IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**ASSIGNMENT OF ERRORS (CORRECTED)**
	)	Before Panel No. 1
v.	)	
	)	Case No. ACM 37249 (rem)
Captain (O-3) **EDWARD T. HUDSON,** United States Air Force, *Appellant*	)	Tried at JBSA Lackland, TX, on 24 June 2014 and 19-27 March 2015 before a general court-martial convened by HQ 2nd AF (AETC)

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

INDEX

TABLE OF AUTHORITIES

Supreme Court of the United States

Court of Appeals for the Armed Forces (and C.M.A.)

Army Court of Criminal Appeals

Other Courts

Uniform Code of Military Justice

Military Rules of Evidence

Other Authorities

ISSUES PRESENTED

I. WHETHER THE MILITARY JUDGE IMPROPERLY ADMITTED EVIDENCE OF UNCHARGED ALLEGATIONS UNDER MILITARY RULES OF EVIDENCE 414 AND 404(B).

II. WHETHER TRIAL COUNSEL'S REFERENCE TO THE STATUTE OF LIMITATIONS IN OPENING STATEMENT, INVOCATION OF FEAR OF APPELLANT IN UNIFORM DURING CLOSING ARGUMENT, REQUEST TO THE MEMBERS TO IMAGINE THEMSELVES IN THE POSITION OF THE ALLEGED VICTIM, AND ASSERTION THAT EVIDENCE OF UNCHARGED OFFENSES COULD BE USED TO OVERCOME A FAILURE OF PROOF ON A CHARGED OFFENSE, UNDERMINES CONFIDENCE THAT THE MEMBERS CONVICTED APPELLANT BASED ON THE EVIDENCE ALONE.

III. WHETHER TRIAL COUNSEL'S ASSERTION THAT THE MEMBERS SHOULD SENTENCE APPELLANT FOR UNCHARGED ACTS AND FOR HIS CRIMINAL PROPENSITY UNDERMINES CONFIDENCE THAT THE MEMBERS SENTENCED APPELLANT BASED ON THE EVIDENCE ALONE.

IV. WHETHER THE MILITARY JUDGE ERRED WHEN SHE DENIED APPELLANT'S MOTION FOR A MISTRIAL AFTER TRIAL COUNSEL REFERENCED THE STATUTE OF LIMITATIONS DURING THE PROSECUTION'S OPENING STATEMENT.

V. WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO ADMIT DEFENSE EXHIBIT B FOR IDENTIFICATION ON THE BASIS OF LACK OF AUTHENTICATION.

VI. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS DEFENSE COUNSEL: (1) FAILED TO PRESENT EVIDENCE OF APPELLANT'S GOOD CHARACTER DURING THE DEFENSE CASE-IN-CHIEF; (2) FAILED TO PRESENT EVIDENCE OF THE CHARACTER FOR UNTRUTHFULNESS OF THE ALLEGED CHILD VICTIMS (CHARGED AND UNCHARGED), AND; (3) OPENED THE DOOR TO EVIDENCE OF THE PRIOR TRIAL.

VII. WHETHER THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE MEMBERS, "IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY

CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED THEN YOU MUST FIND HIM GUILTY," IN VIOLATION OF *UNITED STATES V. MARTIN LINEN SUPPLY CO.*, 430 U.S. 564, 572-73 (1977).

VIII. WHETHER THE FINDINGS ARE FACTUALLY SUFFICIENT.

IX. WHETHER THE FINDINGS AND SENTENCE SHOULD BE SET ASIDE DUE TO CUMULATIVE ERROR.

STATEMENT OF THE CASE

In 2007 Appellant was convicted contrary to his pleas, by a general court-martial composed of officer members, of two specifications of committing indecent acts with a child on divers occasions in violation of Article 134, UCMJ, 10 U.S.C. § 934. Each specification alleged acts with a different child. Appellant was sentenced to confinement for 10 years, forfeiture of all pay and allowances, and to be dismissed. In taking action on the results of the court-martial, however, the convening authority dismissed one of the specifications and approved only so much of the sentence as called for confinement for 4 years and a dismissal. Then, on 14 August 2013, the Court of Appeals for the Armed Forces granted review in Appellant's case and set aside the findings and sentence, authorizing a rehearing. *United States v. Hudson*, 72 M.J. 464 (C.A.A.F. 2013) (summ. disp.).

A rehearing was conducted and, on 27 March 2015, Appellant was convicted contrary to his pleas, by a general court-martial composed of officer members, of one specification of committing indecent acts with a child on divers occasions in violation of Article 134. The members sentenced appellant to confinement for three years and to be dismissed. The convening authority approved the findings and sentence on 30 December 2015.

Appellant's case was docketed with this Court on 19 January 2016. This Court granted Appellant seven enlargements of time to file this Assignment of Errors.

STATEMENT OF FACTS

Appellant is a decorated Air Force officer with over 25 years of service. (*See* Def. Ex. C (index of defense exhibits); Def. Ex. O – V).

In 1992 Appellant married J.O (R. at 916). J.O.'s daughter from a prior relationship – M.P. – lived with J.O. and Appellant during their marriage. (R. at 916-917). On 27 March 1993 J.O. and Appellant gave birth to a daughter of their own, S.H. (R. at 917). The marriage between Appellant and J.O. was not a happy one, however, and it suffered from financial difficulties and an incident in which J.O. forged documents using Air Force letterhead. (R. at 936; R. at 1251-1252). Eventually, while Appellant was stationed in Japan in 2000, he and J.O. separated and J.O. returned to the United States with S.H. and M.P. to live with a friend in Florida. (R. at 922, 936-937). Appellant transferred to Florida soon afterward, and J.O. allowed him visitation with the girls on a regular basis. (R. at 921, 937).

Appellant's regular visitation with S.H. and M.P continued until October 2001, when J.O. completed police academy training and obtained her own apartment. (R. at 922). Shortly before moving into the apartment with S.H. and M.P., J.O. had a conversation with the girls during which – according to J.O. – M.P. said that she did not want to visit Appellant again. (R. at 925). J.O. questioned M.P. and then called a friend who put her in touch with "a social worker that . . . dealt with sexual abuse." (R. at 926). An investigation followed into whether Appellant had sexually abused M.P., but the investigation ended without any prosecution of Appellant. (R. at 947-948). Appellant's visitation with M.P. ended after that. (R. at 930). His visitation with S.H., however, continued.

After his divorce from J.O., Appellant married O.H. (formerly O.G.). O.H. has a niece – C.G. – who was born on 31 March 1997. (R. at 710). C.G. often visited O.H. and Appellant at

their home, first in Florida and later in Texas (after Appellant was transferred to Texas in 2005). (R. at 713; R. at 1408). C.G. is the named victim in the specification of indecent acts with a child of which Appellant was convicted and that is now before this Court. The members convicted Appellant of various sexual touching of C.G., all alleged to have occurred in Texas in 2006.

