

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>Misc. Dkt. No. 2010-13</b>
<b>Appellant</b>	)	
	)	
<b>v.</b>	)	
	)	<b>ORDER</b>
<b>Airman First Class (E-3)</b>	)	
<b>ADAM C. BORGMAN,</b>	)	
<b>USAF,</b>	)	
<b>Appellee</b>	)	<b>Special Panel</b>

On 02 August 2010, counsel for the United States filed an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862. This case comes to us a second time as an Article 62, UCMJ, appeal of the trial judge’s refusal to admit two drug testing reports offered against the appellee in his special court-martial for one charge and specification of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. We previously granted the government’s initial appeal of the military judge’s refusal to admit the two drug testing reports at issue and ordered that the case be remanded for further proceedings. *United States v. Borgman*, Misc. Dkt. No. 2009-12 (A.F. Ct. Crim. App. 14 Dec 2009). Our superior court vacated that earlier order, determining that we lacked jurisdiction to hear the Article 62, UCMJ, appeal because the trial judge excluded the evidence at a pretrial hearing rather than during trial on the merits. *United States v. Borgman*, 69 M.J. 84 (2010) (mem.) (citing *United States v. Bradford*, 68 M.J. 371 (C.A.A.F. 2010)). The case was returned to the trial court.

When trial reconvened on 22 June 2010, the military judge expressed his view that the *Borgman* holding required that he defer any rulings on the admissibility of the drug testing reports until after trial on the merits began. After the appellee entered pleas of not guilty and the court members were empanelled, the military judge held an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, at which time the government offered the two drug testing reports at issue.<sup>1</sup> As in the previous session, the defense counsel objected to the admissibility of the reports as testimonial hearsay in violation of the appellee’s Sixth Amendment<sup>2</sup> right to confront the witnesses against him. Again, the military judge excluded the two drug testing reports.

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<sup>1</sup> The cover page memoranda on the Navy Drug Screening Laboratory (NDSL) report and the Air Force Drug Testing Laboratory report were not offered. See *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010) (holding that drug testing report cover page memoranda are testimonial for Confrontation Clause purposes).

<sup>2</sup> U.S. CONST. amend VI.

The government then offered expert testimony concerning the presence of the cocaine metabolite in the appellee's urine based on the drug testing reports without admitting the reports themselves, arguing that such reports are reasonably relied on by experts who may properly render an opinion based on them under Mil. R. Evid. 703. The military judge sustained a defense objection to such opinion testimony, finding that the government could not establish the reliability of the testing and methods without calling as a witness each analyst at the respective laboratory. He declined to reconsider his ruling after the government presented additional evidence on the reliability of the testing.

For the reasons set forth in our previous order, we find that the drug testing reports at issue in this case are non-testimonial and their admission does not violate the Confrontation Clause. *Borgman*, Misc. Dkt. No. 2009-12; *see also United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). Having determined that the drug testing reports are admissible, the issue concerning whether a qualified expert may render an opinion based on data in the reports without admitting the reports themselves is moot.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 21st day of October, 2010,

**ORDERED:**

That the appeal by the United States Under Article 62, UCMJ, is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings consistent with this opinion.<sup>3</sup>

FOR THE COURT

OFFICIAL



STEVEN LUCAS  
Clerk of the Court

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<sup>3</sup> Pages 2-6 of Prosecution Exhibit 5 for Identification (the NDSL report) as well as the cover memoranda on both reports fall outside the scope of this ruling.