IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S REPLY BRIEF (CORRECTED)**
	)	Before Panel No. 1
v.	)	
	)	Case No. ACM 37249 (rem)
Captain (O-3) **EDWARD T. HUDSON,** United States Air Force, *Appellant*	)	

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

COMES NOW Appellant, pursuant to Rule 15(b) of this Honorable Court's Rules of Practice and Procedure, and files this Reply Brief.

INDEX

TABLE OF AUTHORITIES

SELECTED ERRORS AND ARGUMENT

I. A MILITARY JUDGE'S DISCRETION IS NOT UNLIMITED. HERE IT WAS ABUSED. THE PROSECUTION EMPLOYED IMPROPER EVIDENTIARY BOOTSTRAPPING IN ORDER TO "CHARACTERIZE [APPELLANT] IN THE EYES OF THE MEMBERS AS A CHILD MOLESTER, ONE OF THE MOST UNSYMPATHETIC CHARACTERIZATIONS THAT CAN BE MADE." UNITED STATES V. BERRY, 61 M.J. 91, 97 (C.A.A.F. 2005).

The Government's brief ignores two fundamental principles of law. First:

> Simply stated, 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.

United States v. Diaz, 59 M.J. 79, 95 (C.A.A.F. 2003). Second:

> [W]hat the government cannot successfully introduce into evidence through the front door it cannot successfully introduce through the back door."

United States v. Brown, 11 M.J. 263, 266 (C.M.A. 1981).

The military judge committed a clear abuse of discretion when she wrongly concluded that the uncharged allegations of M.P. were admissible for non-propensity purposes under Mil. R. Evid. 404(b) as proof of Appellant's "intent and absence of mistake or accident." (App. Ex. LXII at 6, ¶ 25). Appellant did not raise those defenses and they were not in issue; Appellant's defense focused instead on the fact that the alleged touching of C.G. didn't happen. *But cf. Estelle v. McGuire*, 502 U.S. 62, 69 (1991) (evidence of the murdered child's prior injuries was relevant to show that the child died as a result of abuse); *United States v. Harrow*, 65 M.J. 190, 202 (C.A.A.F. 2007) (uncharged acts involving the same victim were admissible because appellant's statements to investigators supported the defense of accident). Furthermore, the uncharged allegations were separated in time by more than five years with no intervening allegations; a significant remoteness that the military judge failed to consider. While the charged

offense did require the prosecution to show that Appellant committed acts upon C.G. with the intent to gratify his sexual desires, the uncharged allegations of M.P. were too uncertain and too remote to be properly admitted under Mil. R. Evid. 404(b) for that limited purpose. Yet admitted they were, and then that admission functioned as a back door for their further admission for propensity purposes under Mil. R. Evid. 414. (App. Ex. LXII at 6, ¶ 16).

Additionally, the Government's brief proffers that C.A.A.F. "has found admissible acts occurring more than eight years prior to the charged offenses." (Gov't Br. at 16 (citing *Berry*, 61 M.J. at 96) (citing *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001*))). See also United States v. Bailey*, 55 M.J. 38, 41 (C.A.A.F. 2001) (also cited in *Berry*). None of these cases support admission of the allegations by M.P. in this case, nor do they truly support the proposition advanced by the Government's brief. In *Berry*, C.A.A.F. applied Mil. R. Evid. 403 and found reversible error in the admission of the uncharged allegations of a child. 61 M.J. at 97. The Government's brief, however, argues for the exact opposite here; no error and no reversal. In *Dewrell*, the uncharged acts were contemporaneous with a charged offense: the uncharged acts occurred "between 1987 and 1989," 55 M.J. at 137, while one of the charged offenses occurred "sometime between February 1 and April 30, in 1988," 55 M.J. at 133. The uncharged allegations against Appellant, however, were remote in time; separated by half a decade. In *Bailey*, the defense "did not contest that the [uncharged] sodomy occurred." 55 M.J. at 41. The uncharged allegations of M.P., however, were hotly contested. Appellant certainly concedes that the "length of time between the events alone," *Berry*, 61 M.J. at 96; *United States v. Ediger*, 68 M.J. 243, 251 (C.A.A.F. 2010), is not the reason the military judge abused her discretion in this

case. Rather, the lack of temporal proximity was merely one of five[1] serious errors by the military judge. (*See* App. Br. at 9-14).