C.G. and S.H. first met at Appellant's home in Florida sometime before the allegations involving C.G. were made against Appellant. (R. at 1269). C.G. and M.P. did not meet until after the allegations involving C.G. were made. (R. at 872). After the first meeting of S.H. and C.G. they continued to interact during visits with Appellant, particularly during spring break when both girls would visit Appellant and O.H.'s home in Texas. (R. at 1270-1271). S.H. did not witness any sexual contact between C.G. and Appellant during these visits, however she did discuss the topic with C.G. Specifically, during a spring break visit in 2005, S.H. told C.G. that Appellant was once accused of improper sexual contact with M.P. (R. at 1272). When S.H. told C.G. this, C.G. told S.H. that Appellant had touched her too. (R. at 816; R. at 1272).

After S.H. returned home she told M.P. about C.G.'s allegation against Appellant. (R. at 1291). At that time C.G. and M.P. had not yet met each other. (R. at 872). M.P. subsequently relayed C.G.'s allegation to J.O.. (R. at 1291). J.O., however, allowed S.H. to return to Appellant's home the following spring break, in 2006. (R. at 1291; R. at 1408).

During her 2006 visit with Appellant, S.H. and Appellant discussed S.H.'s desire to live with Appellant in Texas, and they made plans for Appellant to obtain physical custody of S.H.. (R. at 1292). When she returned to Florida after the 2006 visit, S.H. told J.O. about her custody discussion with Appellant. (R. at 1293). J.O. "didn't really like that." (R. at 1293). Soon afterward, J.O. contacted Texas authorities and reported C.G.'s allegation against Appellant. An investigation followed into allegations against Appellant by both C.G. and M.P.

During the investigation, C.G. was interviewed by a woman named M.F. (R. at 778). The interview occurred in May 2006, shortly after the dates of the alleged indecent acts and when C.G.'s "memory was really fresh." (R. at 779). During the 2006 interview, C.G. alleged that Appellant committed indecent acts on three occasions. (R. at 782). At trial in 2015, however, C.G. testified about four occasions of alleged indecent acts: The first after a church picnic (R. at 718-724); the second during a visit by her grandparents (R. 726, 732, 735-737); the third at an indeterminate but separate time (R. at 738-739); and the fourth also at an indeterminate but separate time (R. at 740-741).

On 9 January 2007 two specifications of indecent acts with a minor in violation of Article 134 were preferred against Appellant. One specification alleged indecent acts involving C.G. and the other alleged indecent acts involving M.P. Appellant was tried by a general court-martial and convicted of both specifications. Pursuant to the terms of a post-trial agreement the convening authority dismissed the specification involving M.P.[1] The Court of Appeals for the Armed Forces subsequently set aside the finding of guilty to the specification involving C.G., authorizing a rehearing. *See United States v. Hudson*, 72 M.J. 464 (C.A.A.F. 2013) (summ. disp.).

For the rehearing a new charge consisting of a single specification of indecent acts with a minor in violation of Article 134 involving only C.G. was preferred against Appellant on 25 March 2014. (Charge Sheet, App. Ex. VI). On 31 July 2014 the prosecution gave notice of its intent to offer evidence of Appellant's uncharged alleged indecent acts with M.P. under Mil. R. Evid. 414, and the defense subsequently moved to prevent the prosecution from introducing such

[1] This agreement was discussed during a post-trial Article 39(a) session conducted on 9 April 2008 and contained in the original record of trial at pages 1,793-1,835.

evidence. (App. Ex. XLVIII). The military judge denied the defense motion and allowed the prosecution to introduce evidence of the uncharged allegation involving M.P. under both Mil. R. Evid. 414 and Mil. R. Evid. 404(b). (App. Ex. LXII). M.P. subsequently testified against Appellant during the prosecution's case-in-chief, and her testimony and related 39(a) sessions spans 158 transcribed pages. (R. at 1,090-1,248).

The defense also moved to prohibit the prosecution from referencing the first trial during the rehearing. (App. Ex. XLVII). The prosecution agreed with the defense that any such reference should be avoided. (R. at 239-240). However, during opening statement trial counsel referenced the statute of limitations, drawing an immediate objection from the defense that the military judge sustained. (R. at 681). The defense subsequently moved for a mistrial. (R. at 685). During litigation of the defense motion the military judge engaged in the following exchange with trial counsel:

> MJ: Did you read the order from the appellate court about authorizing a rehearing?
>
> STC: Yes, Your Honor.
>
> MJ: Did they authorize a rehearing on anything regarding [M.P.]?
>
> STC: They did not, Your Honor.
>
> MJ: But you can't add a charge that had already been litigated and dismissed because of the statute of limitations; is that your logic?
>
> STC: Yes, Your Honor.
>
> MJ: I fear--I honestly fear what else is going to come out from your case if this is how you guys are viewing what's admissible and what's not.

(R. at 690). Despite her fear about the prosecution's case and tactics, however, the military judge denied the defense motion for a mistrial. (R. at 692).

Trial counsel also insinuated during opening statement that the members could use the uncharged allegation involving M.P. as proof that Appellant is guilty of the charged offense involving C.G. (R. at 681). The military judge properly instructed the members that they may not "use this evidence to overcome a failure of proof in the government's case." (R. at 1,461). However, trial counsel's last words to the members during closing argument directly contradicted the military judge's instruction and – drawing on the insinuation made during opening statement – trial counsel specifically called upon the members to misuse the evidence of the uncharged allegation, stating:

> You heard [C.G.]; you heard [M.P.]; you know how many previous times they have said the same thing. And you know beyond a reasonable doubt that this accused touched them and is guilty of indecent acts.

(R. at 1,511 (emphasis added)). Trial counsel also invoked fear of Appellant "among us" and invited the members to imagine themselves in the position of the alleged victim. (R. at 1,468).

During trial the defense offered an email sent to Appellant from J.O.'s email account. (R. at 1,372. *See* Def. Ex. B FID). The email was powerful evidence of J.O.'s bias against Appellant and also impeached J.O. by contradiction because she denied sending the email. (*See* R. at 958-961). However, the military judge denied the defense motion to admit the email on authentication grounds. (R. at 1,404).

In advance of trial the defense provided the prosecution with notice of "a multitude of potentially good military character witnesses." (R. at 247). During trial, however, Appellant's defense counsel did not call a single witness to testify about Appellant's good military character, nor did defense counsel elicit testimony from any prosecution witness about Appellant's good character. Appellant's defense counsel also failed to offer evidence of the bad character for truthfulness of C.G. and M.P. Furthermore, Appellant's defense counsel introduced evidence of

the first trial during cross-examination of a prosecution witness, (R. at 959), deliberately opening the door to the prosecution to freely and extensively refer to the first trial (R. at 964; R. at 986). Appellant signed and moved to attach an appellate affidavit asserting that his trial defense counsel's failure to offer evidence of his good character, failure to offer evidence of the bad character of C.G. and M.P., and deliberate opening of the door to evidence of the prior trial constitute ineffective assistance of counsel. (Def. App. Ex. A).

