Frank E. Kostik, Jr., JA (on brief).

1 June 2012

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MEMORANDUM OPINION ON REMAND  
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*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

MAGGS, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of failure to repair and wrongful use of a controlled substance (three specifications) in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a (2006) [hereinafter UCMJ]. The panel sentenced appellant to a bad-conduct discharge, confinement for 120 days and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence. This case is again before this court for review pursuant to Article 66, UCMJ.

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<sup>1</sup> Judge MAGGS took final action while on active duty.

## INTRODUCTION

We previously issued an unpublished memorandum opinion in this case, *United States v. Henderson*, ARMY 20090613 (Army Ct. Crim. App. 27 May 2011) (mem. op.). In that opinion, we concluded that the evidence was not legally and factually sufficient to sustain the finding of guilty to the charge and specification of failure to repair and also not sufficient to sustain the finding of guilty to one specification of wrongful use of a controlled substance. We affirmed the findings with respect to the other two specifications of wrongful use of a controlled substance. We then reassessed the sentence, and reduced the period of confinement from 120 days to 100 days, while upholding the forfeiture of all pay and allowances and the bad-conduct discharge.

The Court of Appeals for the Armed Forces granted review, vacated our decision, and remanded the case for consideration of two issues:

I. WHETHER, IN LIGHT OF *BULLCOMING v. NEW MEXICO*, 131 S. CT. 2705 (2011), APPELLANT WAS DENIED MEANINGFUL CROSS-EXAMINATION OF THE GOVERNMENT WITNESSES WHO PERFORMED AND OBSERVED THE ERRONEOUSLY ADMITTED LABORATORY TESTS IN VIOLATION OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION WHEN THE MILITARY JUDGE ALLOWED THE EXPERT TOXICOLOGIST TO TESTIFY TO NON-ADMISSIBLE HEARSAY.

II. WHETHER APPELLANT WAIVED THE CONFRONTATION CLAUSE ISSUE WITH RESPECT TO THE FORENSIC LABORATORY REPORTS BY ONLY OBJECTING TO THEIR ADMISSION BASED ON AN INADEQUATE CHAIN OF CUSTODY.

*United States v. Henderson*, 71 M.J. 102 (C.A.A.F. 2012).

Consequently, appellant's case is once again before this court for review under Article 66, UCMJ. Considering the two remanded issues in reverse order, we now conclude, in light of our superior court's recent decision in *United States v. Sweeney*, 70 M.J. 296 (2011), that appellant did not waive the Confrontation Clause issue with respect to admission of certain forensic laboratory litigation packets. We further conclude, in light of *Bullcoming v. New Mexico*, 564 U.S. \_\_\_, 131 S. Ct. 2705 (2011), that the admission of these litigation packets, and the expert's testimony as to non-admissible hearsay within these packets, was plain error and that

this error was not harmless beyond a reasonable doubt. We therefore set aside the findings of guilty.

### WAIVER

When this case first came before us, appellant argued that the admission into evidence of three litigation packets documenting urinalysis laboratory testing violated his rights under the Confrontation Clause of the Sixth Amendment. Appellant based his argument on the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and on our superior court's decisions in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010) [hereinafter *Blazier I*], and *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010) [hereinafter *Blazier II*]. The government conceded that the litigation packets contain substantial testimonial evidence. We concluded, however, that appellant had waived the Confrontation Clause issue because the record showed a specific intention by defense counsel not to raise this issue. See *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008).

After our decision was released, our superior court decided *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). The *Sweeney* decision now causes us to alter our analysis of the waiver issue and to conclude that no waiver occurred. In *Sweeney*, a sailor reported to a Navy installation following an unauthorized absence. *Id.* at 298. An applicable policy required anyone returning from an unauthorized absence of twenty-four hours or more to submit to urinalysis. *Id.* A urine sample was taken, and laboratory analysis revealed that it contained cocaine metabolites. *Id.* at 299. Defense counsel knew of the *Crawford* decision, but did not make a Confrontation Clause objection to the drug testing report or report summary. *Id.* at 299-300, and n. 6. One issue on appeal in the case was whether defense counsel had waived any Confrontation Clause issue.

Our superior court ruled in *Sweeney* that there was no waiver. The court observed that, at the time of the trial, the leading case on admission of drug testing reports in the military justice system was *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). *Sweeney*, 70 M.J. at 301, 304. In *Magyari*, our superior court held that a drug testing report is non-testimonial *in toto*, and that its admission does not violate the Confrontation Clause, provided that the persons conducting the report were merely cataloging the results of routine tests and were not engaged in a law enforcement function. *Magyari*, 63 M.J. at 126-127. Under the *Magyari* precedent, the drug testing report at issue in *Sweeney* would have been admissible because it was made pursuant to a standing policy requiring the testing of urine samples from service members returning from unauthorized leave.