Finally, the Government's brief suggests that "this case aligns with *Munoz*." (Gov't Br. at 21 (referencing *United States v. Munoz*, 32 M.J. 359 (C.M.A. 1991))). *Munoz*, however, involved a unique and specific set of circumstances supporting a singular theory of admissibility – that of *common plan or scheme*:

> The theory is that Sergeant Munoz would drink alcohol, become intoxicated and then approach his daughters while they were alone in a room in the house, either the bedroom or the living room, and that family members either present in the house but another part of the house or out of the house entirely and that the fondling would occur, rubbing of breasts and vagina, and then always a statement afterwards that, "This is our secret. Don't tell anybody about that." That these would occur periodically. There was, of course, only the one instance with [AA] but there are multiple instances with [A] as charged and also with [I].

Munoz, 32 M.J. at 361 (marks in original) (emphasis omitted). C.A.A.F. specifically affirmed the military judge's conclusion that this was "probative of a plan on [Munoz]'s part to sexually abuse his children." *Munoz*, 32 M.J. at 364 (citations omitted). Appellant's case is quite obviously different. Not only did the prosecution not offer, and the military judge not admit, the

---

[1] Appellant's opening brief identifies four errors: (1) Failure to apply the proper test for relevance, (2) conclusion that non-propensity reasons supported admission for propensity purposes, (3) giving excessive weight to the fact that Appellant was previously convicted, and (4) failure to properly consider the lack of temporal proximity. There is a fifth: the military judge improperly held the defense to the burden to show that the prosecution's evidence was inadmissible. (R. at 269). This was error because "the structure of M.R.E. 404(b) permits admission of evidence of other crimes, wrongs, or acts only upon a showing by the proponent of a specifically relevant purpose to be served under the circumstances of the particular case." *United States v. Tanner*, 63 M.J. 445, 449 (C.A.A.F. 2006) (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)) (emphasis added). Furthermore, the military judge did not distinguish between the burden to show admissibility under Mil. R. Evid. 404(b) and the presumption of relevance under Mil. R. Evid. 414. Instead, she erroneously used the former as a backdoor for admission under the latter.

allegations of M.P. as evidence of a plan, but the prosecution's theory of admissibility was ultimately the assassination of Appellant's character. As the Assistant Trial Counsel wrote in her motion:

> It is a necessary part of the case for the members to fully understand the Accused.

App. Ex. XLIX at 4.

Appellant's case is most similar to *Berry*. Just as in *Berry*:

> a distracting mini-trial on the collateral issue of the [MP] incident resulted from the admission of [MP]'s testimony and the prosecution's pointed references. The emphasis on ["a chillingly similar account,"] ["another little girl,"] and ["how many previous times they have said the same thing"] all characterized [Hudson] in the eyes of the members as a child molester, one of the most unsympathetic characterizations that can be made.

61 M.J. at 97; (R. at 681, 1151). As a result, just as in *Berry*, the testimony of M.P. fails the Mil. R. Evid. 403 balancing test. 61 M.J. at 97. Also, as in *Berry*, "due to the inflammatory nature of the testimony and the emphasis given the testimony by the Government, it was likely considered by the members as much more than propensity evidence." 61 M.J. at 98.

"One of the most basic precepts of American jurisprudence [is] that an accused must be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition." *United States v. Hogan*, 20 M.J. 71, 75 (C.M.A. 1985). The admission of propensity evidence is "fundamentally unfair if it undermines the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt." *United States v. Wright*, 52 M.J. 476, 481 (C.A.A.F. 2000). The record clearly reflects that the trial counsel

believed that Appellant was a child molester who was necessarily guilty.[2] But "propensity evidence does not relieve the government of its burden of proving every element of every offense charged." *United States v. Schroder*, 65 M.J. 49, 56 (C.A.A.F. 2007). Put differently, propensity evidence is not evidence of the crime. Here, however, it was the most potent evidence presented.