Additional facts are set forth below as necessary.

ERRORS AND ARGUMENT

I. WHETHER THE MILITARY JUDGE IMPROPERLY ADMITTED EVIDENCE OF UNCHARGED ALLEGATIONS UNDER MILITARY RULES OF EVIDENCE 414 AND 404(B).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Bare*, 63 M.J. 707, 710 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). A military judge abuses her discretion when her "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Webb*, 66 M.J. 89, 93 (C.A.A.F. 2008).

Discussion

The military judge erred when she admitted the uncharged allegation of M.P. under Mil. R. Evid. 414 and under Mil. R. Evid. 404(b). These erroneous rulings materially prejudiced Appellant's substantial rights, requiring reversal.

A. Admission of the uncharged allegations under Mil. R. Evid. 414.

Admission of evidence under Mil. R. Evid. 414 requires a two-step process:

> First, the military judge must make three threshold findings: (1) whether the accused is charged with an act of child molestation as defined by [Mil. R. Evid.] 414(a); (2) whether the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and (3) whether the evidence is relevant under [Mil. R. Evid.] 401 and [Mil. R. Evid.] 402.

United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing *United States v. Bare*, 65 M.J. 35, 36 (C.A.A.F. 2007)). If "the[se] three threshold factors are met, the military judge must then apply a balancing test under [Mil. R. Evid.] 403." *Id*. *United States v. Wright*, 53 M.J. 476, 482-483 (C.A.A.F.2000).

The military judge conducted this two-step process in a written ruling. (App. Ex. LXII). However, her application of the law was flawed in four ways: First, she failed to apply the proper test for relevance under Mil. R. Evid. 401 and 402 (App. Ex. LXII at 4, ¶ 16); second, she erroneously concluded that non-propensity reasons offered by the prosecution for admission of the uncharged allegation support its admission for propensity purposes (App. Ex. LXII at 4, ¶ 16); third, she gave excessive weight to the fact that Appellant was previously convicted of indecent acts with M.P. (App. Ex. LXII at 5, ¶ 17), and; fourth, she failed to properly consider the lack of temporal proximity between the allegations of M.P. and of C.G. (App. Ex. LXII at 5, ¶ 18).

The military judge's first error was her failure to apply the proper test for relevance under Mil. R. Evid. 401 and 402. Relevant evidence is that which "make[s] a fact more or less probable than it would be without the evidence." Mil. R. Evid. 401(a). In her ruling the military judge concluded that "the government argues the evidence is of acts nearly identical to the charged offenses committed upon two girls who never met or discussed events." (App. Ex. LXII at 4, ¶

16). This conclusion, however, does not answer the entirely different question of whether the evidence of the uncharged allegation is sufficient to prove that Appellant actually committed the uncharged allegation. "There must be sufficient evidence to establish Appellant's culpability regarding an incident of alleged misconduct in order to establish the relevance of that incident. . . . The prosecution cannot merely lump together a series of incidents and assert that together they establish Appellant committed each act of abuse." *United States v. Diaz*, 59 M.J. 79, 94 (C.A.A.F. 2003). Here, however, the prosecution did merely lump together a series of alleged incidents. Furthermore, the military judge found as facts that there were inconsistencies in M.P.'s recollection and that M.P.'s testimony in 2007 included additional information that "she had not mentioned at the forensic interview in October 2001." (App. Ex. LXII at 2, ¶ 4.b). Such inconsistencies and shifting stories undercut the sufficiency of M.P.'s uncorroborated testimony to prove that Appellant committed all of the acts in the uncharged allegation. Accordingly, the military judge erred in admitting the uncharged allegation of M.P. under Mil. R. Evid. 414.

The military judge's second error was her conclusion that non-propensity reasons offered by the prosecution for admission of the uncharged allegation supported its admission for propensity purposes. Specifically, addressing relevance, the military judge concluded:

> Moreover, the government provided non-propensity theories of admissibility, stating [M.P.'s] "testimony is not confusing, distracting, or misleading, and it is clear evidence of the Accused's pattern, intent and absence of mistake."

(App. Ex. LXII at 4, ¶ 16). Assuming *arguendo* that the uncharged allegation is evidence of Appellant's pattern, intent, and absence of mistake, and also that those matters were in issue, the military judge's conclusions do no more than support admission of the uncharged allegation for non-propensity purposes under Mil. R. Evid. 404(b). Admission under Mil. R. Evid. 414, however, requires more; the prosecution may not disguise propensity evidence in non-propensity

clothes. Because she based her ruling on non-propensity justifications, the military judge erred in admitting the uncharged allegation of M.P. under Mil. R. Evid. 414.

The military judge's third error was in giving excessive weight to the fact that Appellant was previously convicted of indecent acts with M.P. (App. Ex. LXII at 5, ¶ 17). While a conviction is a recognized factor affecting the weight of the evidence of the prior act, *see Wright*, 53 M.J. at 483, Appellant's conviction involving M.P. had been set aside and the specification dismissed. The military judge, however, gave little or no weight to that reversal and dismissal. *Cf. United States v. Solomon*, 72 M.J. 176, 180 (C.A.A.F. 2013) (finding that the military judge abused his discretion in failing to address the appellant's alibi evidence and acquittal on the prior acts). Furthermore, the military judge overvalued the prior conviction in light of the time required to re-litigate M.P.'s allegation, the possibility that the prior conviction was the result of impermissible spillover, and the passage of time. By misinterpreting and overvaluing the prior conviction the military judge erred in admitting the uncharged allegation of M.P. under Mil. R. Evid. 414.

The military judge's fourth error was her failure to properly consider the lack of temporal proximity between the allegations of M.P. and of C.G. (App. Ex. LXII at 5, ¶ 18). M.P. alleged that Appellant touched her in 2000. The charged offense involving C.G., however, alleged touching in 2006. Assuming that both allegations are true, the passage of so much time between incidents undercuts any conclusion that Appellant had a propensity or predisposition to engage in such acts. Put differently, if Appellant had a propensity to commit indecent acts with children, then he would have done so more often. The military judge, however, failed to consider and resolve this self-evident contradiction. Accordingly, she erred in admitting the uncharged allegation of M.P. under Mil. R. Evid. 414.

B. Admission of the uncharged allegations under Mil. R. Evid. 404(b).

Admission of evidence under Mil. R. Evid. 404(b) requires testing the evidence under three standards:

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> 2. What fact of consequence is made more or less probable by the existence of this evidence?
>
> 3. Is the probative value substantially outweighed by the danger of unfair prejudice?

United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (marks and citations omitted). *See also Huddleston v. United States*, 485 U.S. 681, 686 (1988). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Reynolds*, 29 M.J. at 109.