The *Magyari* decision is no longer entirely good law. As explained by CAAF in *Sweeney*, “recent case law demonstrates that the focus has to be on the purpose of

the *statements* in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for testing.” *Sweeney*, 70 M.J. at 302 (emphasis in original). However, because *Magyari* was viewed as valid at the time of the court-martial, the court in *Sweeney* reasoned that raising a Confrontation Clause objection to admission of the drug testing report would have been futile. *Sweeney* at 304. Accordingly, CAAF held that failing to present a Confrontation Clause objection did not constitute a waiver, explaining that:

At the time of Appellant's trial, he had no “colorable objection” and therefore did not voluntarily relinquish a “known” right of confrontation. Because Appellant's urinalysis, like the urinalysis testing in *Magyari*, was not initiated at the outset by law enforcement, any objection by Appellant would have been overruled under *Magyari*—as evidenced by the continued use of *Magyari* in the Courts of Criminal Appeals as the basis for finding no error in the admission of such test . . . . Failing to make what would have been a meritless objection under *Magyari*'s interpretation of *Crawford* cannot possibly signal either a strategic trial decision or a voluntary relinquishment of a “known” right . . . in the context of the military justice system.

*Sweeney*, 70 M.J. at 304 (citations omitted).

The *Sweeney* decision stands for the proposition that an accused should not be held to have waived a Confrontation Clause objection to a drug testing report by failing to make an objection at trial if (1) the evidence was introduced at trial at a time when the courts of criminal appeals were applying the *Magyari* case, and (2) the persons who made the drug testing report were merely cataloging the results of routine tests.

We find the present case to be indistinguishable from *Sweeney* on the waiver issue. Urine samples were collected from appellant on 1 and 3 March 2008 and on 31 October 2008. Appellant was not suspected of drug use prior to submitting his urine samples for testing. As such, the basic data entries regarding the urine samples were not made “in anticipation of prosecution or trial” but were “‘simply a routine, objective cataloging of an unambiguous factual matter.’” *Magyari*, 60 M.J. at 126-27 (quoting *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir.2005)). Appellant’s case came to trial on 1 and 2 July 2009. At the time, the leading opinion of the Army Court of Criminal Appeals on point was *United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007), which cited *Magyari* for the proposition that a decisive factor was whether drug testing was done at the behest of law enforcement. *Williamson*, 65 M.J. at 718. In accordance with the

reasoning in *Sweeney*, the *Williamson* case reasonably indicated that raising a Confrontation Clause objection would have been futile.

In fact, the government relied on *Magyari* in its appellate brief in this case, arguing that “appellant was not suspected of drug use prior to submitting his samples for testing at the laboratory” and that the data entries were “‘simply a routine, objective cataloguing of an unambiguous factual matter’ not made at the ‘behest of law enforcement.’” (Brief for Appellee at 6-7 (quoting *Magyari*, 63 M.J. at 126-27)). This conclusion is consistent with our superior court’s observation in *Sweeney* that “the Courts of Criminal Appeals have continued to cite *Magyari* without further analysis as the basis for finding no error in the admission of all portions of a drug test report except the cover memorandum where the impetus behind the initial urinalysis was unit inspection, rather than law enforcement.” *Sweeney*, 70 M.J. at 301-02 (citing cases). Thus, we now conclude that appellant did not waive the Confrontation Clause issue.

### CONFRONTATION CLAUSE

Having found no waiver, we now turn to the substantive issue on remand: whether, in light of *Bullcoming v. New Mexico*, 131 S. Ct. 2705, admission of the litigation packets and testimony of an expert witness about the litigation packets violated appellant’s rights under the Confrontation Clause.<sup>2</sup> We will apply plain error review to this issue because, although it was not waived, it was also not raised below. Under plain error review, a court may “grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused.” *Sweeney*, 70 M.J. at 304.

#### (A) *Whether There was Error*

In *Bullcoming*, the defendant challenged the admission of a laboratory report containing a testimonial certification because the analyst who prepared the report did not testify. The state argued that the admission was permissible because a second analyst, who qualified as an expert, had testified as a surrogate for the first analyst. The Supreme Court held that the surrogate testimony did not suffice to eliminate a Confrontation Clause problem. The Court ruled that “the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.” *Bullcoming*, 131 S. Ct. at 2716. In *Sweeney*, the facts were similar to those of *Bullcoming*; the government did not call analysts who prepared a drug testing report, but instead called an expert who testified as to the contents of the reports. *See* 70 M.J. at 300. *Sweeney* likewise

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<sup>2</sup> Because we found waiver in our first opinion, we did not previously address this issue.

concluded the surrogate testimony could not satisfy the Confrontation Clause. *Id.* at 304.