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

II. NO EVIDENCE SUPPORTED THE TRIAL COUNSEL'S FINDINGS ARGUMENT THAT "THE SCARIEST PART OF THE AIR FORCE [IS] TO THINK THAT SOMEONE LIKE THE ACCUSED IS AMONG US." BY THIS AND OTHER ASSERTIONS OF PERSONAL OPINION, THE TRIAL COUNSEL DID "SEEK UNDULY TO INFLAME THE PASSIONS OR PREJUDICES OF THE COURT MEMBERS." UNITED STATES V. CLIFTON, 15 M.J. 26, 30 (C.M.A. 1983).

The Government's brief suggests a deeply flawed and misleading interpretation of the trial counsel's findings argument, arguing that:

> trial counsel's statement does not express a personal opinion. She did not say, "I believe" Appellant's sexual molestation of a child discredited the uniform and the Air Force. She instead argued that the members should find that Appellant's despicable conduct undermined and tarnished the reputation of the Air Force and damaged good order and discipline. That is a fair and proper argument on an element of the charged offense.

(Gov't Br. at 30-31). Appellant respectfully suggests that this Court must firmly and forcefully reject the Government's interpretation.

---

[2] The trial counsel's findings argument, addressed in AOE II, are particularly revealing as she began her argument with the statement that "the scariest part of the Air Force, to think that someone like the accused is among us." (R. at 1468). Appellant was, however, supposed to still be presumed innocent at that time.

Appellant was not convicted of anything when the trial counsel began her closing argument with the assertion:

> 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 1468). No evidence supported the trial counsel's inflammatory expression of prejudgment and emotion, nor did the circumstances of the allegations (charged or uncharged) warrant reference to Appellant in uniform. Even with a charge preferred under Article 134, 10 U.S.C. §934, the trial counsel's hyperbolic argument about "someone like him" as "the scariest part of the Air Force," (R. at 1468), was wholly improper when, just moments earlier, the military judge instructed the members that "the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt" (R. at 1465). Moreover, as the very first words spoken by the trial counsel in argument, these words were certainly deliberate.

The trial counsel's argument was no more than "unsworn, unchecked testimony . . . exploit[ing] the influence of the office and undermin[ing] the objective detachment which should separate a lawyer from the cause for which she argues." *United States v. Fletcher*, 62 M.J. 175, 179-80 (C.A.A.F. 2005) (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))). This Court should be deeply disturbed by the military judge's refusal to take corrective action when defense counsel objected to the trial counsel's improper argument. It should be similarly concerned that the Government still refuses to acknowledge this error.

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

III. THE TRIAL COUNSEL'S ASSERTION THAT THE MEMBERS SHOULD SENTENCE APPELLANT FOR UNCHARGED ACTS AND FOR HIS CRIMINAL PROPENSITY WAS NOT DISCUSSION OF HIS REHABILITATIVE POTENTIAL AND WAS IMPROPER.

Appellant disagrees with the Government's interpretation that the trial counsel's sentencing argument was proper. (Gov't Br. at 38.) The Government's brief relies on the claim that the statements were confined to the discussion of Appellant's rehabilitative potential. *Id.* But regardless of whether the trial counsel's statements were confined to the discussion of Appellant's rehabilitative potential, they were still facts not in evidence. Therefore, they were improper.

There is no evidence in the record to support trial counsel's assertions:

> But you don't learn these behaviors overnight. You don't learn how to sexually abuse a little girl licking your fingers and rubbing her vagina. That's not something you learn and do quickly. He's not going to unlearn those actions quickly either.

(R. at 1666-1667 and Gov't Br. At 36.). In order for these statements to be within the proper bounds of argument, there must have been evidence admitted to support each statement.

Evidence of rehabilitative potential is limited to opinion testimony. R.C.M. 1001(b)(5)(A). *See also United States v. Eslinger*, 70 M.J. 193, 198 (C.A.A.F. 2011); *United States v. Hill*, 62 M.J. 271, 272 (C.A.A.F. 2006). Before the trial counsel's statements could be proper, the prosecution was required to present such evidence. R.C.M. 1001(b)(5)(A)-(C). They did not, and so the trial counsel's personal opinion of Appellant's rehabilitative potential is based on no evidence, is not relevant, and constitutes improper argument.

C.A.A.F. addressed precisely this type of improper argument in *United States v. Frey*, 73 M.J. 245 (C.A.A.F. 2014). There the court considered statements by trial counsel that "were not

derived from the evidence presented at trial." 73 M.J. at 249. It endorsed this Court's decision in that case that found the argument improper. *Id*. The same error occurred in Appellant's case.