The military judge concluded that the evidence of the uncharged allegation involving M.P. "is relevant to intent and absence of mistake or accident." (App. Ex. LXII at 6, ¶ 25). This conclusion is clear and obvious error. "The prosecution cannot introduce uncharged misconduct to rebut a defense that was never raised or presented by the defense. Such evidentiary bootstrapping is not permitted." *Diaz*, 59 M.J. at 95. Furthermore:

> [T]his type of evidence should not be admitted until the issue is clearly in controversy. The rationale is simple. It is impossible to weigh the unfair prejudice against the probative value of the 404(b) evidence until the fact in controversy becomes clear. For example, if the accused denies the criminal act, evidence which proves his intent is not the issue. If, on the other hand, he admits the act but asserts a non-criminal intent, then his intent is relevant.

Reynolds, 29 M.J. at 110. Because Appellant never offered a defense of innocent intent or of mistake or accident, those issues were not in controversy and they were no basis for admission of the uncharged allegation of M.P. under 404(b). Furthermore, for the reasons discussed *supra* involving Mil. R. Evid. 414, the probative value of M.P.'s testimony about the uncharged

allegation was substantially outweighed by the danger of unfair prejudice because the value of her testimony was low and the military judge overvalued Appellant's prior conviction in light of the time required to re-litigate M.P.'s allegation, the possibility that the prior conviction was the result of impermissible spillover, and the passage of time. Accordingly, the military judge erred in admitting the uncharged allegation of M.P. under Mil. R. Evid. 404(b).

C. Material prejudice to Appellant's substantial rights.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a). For a non-constitutional error such as the erroneous admission of evidence under Mil. R. Evid. 414 and 404(b) in this case, "the Government has the burden of demonstrating that 'the error did not have a substantial influence on the findings.'" *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (quoting *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003)). The Government cannot possibly meet that burden in this case. Propensity to engage in indecent acts with minors was the central theme of the prosecution's case against Appellant, beginning with trial counsel's opening statement that:

> After you hear from [C.G.], you are going to hear a chillingly similar account of the accused's actions with another little girl, [M.P.].

(R. at 681), and concluding with trial counsel's final appeal to the members that:

> You heard [C.G.]; you heard [M.P.]; you know how many previous times they have said the same thing. And you know beyond a reasonable doubt that this accused touched them and is guilty of indecent acts.

(R. at 1151). Because propensity was the central theme of the prosecution's case, the admission of propensity evidence cannot be deemed insubstantial.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

II. WHETHER TRIAL COUNSEL'S REFERENCE TO THE STATUTE OF LIMITATIONS IN OPENING STATEMENT, INVOCATION OF FEAR OF APPELLANT IN UNIFORM DURING CLOSING ARGUMENT, REQUEST TO THE MEMBERS THAT THEY IMAGINE THEMSELVES IN THE POSITION OF THE ALLEGED VICTIM, AND ASSERTION THAT EVIDENCE OF UNCHARGED OFFENSES COULD BE USED TO OVERCOME A FAILURE OF PROOF ON A CHARGED OFFENSE, UNDERMINES CONFIDENCE THAT THE MEMBERS CONVICTED APPELLANT BASED ON THE EVIDENCE ALONE.

Standard of Review

Whether a trial counsel's argument is improper is a question of law reviewed *de novo*. *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011). In the absence of objection improper argument is reviewed for plain error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004)). Plain error occurs when (1) there is error, (2) the error is plain and obvious, and (3) the error results in material prejudice to a substantial right of the accused. *Id.*

Law

Prosecutorial misconduct is behavior by the prosecuting attorney that "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Fletcher*, 62 M.J. at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Improper argument is tested for prejudice by weighting the severity of the misconduct, the curative measures taken, and the overall strength of the prosecution's case. *Fletcher*, 62 M.J. at 184-185. "Relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice).'" *Fletcher*, 62 M.J. at

175 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citations omitted). Put differently, reversal is required when you "cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184.

Improper remarks by a prosecutor can, in fact, "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). This is because members justifiably "place great confidence in the faithful execution of the obligations of a prosecuting attorney." *United States v. Solivan*, 937 F.2d 1146, 1150 (6th Cir. 1991).

Discussion

Trial counsel committed four acts of prosecutorial misconduct during opening statement and closing argument on the findings: First, trial counsel referred to the statute of limitations with respect to the uncharged allegation involving M.P. (R. at 681); second, trial counsel invoked fear of Appellant in uniform during closing argument (R. at 1,468); third, trial counsel invited the members to imagine themselves in the position of C.G. (R. at 1,468), and; fourth, trial counsel asserted that M.P.'s testimony regarding the uncharged allegation could be used to overcome a failure of proof on the charged offense involving C.G. (R. at 681, 1,477, 1,511). Each of these acts was a serious breach of the propriety and fairness which should characterize the conduct of a trial counsel in the prosecution of a criminal offense at a court-martial.

First, it was plainly improper for trial counsel to reference the statute of limitations during opening statement as an explanation for why Appellant was not charged with an offense involving M.P. Trial counsel's misconduct was severe because the reference to the statute of limitations was totally false; the allegation involving M.P. was not before the court-martial because it was dismissed by the convening authority and not included in the rehearing

authorization of the Court of Appeals for the Armed Forces. (*See* R. at 691-692). Furthermore, trial counsel's misconduct undercut the prosecution's agreement with the defense that no reference would be made to the first trial. (*See* R. at 239-240; App. Ex. XLVII). While the military judge issued an immediate curative instruction to the members, (R. at 681), and another instruction before the defense opening statement, (R. at 699-700), those curative measures were less than what was requested by the defense and were inadequate under the circumstances of this case. *See* AE IV, *infra*. Additionally, the overall strength of the prosecution's case was weak, as the prosecution of Appellant was based on the uncorroborated and unreliable memories of young children and relied heavily on the improper admission of evidence to show that Appellant had a propensity to engage in indecent acts with minors.

Second, it was plainly improper for trial counsel to invoke fear of Appellant in uniform during closing argument. Trial counsel argued:

> TC: Members, the scariest part of the Air Force, to think that someone like the accused is among us. Someone like him as an officer and wears our same uniform.

(R. at 1,468). This argument improperly injected trial counsel's personal opinion into the court-martial. Such personal opinions are prohibited because they become "a form of unsworn, unchecked testimony and tend to exploit the influence of the office and undermine the objective detachment which should separate a lawyer from the cause for which she argues." *Fletcher*, 62 M.J. at 179-80 (quoting *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980) (quoting ABA Standards, The Prosecution Function, § 5.8(b), Commentary at 128 (1971))) (marks omitted). The defense objected to this improper injection of trial counsel's personal opinion, however the military judge overruled the objection. (R. at 1,468). As a result, no curative measures were taken. Additionally, the overall strength of the prosecution's case was weak, as is self-evident by trial counsel's injection of impermissible personal opinion in closing argument.

Third, it was plainly improper for trial counsel to invite the members to imagine themselves in the position of C.G. Trial counsel argued:

> That someone who does something like he did who is supposed to leading our airmen and is trusted with a commission. Worse is not bringing ourselves to believe it. Worse is not letting yourself imagine what he did. Imagine him lying next to [C.G.] on his bed, in his home and slipping his hand under her clothes and rubbing her vagina. Eight years old and she laid on his bed in a home where she trusted him, watching Nickelodeon. It's a horrible thing to try to imagine. It's unthinkable, but worse than not doing that is failing to accept the reality of it.