In the present case, the government concedes that numerous pages of the laboratory packets have testimonial content. The government, however, argues that their admission did not violate the Confrontation Clause because appellant had the opportunity to confront a government witness who could respond competently to challenges to this evidence. In light of *Bullcoming* and *Sweeney*, we disagree with the government's argument. The government cannot use an expert as a surrogate witness to satisfy the requirements of the Confrontation Clause when testimonial aspects of drug testing reports are admitted. Accordingly, there was error in the admission of the prosecution exhibits.

(B) *Whether the Error was Plain*

In *Sweeney*, our superior court determined that it was plain and obvious error to admit the cover memorandum for the drug testing report because it was an “affidavit-like certification of results resembl[ing] those [the court had] found testimonial in *Blazier I*, and the declarant [i.e., the person who prepared the cover memorandum] . . . was not subject to cross-examination.” *Id.* (citing *Bullcoming*, 131 S. Ct. at 2715-17, and *Blazier II*, 69 M.J. at 223-24). The court further held that it was plain error to admit a specimen custody document certification because it was an “affidavit-like statement” that “indicated ‘that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated.’” *Id.* (quoting *Bullcoming*, 131 S. Ct. at 2715). However, the court held admission of other portions of the drug testing reports, including among other things a data review sheet and a results report summary, was not plain error. The court reasoned that these documents were not plainly and obviously testimonial because they were not “formalized, affidavit-like statements.” *Id.* at 305 (citing *Bullcoming*, 131 S. Ct. at 305).

We reach a similar conclusion here. Admission of the cover memoranda and various testimonial certifications and statements within the reports was plain and obvious error. Admission of other pages, which contained only non-testimonial testing data,<sup>3</sup> was not plain error.

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<sup>3</sup> The government argues that no testimonial content appears on pages 8-11, 13-15, 17-21, and 23-42 of Prosecution Exhibit 1; pages 9-11, 13-15, 17-21, and 23-42 in Prosecution Exhibit 2; and pages 9-11, 13-16, 18-23, and 25-43 in Prosecution Exhibit 3. We agree with this assessment.

(C) *Whether There was Prejudice*

The final question is whether the plain error was prejudicial. Because the error is constitutional in nature, the government must show that the error was harmless beyond a reasonable doubt. *See Sweeney*, 70 M.J. at 304. Among the factors we must consider are “the importance of the uncontroverted testimony in the prosecution’s case, whether that testimony was cumulative, the existence of corroborating evidence, the extent of confrontation permitted, and the strength of the prosecution’s case.” *Id.* at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

In this case, we recognize that the government introduced substantial evidence that did not violate the Confrontation Clause, including appellant’s own incriminating admissions and the portions of the reports that are not testimonial. This evidence might have been sufficient to uphold the conviction if that were all that the panel had seen. But in *Sweeney*, our superior court emphasized:

[I]n assessing harmlessness in the constitutional context, the question is not whether the evidence was legally sufficient to uphold a conviction without the erroneously admitted evidence. *See Fahy v. Connecticut*, 375 U.S. 85, 86, 84 S. Ct. 229, 11 L.Ed.2d 171 (1963). Rather, “ [t]he question is whether there is a reasonable probability that the evidence complained of might have contributed [to] the conviction.’ ” *Chapman [ v. California]*, 386 U.S. [18], 23, 87 S. Ct. 824 [17 L.Ed.2d 705 (1967)] (quoting *Fahy*, 375 U.S. at 86–87, 84 S. Ct. 229).

70 M.J. at 304.

Having reviewed the record as a whole, and applying this high standard, we determine that there is a reasonable probability that at least some of the evidence complained of contributed to the finding of guilty. The panel in all likelihood gave some weight to the reports and certifications in the litigation packets because these items make the packets much easier to understand. In addition, the panel likely gave at least some weight to the surrogate expert’s testimony concerning inadmissible aspects of the litigation packets. We therefore find prejudice, and we cannot uphold the findings of guilty to the two remaining specifications of drug use in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

**CONCLUSION**

We reaffirm our previous decision to set aside and dismiss the findings of guilty to the Specification of Charge I and Charge I and the finding of guilty to

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Specification 2 of Charge II. We now also set aside the findings of guilty to Specifications 1 and 3 of Charge II and Charge II and the sentence. A rehearing on Specifications 1 and 3 of Charge II may be ordered by the same or a different convening authority. All rights, privileges, and property of which appellant has been deprived by virtue of his sentence being set aside by this decision are ordered restored. *See* UCMJ, arts. 58b(c) and 75(a).

Senior Judge KERN and Judge YOB concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.  
Clerk of Court