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. THE PROSECUTION HAD NO REASONABLE THEORY OF WHY THE STATUTE OF LIMITATIONS WAS RELEVANT.

The defense moved to prohibit the prosecution from referencing the first trial during the rehearing. (App. Ex. XLVII). The prosecution agreed that any such reference should be avoided. (R. at 239-240). Yet the senior trial counsel began her opening statement with a reference to prior testimony. (R. at 680 ("This is the [C.G.] that reported and later testified. . ."). She then introduced M.P. as the proponent of "a chillingly similar account" to that of C.G. (R. at 681). The senior trial counsel explained that M.P.'s account, however, was not on the charge sheet because "the legal concept of the statute of limitations they [*sic*] are going to allow certain cases----." (R. at 618 (interrupted by sustained objection)).

A few minutes later, outside the presence of the members, the senior trial counsel offered two contradictory rationales for her decision to reference the statute of limitations:

> STC: Yes, Your Honor. The government's position is that I had a proper basis to mention the statute of limitations. We believe that the evidence will be fairly presented through [M.P.] that her understanding of why her case wasn't charged was based on the statute of limitations.
>
> MJ: What's the relevance of that?
>
> STC: Your Honor, we were trying to explain to the members why they would hear from [M.P.], but the charge wasn't in front of them.

(R. at 686-687). The Government's brief asserts that the prosecution "had a reasonable theory of why it considered the statute of limitations relevant" during opening statements. (Gov't Br. at 46). In reality, however, there was no such theory.

The first rationale offered by the senior trial counsel was that the statute of limitations "will be fairly presented through [M.P.] that [*sic*] her understanding of why her case wasn't charged." (R. at 686). As the military judge aptly noted, whatever M.P. thought about why her allegations weren't charged wasn't relevant.

The senior trial counsel then offered the second rationale: that she was "trying to explain to the members why they would hear from [M.P.], but the charge wasn't in front of them." (R. at 687). This second rationale contradicted the first because if the statute of limitations would be "fairly presented through M.P.," (R. at 686), then there was no need for the senior trial counsel to explain it herself.[3]

The senior trial counsel's vacillating rationales also suggest that she either believed the members might, or sought to incite the members to, prejudge the case. The military judge gave the members preliminary instructions that included the admonition that "the fact that the charges have been preferred against this accused and referred to this court for trial does not permit any inference of guilt." (R. at 435). By offering an explanation for the absence of a charge involving M.P. – a prosecution witness who would allege "a chillingly similar account" against Appellant

[3] This also occurred right after the members were instructed "that opening statements are not evidence rather they are what counsel expect the evidence will show in this case." (R. at 679). The senior trial counsel and the Government's brief, however, seemingly suggest that it is reasonable for the prosecution to offer gratuitous explanations about irrelevant and prejudicial matters to the members during opening statements.

during the trial – the senior trial counsel encouraged the members to see the charge sheet as an indicator of the truthfulness of an allegation and of the guilt of Appellant.

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

V. DEFENSE EXHIBIT B FOR IDENTIFICATION WAS ADMISSIBLE. CONSIDERATIONS OF ITS WEIGHT AND THE CREDIBILITY OF THE WITNESSES WERE FOR THE TRIER OF FACT, NOT THE MILITARY JUDGE.

The Government's brief asserts that the military judge found J.O. a more credible witness than S.H. (Gov't Br. At 53.). Yet such a credibility determination is the quintessential measure of weight, not admissibility. Appellant elected trial by members, not by military judge, and he was entitled to have credibility determinations made by the members, not the military judge.

The requirement for authentication is that the proponent make merely a *prima facie* showing that the item is what the proponent claims it to be. *United States v. Lubich*, 72 M.J. 170, 174 (C.A.A.F. 2013). Specifically:

> 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. . . .
>
> Once the proponent has made the requisite showing, the trial court should admit the item, assuming it meets the other prerequisites to admissibility, such as relevance and compliance with the rule against hearsay, in spite of any issues the opponent has raised about flaws in the authentication. Such flaws go to the weight of the evidence instead of its admissibility. 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.

Id. Appellant satisfied that requirement.