(R. at 1,468-1,469 (emphasis)). Appellant's defense counsel did not object so this argument is reviewed for plain error. However, the error here is plain and obvious. *Golden Rule* arguments that ask the members to place themselves in the position of a victim have long been held improper in courts-martial. *See United States v. Baer*, 53 M.J. 235, 237-38 (C.A.A.F. 2000) (citing cases). Trial counsel's graphic invitation to the members to imagine Appellant committing an act alleged by C.G. was such improper argument. Furthermore, such an emotional appeal cannot possibly be seen as harmless.

Finally, trial counsel asserted that M.P.'s testimony regarding the uncharged allegation could be used to overcome a failure of proof on the charged offense involving C.G. Specifically, during opening statement trial counsel said:

> You will hear from [M.P.], and she is not on the charge sheet, but you can listen to the actions that the accused took with [M.P.], and the judge is going to tell you that, that you can listen to those actions and take those into account when you are deciding that charge in front of you.

(R. at 681). Then, during initial closing argument trial counsel said:

> What there is evidence of is that the accused touched [M.P.] and [C.G.]. They're connected by nothing more than his betrayal of trust and the innocence he took from them. They're connected by what they went through because of him. That's the evidence that's in front of you and that's the evidence you must use to find him guilty.

(R. at 1,477). Then, during rebuttal closing argument trial counsel said:

> You heard [C.G.]; you heard [M.P.]; you know how many previous times they have said the same thing. And you know beyond a reasonable doubt that this accused touched them and is guilty of indecent acts.

(R. at 1,511). This argument was improper because it encouraged the members to disregard the military judge's instructions to the members that:

> You may not, however, convict the accused solely because you believe he committed this other offense or solely because you believe the accused has a propensity or predisposition to engage in child molestation offenses. In other words, you cannot use this evidence to overcome a failure of proof in the government's case if you perceive any to exist.

(R. at 1,461).

"[T]rial counsel is at liberty to strike hard, but not foul, blows." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (citation and marks omitted). As a result, "it is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *Id*. (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983); R.C.M. 919(b) Discussion) (marks in original). In Appellant's case, however, trial counsel's argument was either deliberately calculated to inflame the passions and prejudices of the members, or it recklessly solicited that unjust result. Either way this Court cannot be confident that the members convicted Appellant on the basis of the evidence alone.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

III. WHETHER TRIAL COUNSEL'S ASSERTION THAT THE MEMBERS SHOULD SENTENCE APPELLANT FOR UNCHARGED ACTS AND FOR HIS CRIMINAL PROPENSITY UNDERMINES CONFIDENCE THAT THE MEMBERS SENTENCED APPELLANT BASED ON THE EVIDENCE ALONE.

"The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (quoting *Baer*, 53 M.J. at 237). When improper argument occurs during the sentencing portion of a court-martial relief is warranted when the reviewing court cannot be "confident that the appellant was sentenced on the basis of the evidence alone." *Frey*, 73 M.J. at 248 (quoting *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013)) (marks omitted).

During argument on the sentence trial counsel twice argued that the members should sentence Appellant for uncharged acts and his criminal propensity rather than for only the offense of which the members found Appellant guilty. Specifically, trial counsel argued:

> How can we as court members perfect a change in the accused?" Frankly, as I'm sure you'll come to understand, it's going to take a long time. He expressed his perverted sexual desires on two young innocent girls.

(R. at 1,666). Defense counsel objected and the military judge issued a curative instruction to the members. (R. at 1,666). However, trial counsel immediately made the exact same improper argument again, stating:

> He did this before; he got caught, found a new victim, [C.G.]. So he started anew with her in 2006.

(R. at 1,666). There was no objection or curative instruction to trial counsel's second invocation of the uncharged acts and criminal propensity.

Trial counsel requested a sentence that included confinement for seven years and a dismissal. (R. at 1,669). The defense requested a sentence that would not include a dismissal. (R. at 1,675). The members sentenced Appellant to confinement for three years and a dismissal. (R. at 1,690).

Improper argument is tested for prejudice by weighting the severity of the misconduct, the curative measures taken, and the overall strength of the prosecution's case. *Fletcher*, 62 M.J. at 184-185. Here the misconduct was especially severe, as trial counsel made an improper argument, was corrected, and then made the exact same improper argument again. Additionally, while the military judge gave a curative instruction after the first incident of improper argument, she gave no instruction after the second incident. Finally, the overall strength of the prosecution's sentencing case was weak: Trial counsel called no witnesses during sentencing and offered only two prosecution exhibits before resting, (R. at 1,631); trial counsel offered no rebuttal to the defense sentencing evidence, (R. at 1,650), and; trial counsel made a short sentencing argument (R. at 1,663-1,669). All of these factors support a finding of prejudice from trial counsel's improper sentencing argument.

Wherefore, Appellant respectfully requests this Honorable Court disapprove the adjudged dismissal or, in the alternative, set aside the sentence and authorize a sentence rehearing.

IV. WHETHER THE MILITARY JUDGE ERRED WHEN SHE DENIED APPELLANT'S MOTION FOR A MISTRIAL AFTER TRIAL COUNSEL REFERENCED THE STATUE OF LIMITATIONS DURING THE PROSECUTION'S OPENING STATEMENT.

Standard of Review

A military judge's ruling on a request for a mistrial is reviewed for clear evidence of an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).

Discussion

A mistrial is appropriate when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). Here the military judge quickly recognized the impropriety of

trial counsel's reference to the statute of limitations during opening statement and sustained the defense objection. (R. at 681). The military judge also provided the members with an immediate curative instruction, and an additional curative instruction before the defense gave its opening statement. (R. at 681, 699). Appellant acknowledges that "absent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014) (quoting *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)). The problem in this case, however, is that the military judge's instruction to the members was fundamentally flawed.

Before the defense gave its opening statement the military judge instructed the members that:

> The fact that charges have been referred to this court for trial does not permit any inference of guilt. You heard that yesterday. Also, the fact that an allegation has not been referred to this court does not permit any inference of any kind.

(R. at 699). The military judge's instruction that "the fact that an allegation has not been referred to this court does not permit any inference of any kind" was flawed because it conflicts with the presumption of innocence and removed the prosecution's burden of proof.

"A foundational tenet of the Due Process Clause, U.S. Const. amend. V., is that an accused is presumed innocent until proven guilty." *United States v. Hills*, 75 M.J. 350, __, slip op. at 9 (C.A.A.F. 2016) (citing *In re Winship*, 397 U.S. 358, 363 (1970); *Coffin v. United States*, 156 U.S. 432, 453–54 (1895)). In *dicta* in *Hills* the court suggested that no presumption of innocence attaches to uncharged acts. *See Hills*, 75 M.J. at __ n.3, slip op. at 10 n.3. However, this suggestion conflicts with CAAF's own precedent – as well as that of the Supreme Court – that requires that a military judge separately conclude that members could find by a preponderance of the evidence that the uncharged acts occurred prior to admitting them. *See*

Wright, 53 M.J. at 483; *Huddleston*, 485 U.S. at 689-690. If no presumption of innocence applies to uncharged acts, then there is no logical basis for a military judge to apply such burden of proof to the prosecution as a condition precedent to admission.

Furthermore, the military judge's instructions to the members conflicted with her other instructions that Appellant was "presumed to be innocent." (R. at 434, 458, 1,465). Her instructions also conflicted with her instruction that the uncharged acts "may have no bearing on [the members'] deliberations unless [they] first determine by a preponderance of the evidence, that is, more likely than not these uncharged offenses occurred." (R. at 1,460).

These conflicting instructions reveal that a mistrial was manifestly necessary and the military judge abused her discretion when she denied the defense motion.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

V. WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO ADMIT DEFENSE EXHIBIT B FOR IDENTIFICATION ON THE BASIS OF LACK OF AUTHENTICATION.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009). Findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. *Id.*

Discussion

Authentication is a precondition to the admission of an item of evidence. The requirement of authentication is satisfied when the party offering the evidence "produce[s] evidence sufficient to support a finding that the item is what the proponent claims it is." Mil. R. Evid 901(a). However:

> Generally speaking, the proponent of a proffered item of evidence needs only to make a *prima facie* showing that the item is what the proponent claims it to be. . . . The trial court's admission of the exhibit means only that the fact finder may consider the item of evidence during its deliberations. The fact finder remains free to disregard the item if the trial evidence overcomes the preliminary showing of authenticity.

United States v. Lubich, 72 M.J. 170, 174 (C.A.A.F. 2013) (quoting Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 901.02[3], at 901–13 to 901–14 (Joseph M. McLaughlin ed., 2d ed. 2003)).

Mil. R. Evid. 608(c) specifically permits admission of extrinsic evidence to show that any witness suffers from bias, prejudice, or a motive to misrepresent. *United States v. Bahr*, 33 M.J. 228, 232 (C.M.A. 1991) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). CAAF "has held that rules of evidence should be read to allow liberal admission of bias-type evidence." *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006) (citing *United States v. Williams*, 40 M.J. 216, 218 (C.M.A. 1994)) (emphasis added).

Here Appellant's defense counsel presented sufficient evidence to make a *prima facie* showing that Defense Exhibit B for identification was an email sent from J.O.'s email account. That was all that was required for its admission. Whether other individuals had access to the account, and whether the content of the email was consistent with J.O.'s other writings, were factors that go to the weight to be given to the evidence, not its admissibility. The members had the duty to determine the weight to be given to the exhibit, and they were free to disregard it entirely if they desired. *See United States v. Sullivan*, 70 M.J. 110, 124 (C.A.A.F. 2011). However, the military judge deprived them of the opportunity to do so by refusing to admit it into evidence. This was error.

"When the military judge excludes evidence of bias, the exclusion raises issues regarding an accused's Sixth Amendment right to confrontation." *Moss*, 63 M.J. at 233 (citing *United*

States v. Bins, 43 M.J. 79, 84 (C.A.A.F. 1995)). "If an abuse of discretion is found, the case will be reversed unless the error is harmless beyond a reasonable doubt." *Id*. Such harmlessness exists only when there is no reasonable possibility that the error complained of might have contributed to the conviction. *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007); *Chapman v. California*, 386 U.S. 18, 24 (1967).

The email was also admissible for the purpose of impeachment by contradiction. *See United States v. Cobia*, 53 M.J. 305, 310-11 (C.A.A.F.2000).

Here the error cannot possibly be held harmless because of the primary role J.O. played in the case against Appellant. It was J.O. who first reported C.G.'s allegation to authorities, and J.O. had physical custody of, and was primarily responsible for raising, M.P. whose uncharged allegation against Appellant was a central theme in the prosecution case. There were no eyewitnesses to the alleged acts involving Appellant and C.G., and no physical evidence that might corroborate her story. There was a similar absence of eyewitnesses and physical evidence to support the uncharged allegation of M.P. Defense Exhibit B was powerful evidence of J.O.'s bias against Appellant, and it could have tipped the overall credibility balance in Appellant's favor. *See Moss*, 63 M.J. at 239. Accordingly, the military judge's erroneous exclusion of Defense Exhibit B was not harmless beyond a reasonable doubt.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

VI. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS DEFENSE COUNSEL: (1) FAILED TO PRESENT EVIDENCE OF APPELLANT'S GOOD CHARACTER DURING THE DEFENSE CASE-IN-CHIEF; (2) FAILED TO PRESENT EVIDENCE OF THE CHARACTER FOR UNTRUTHFULNESS OF THE ALLEGED CHILD VICTIMS

(CHARGED AND UNCHARGED), AND; (3) OPENED THE DOOR TO EVIDENCE OF THE PRIOR TRIAL.

Standard of Review

Allegations of ineffective assistance of counsel are reviewed *de novo*. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Law

The Sixth Amendment guarantees an accused the right to the "effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 653-656 (1984). To prevail on a claim of ineffective assistance of counsel, appellant must show: (1) deficient performance, and (2) prejudice. *Strickland*, 466 U.S. at 687. Regarding the first prong, the proper inquiry is whether counsel's conduct fell below an objective standard of reasonableness or was outside the "wide range of professionally competent assistance." *Id*. at 694. Regarding the second prong, Appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id*. (emphasizing that a reasonable probability is less than a preponderance). Appellant need not, however, "make an 'outcome-determinative' showing that 'counsel's deficient conduct more likely than not altered the outcome in the case.'" *United States v. Howard*, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 693).

Strategic, tactical, or other deliberate decisions of counsel must be objectively reasonable, based on counsel's prospective at the time of the conduct in question. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001) (*citing Strickland*, 466 U.S. at 688; *United States v. Marshall*, 45 M.J. 268, 270 (C.A.A.F. 1996)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result." *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (quoting *Strickland*, 466 U.S. at 686).

Discussion

The performance of Appellant's trial defense counsel was deficient in thee respects: First, trial defense counsel possessed evidence of Appellant's good character but failed to introduce it during the defense case-in-chief; second, trial defense counsel possessed evidence of the character and reputation for untruthfulness of C.G. and M.P. but failed to offer it at any point during the trial, and; third, trial defense counsel opened the door to evidence of the prior trial. These deficiencies fell measurably below any objective standard of reasonableness and were not professionally competent assistance. Furthermore, there is a reasonable probability that, but for these deficiencies, the result of the proceedings would have been different. Accordingly, Appellant was deprived of his Sixth Amendment guarantee of the effective assistance of counsel.

A. Trial defense counsel possessed evidence of Appellant's good character but failed to introduce it during the defense case-in-chief.