However, the military judge usurped the role of the fact finder. As the Government's brief concedes:

> The purported writer of the email testified under oath multiple times that she did not write the email. […] Regarding the email address attributed to the email, four people, including S.H., had access to the email account. […]
>
> Concerning the language used in the email, the only evidence in front of the military judge tying the language used to J.O. was the testimony of S.H. […] The military judge found unclear S.H.'s explanation of how she considered the language in the email similar to that used by her mother. […]

(Govt. Br. at 56 (citations omitted)). These are matters that should have been presented to the members for their determination.

The excluded evidence was highly probative of bias. It was also admissible for impeachment by contradiction. Furthermore, it involved one of the prosecution's primary witnesses. Accordingly, its exclusion was not harmless.

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

VI. THE DECLARATIONS OF APPELLANT'S TRIAL DEFENSE COUNSEL CONCLUSIVELY PROVE THAT APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Appellant's defense counsel's misunderstanding of the mechanics of a good character defense fell well below any objective standard of reasonableness.

In each of their declarations, Appellant's trial defense counsel make the identical claim that had they offered evidence of Appellant's good military character – as he wanted them to – then:

> The Defense would essentially have been powerless to rebut the basis of the "have you heard" questions, potentially leaving the members with a more negative opinion of the Accused.

(CDC Dec. at 1-2, ¶ 5); (DC Dec. at 1-2 ¶ 5). Neither declaration identifies what such questions might have been, except that both suggest that some new claim of past misconduct by Appellant might have been fabricated by Appellant's ex-wife during the trial. *Ibid*.

These declarations reveal that Appellant's trial defense counsel simply do not understand how a character defense works or how it might be rebutted. This Court, however, understands these issues quite well:

> Once the accused opens the character door, the prosecution may walk through it with cross-examination on specific instances of conduct or its own reputation or opinion character witnesses in rebuttal. Mil. R. Evid. 404(a). But, the prosecutor may not prove specific acts of conduct through extrinsic evidence solely to rebut the accused's character evidence.
>
> On cross-examination, the prosecutor may test the opinions or knowledge of the accused's character witnesses by asking if they "know" (an opinion witness) or "are aware" (a reputation witness) of specific acts of conduct which would reflect poorly on the accused's character trait at issue. Mil. R. Evid 405(a). The cross-examiner can diminish the impact of the character witness' testimony by showing the witness is either unaware of relevant facts bearing on the trait at issue or fails to adequately factor them in an opinion. *See Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948).
>
> Of course, the prosecutor must have a good faith basis for believing that the conduct occurred before cross-examining the character witness about it. In this regard, the trial judge may require the prosecutor to establish in advance the basis for the questioning. *Id.*; *United States v. Robertson*, 39 M.J. 211 (C.M.A.1994), *cert. denied*, 513 U.S. 1076, 115 S.Ct. 721, 130 L.Ed.2d 626 (1995). However, "[i]t is a strange cross-examination, because the cross-examiner is not allowed to prove the existence of the acts about which he asks." S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual*, 496 (3d ed. 1991). Thus, the prosecutor is bound by the witness' answer.

United States v. Pruitt, 43 M.J. 864, 868 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 148 (C.A.A.F. 1997) (emphasis added). It was objectively unreasonable for Appellant's trial defense counsel to fear "powerless[ness] to rebut the basis of the 'have you heard' questions," (CDC Dec. at 1-2, ¶ 5); (DC Dec. at 1-2 ¶ 5), when the basis of such questions was not admissible (and so there was nothing to rebut). Similarly, it was objectively unreasonable for Appellant's trial defense counsel to fear that Appellant's ex-wife "could say any number of bombastic things (whether true or not) that would leave the defense without response," (CDC Dec. at 2, ¶ 5), when a good faith basis was required before the prosecution could have inquired about any specific act by Appellant on cross-examination, and when the prosecution could not otherwise prove the existence of any such act. Furthermore:

> Although cross-examination of character witnesses about specific acts is permissible under [Mil. R. Evid.] 405(a), "cross-examination should be limited to acts that would have occurred prior to the crime charged, because the court wants to test character at that time." Stephen A. Saltzburg, Lee D. Schinasi, and David A. Schlueter, *Military Rules of Evidence Manual* 572 (4th ed.1997) (emphasis in original).