"It is not necessary to cite authorities to show that, in criminal prosecutions, the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime with which he is charged." *Edgington v. United States*, 164 U.S. 361, 363 (1896). Nevertheless, Mil. R. Evid. 404(a)(2)(A) (2013) specifically allows an accused to "offer evidence of the accused's pertinent trait."[2] Good military character is

[2] In Executive Order 13,696, 80 Fed. Reg. 35,781 (Jun. 22, 2015), the President of the United States amended Mil. R. Evid. 404 in to restrict the admissibility of character evidence in accordance with § 536 of the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015, 128 Stat. 3291, 3368 (2014). Appellant's rehearing was completed (though the convening authority had not yet acted) prior to the effective date of those amendments.

a character trait within the meaning of this rule. *United States v. Court*, 24 M.J. 11, 14 (C.M.A. 1987). It is a pertinent trait in a court-martial because "the well-recognized rationale for admission of evidence of good military character is that it would provide the basis for an inference that an accused was too professional a soldier to have committed offenses which would have adverse military consequences." *United States v. Wilson*, 28 M.J. 48, 49 n.1 (C.M.A. 1989).

Evidence of an accused's good character "is not proof of innocence, although it may be sufficient to raise a doubt of guilt." *Edgington*, 164 U.S. at 367 (quoting *Jupitz v. The People*, 34 Ill. 516, 521-22 (1864)). Put differently, "character evidence may itself generate reasonable doubt in the factfinder's mind." *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985). Appellant's civilian and detailed trial defense counsel had extensive character evidence available to them with which to generate reasonable doubt in the minds of the members. As described by trial counsel, there were "a multitude of potentially good military character witnesses." (R. at 247). Furthermore, Appellant worked closely with his defense counsel to identify character witnesses for trial, and Appellant expected that they would be called to testify in his defense. (Def. App. Ex. A). However, Appellant's defense counsel did not call a single one of the identified witnesses to testify about Appellant's good character during the merits phase of the court-martial. Furthermore, while Appellant's defense counsel possessed ten written statements regarding Appellant's good character, his counsel made no effort to introduce these statements prior to the sentencing phase of the court-martial despite the provisions of Mil. R. Evid. 405(c) that allow the defense to "introduce affidavits or other written statements of persons other the accused concerning the character of the accused."

There is no justification for this wholesale failure to present available and admissible evidence that could have given rise to reasonable doubt and changed the outcome of the trial. Appellant was thereby denied his Sixth Amendment right to the effective assistance of counsel.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

B. Trial defense counsel possessed evidence of the character and reputation for untruthfulness of C.G. and M.P. but failed to offer it at any point during the trial.

"A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character." Mil. R. Evid. 608(a). The credibility of C.G. and M.P. were the central issues in this case, as their allegations against Appellant were unsupported by either eyewitnesses or physical evidence. Appellant's trial defense counsel had ample evidence with which to attack the credibility of C.G. and M.P. by showing that they have character and reputation for untruthfulness. (See Def. App. Ex. A). However, Appellant's defense counsel did not call the witnesses or offer the evidence that would have undercut the credibility of C.G. and M.P.

There is no justification for this wholesale failure to present available and admissible evidence that could have caused the members to disbelieve the testimony of crucial prosecution witnesses and changed the outcome of the trial. Appellant was thereby denied his Sixth Amendment right to the effective assistance of counsel.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

C. Trial defense counsel opened the door to evidence of the prior trial.

Appellant's trial defense counsel filed a pretrial motion seeking to exclude any reference to a prior trial in Appellant's case. (App. Ex. XLVII). The motion asserted that the existence of a prior trial was not relevant and that Appellant would be prejudiced by reference to a prior trial because "if the members are told a prior trial was held, their intellect will lead at least some to the conclusion that [Appellant] was previously convicted." (App. Ex. XLVII at 4). Trial counsel "completely agree[d] that there should be no reference to the prior trial." (R. at 240). The military judge accepted the agreement of the parties on this issue. (R. at 240).

Despite having concluded that any reference to a prior trial would prejudice Appellant, and having sought and won restrictions against any such reference, civilian trial defense counsel then referenced the prior trial during cross-examination of J.O., opening the door to allow the prosecution to make further references. Specifically, while questioning J.O. about an email sent from her account to Appellant, civilian trial defense counsel asked:

> Q. That you said, "You have no idea how much joy I've gotten out of this entire situation. First court-martial, then having S.H. taken away from the wetback, and all the custody hearings so far going my way." You don't recall saying that?

(R. at 959 (emphasis added)). Civilian trial defense counsel also asked:

> Q. That you said, "You tell that stupid wetback of a bitch to watch her back because she might end up in prison without her son just like you." Do you recall saying that?

(R. at 960 (emphasis added)). These questions were two out of 12 separate questions that civilian trial defense counsel asked J.O. about the content of the email during this exchange. (See R. at 958-961).

After civilian trial defense counsel finished his cross-examination, trial counsel requested a 39(a) session. (R. at 961). Trial counsel then raised the issue of civilian trial defense counsel's references to the prior trial, leading to the following exchange:

> STC: The third thing is Your Honor told the defense that they could not hide behind mention of prior trial. I think the defense squarely went there. They are going there with the custody. The reason she got custody is because he was in jail.
>
> CDC: I knew the trapdoors, Your Honor and we made a call on the spot to do so. I understand that an instruction is going to be forthcoming.
>
> MJ: Everything but sentence is open now?
>
> CDC: I would argue that there was -- the way that I phrased it, I think, was an artful way to avoid the fact that it was, in fact, a conviction, excuse me, that it was a judicial conviction, or that it was a judicial sentence, just that there were significant consequence that came from it.
>
> MJ: You said the word "court-martial."
>
> CDC: Well, that's the text of the letter.
>
> MJ: I know.
>
> CDC: I didn't want to misphrase it.
>
> MJ: You did and they can't consider that for truth, but you now want them to consider her credibility based on an email that is not in evidence, in which she says that he was at a court-martial and now he is away from his family for a long time.
>
> CDC: And I think that "prison" was in there as well.
>
> MJ: Okay, how is the door not wide-open?
>
> CDC: The door is pretty far open.

(R. at 964-965). After a recess and then further 39(a) proceedings, the military judge ruled:

> All right, government to the extent that you need to rebut evidence elicited by the defense, you may reference previous proceedings, including that there was an Article 32 and a trial.

(R. at 986).

It was deficient performance, falling well below any objective standard of reasonableness and professional competence, for civilian trial defense counsel to gratuitously reference the prior

trial during cross-examination of J.O. when he could have easily limited his cross-examination to the ten questions that did not reference the prior trial. This was a deliberate decision of civilian trial defense counsel who "made a call on the spot to do so," (R. at 964), however it was not objectively reasonable because it was unnecessary. *See Dewrell*, 55 M.J. at 133. The crux of the impeachment was that J.O. was biased against Appellant because she was angry about the breakup of their marriage. This bias was revealed by the first question asked by civilian trial defense counsel. (See R. at 958). Counsel's continued questions – and particularly the references to the prior trial – were wholly unnecessary. However, those questions prejudiced Appellant because they opened the door to evidence of the prior trial that (as civilian trial defense counsel himself argued) would "lead at least some [of the members] to the conclusion that [Appellant] was previously convicted." (App. Ex. XLVII at 4).

Because civilian trial defense counsel's deliberate decision to open the door to evidence of the prior trial was objectively unreasonable and prejudiced Appellant, Appellant was denied his Sixth Amendment right to the effective assistance of counsel.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

VII. WHETHER THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE MEMBERS, "IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED THEN YOU MUST FIND HIM GUILTY," IN VIOLATION OF *UNITED STATES V. MARTIN LINEN SUPPLY CO.*, 430 U.S. 564, 572-73 (1977).

Standard of Review

"The military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F.2008) (citing *United States v.*

Westmoreland, 31 M.J. 160, 163-64 (C.M.A. 1990). Whether the military judge properly instructed the panel is a question of law reviewed *de novo*. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010). However, in the absence of an objection, the instruction is tested "for plain error based on the law at the time of appeal." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

Facts

The military judge gave the following instruction to the members before *voir dire*:

> If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged then you must find him guilty.

(R. at 434) (emphasis added). Later, during findings instructions, the military judge reiterated this instruction:

> If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged then you must find him guilty.

(R. at 1,466 (emphasis added)). The military judge also gave this additional instruction:

> Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

(R. at 1,467).

Appellant's defense counsel did not object to these instructions.

Discussion

"[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) (internal quotations omitted). "Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no

matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). "By instructing the jurors that they must find the defendant guilty if they determined that the evidence placed him at the scene of the crime, [a trial] court [takes] from the jury an essential element of its function." *United States v. Hayward*, 420 F.2d 142, 145 (D.C. Cir. 1969) (emphasis in original). "Instructions to the jury . . . should avoid the use of language that suggests to the jury that it is obliged to return a guilty verdict." *United States v. Mejar-Matrecios*, 618 F.2d 81, 85 (9th Cir. 1980).

The military judge's instructions in this case concerning reasonable doubt violate the Supreme Court's holdings and, therefore, constitute plain error. By instructing the members that they must convict if the evidence left them firmly convinced of guilt, the military judge improperly directed the members to return a finding of guilty. This instruction deprived the members of an essential element of their function.

Appellant was prejudiced by this error because he was not tried by a panel properly instructed as to the burden of proof and its role. This prejudice was heightened in Appellant's case because the military judge gave the erroneous instruction twice: during the preliminary stages of trial (before *voir dire*) and prior to findings arguments.

Appellant acknowledges that this Court has previously relied on *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999), regarding this issue. *Sanchez*, however, addressed a different instruction; one that directly addressed the possibility of jury nullification:

> [T]here's a concept called jury nullification, which is kicked around in the civilian world, where juries, court panels, think they have the right to disobey the law, and come back with an acquittal, even if guilt has been established. And I'll advise you that your obligation is to follow the law. If the Government meets their burden, you have a duty to return a conviction, whether you like it or not--whether you like the law or not.

Sanchez, 50 M.J. at 509 (quoting the record). The instruction in this case was not targeted to the issue of jury nullification like the instruction at issue in *Sanchez*. Rather, the instruction in this case erroneously compelled the members to return a finding of guilty when the law allows them to do otherwise.

Furthermore, the military judge also instructed the members that: "[e]ach of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience." (R. at 1,467) (emphasis added). This direction to the members to each use their own conscience conflicts with the other directives that the members must convict Appellant if they find that the prosecution met its evidentiary burden

Finally, Appellant respectfully notes that the military judge's error was avoidable given the existence of a legally-correct standard instruction at ¶ 2-5-12, DA Pamphlet 27-9, the *Military Judge's Benchbook*. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, directs legal practitioners to follow DA Pamphlet 27-9:

> The Procedure Guide for use in Air Force courts-martial will be DA Pamphlet 27-9, as modified by the Chief Trial Judge, US Army Trial Judiciary, and the Chief Trial Judge, US Air Force Trial Judiciary. Nothing in this rule prohibits military judges from exercising their discretion to depart from the procedure guide, where appropriate, and from fashioning appropriate instructions, notwithstanding those set forth in DA Pamphlet 27-9.

AFI 51-201, Attachment 4, Rule 8.1. However, the military judge improperly deviated from DA Pamphlet 27-9 to Appellant's prejudice.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

VIII. WHETHER THE FINDINGS ARE FACTUALLY SUFFICIENT.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). When reviewing for sufficiency, this Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or the members. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

This Honorable Court cannot be personally convinced of Appellant's guilt beyond a reasonable doubt. Appellant was convicted of committing indecent acts with C.G. based only on the fragmented and uncertain memory of C.G; there were no eyewitnesses to the alleged acts, and no physical, medical, scientific, or forensic evidence that would corroborate C.G.'s accusation. Furthermore, C.G.'s testimony was inconsistent with her prior statements about basic facts of the allegation, as the number of alleged incidents grew from three to four. (*Compare* R. at 782 (only three incidents alleged in 2006) *with* R. at 781-724 (first trial allegation), R. at 726, 732, 735-737 (second trial allegation), R. at 738-739 (third trial allegation), and R. at 740-741 (fourth trial allegation). Considering these inconsistencies and the lack of corroboration, Appellant's conviction cannot stand.

Wherefore, Appellant respectfully requests this Honorable Court set aside the findings and the sentence, and dismiss the charge.

IX. WHETHER THE FINDINGS AND SENTENCE SHOULD BE SET ASIDE DUE TO CUMULATIVE ERROR.

"It is well-established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually." *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996). As a result, if this Court does not grant relief on any individual assignments of error, it can still grant relief under the cumulative-error doctrine. *Id*. Relief is warranted if this Court "cannot say with any certainty that the cumulative effect" of the errors here "did not affect the outcome." *Id*. at 243 (citing *United States v. Banks*, 36 M.J. 150, 162 (C.M.A. 1992); *United States v. Walker*, 42 M.J. 67, 74 (C.A.A.F. 1995)).

The Government's case against appellant was a she-said presentation centered on C.G. fragmented and uncertain memory of events with Appellant nearly a decade before. This evidence was weak. The combined effect of the assigned errors, on the other hand, is strong. When viewed in total, it is clear that appellant did not receive a fair court-martial. As a result, this Court should set aside the findings and sentence.

CONCLUSION

Appellant was wrongly convicted, despite factually insufficient evidence, after a deeply flawed trial tainted by serious legal errors. Absent the many errors, improprieties, and deficiencies of counsel in Appellant's court-martial, Appellant would have been acquitted of the charge, and accordingly Appellant asks that this Court set aside the findings and sentence.

Wherefore Appellant respectfully prays this Honorable Court for the relief requested.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 30 March 2017.

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