United States v. Matthews, 53 M.J. 465, 470 (C.A.A.F. 2000). The relevant time for Appellant's good character was before, during, and soon after 2005; ten years prior to the court-martial. Even if it were somehow reasonable for Appellant's defense counsel to fear a bombastic new false allegation – one that could only be mentioned during cross-examination of a defense character witness, and that could not be otherwise proven when the witness expresses predictable ignorance – it is highly unlikely that the prosecution would have a good faith basis to ask about an allegation that was kept secret for a decade or more only to be suddenly begat mid-trial by Appellant's ex-wife.

Appellant readily concedes that many cases involve known incidents of bad conduct that could devastate good character testimony. His case, however, isn't one of them. Appellant's trial defense counsel's fears about nonexistent allegations that (even if raised and allowed) could never be proven, is objectively unreasonable.

Yet the declarations of Appellant's trial defense counsel raise an even greater concern: they apparently believed that the prosecution could cross-examine a writing. The defense may introduce the accused's character through "affidavits or other written statements of persons other than the accused." Mil. R. Evid. 405(c). Appellant's trial defense counsel introduced ten such writings in sentencing, but none in findings. (*See* Def. Ex. D, E, F, G, H, I, J, K, L, and M). Furthermore, the declarations of Appellant's trial defense counsel contain the identical claims that:

> My understanding of character evidence is that for it to be admissible, it must speak to the character at a relevant time. In Capt Hudson's case, I recall that many character opinions were peripheral to the relevant time frame and not directly on point.

(CDC Dec. at 2, ¶ 8); (DC Dec. at 2 ¶ 6). But the writings attached to the record were not peripheral. Rather, they were directly probative of numerous pertinent traits of appellant's character during the relevant timeframe, as follows:

Def. Ex.	**Author**	**Known Appellant Since**	**Favorable Opinions**
D	Lt Col T. (ret), USAF	1999	"epitome of professionalism;" "caring father;" "I trust Todd implicitly with my daughter" (boldface type); and "someone you can trust both personally and professionally."
E	Lt Col C. (ret), USAF	"During the charged timeframe"	Good military character; "As his previous commander, I have thoroughly reviewed the evidence."

F	CMSGT C., USAF	2006	Good military character; Personal experience as a victim supports belief that Appellant is not guilty.
G	SMSGT W., USAF	2002	Good military character; "his fathering is second to none;" "protective of children;" "law abiding citizen."
H	SMSGT P. (red), USAF	1993	Good military character; "focused and caring."
I	TSgt D.T., USAF	2006	Unselfish; "the most reliable, dependable, trusted person I know; "I trust him completely with my life and my son."
J	Mr. M.	1977	"polite, considerate of others feelings, practicing family values;" "honest;" "always being responsible."
K	Mr. G.	2002	"devoted father and husband;" "good and trustworthy human being;" "I trust him, without hesitation, with my own child."
L	Ms. G.	~2015 ("past ten years")	"He is one of the most respectful people I have ever met in my life;" "genuinely a kind, responsible, unselfish, positive and good natured person;" "an excellent husband;" "a good father."
M	Mr. F.	2005	"Truly an Air Force professional I can count on for anything;" "He treats everyone with respect."
N	Lackland Regional Confinement Facility	Unclear	"He is a model inmate;" "He is a positive role model."

Even if this Court finds that Appellant's trial defense counsel was justified in fearing cross-examination about nonexistent allegations that (even if raised and allowed) could never be proven, there is no justification whatsoever for their failure to offer writings that could not be cross-examined.

"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). When Appellant's counsel failed to present such a readily available defense, they denied him his Sixth Amendment right to the effective assistance of counsel.

B. Appellant was not consulted before his defense counsel decided to forego a good character defense.

Appellant's civilian trial defense counsel's declaration states that he "recall[s] having a conversation with Capt Hudson just before trial, and again mid-trial, in which I stated that I was not going to put on a good character defense." (CDC Dec. at 2, ¶ 10). Appellant's military trial defense counsel's declaration contains almost identical language, stating that she: "recall[s] [civilian defense counsel] having a conversation with Capt Hudson just before trial, and again mid-trial, in which he stated that he was not going to put on a good character defense." (DC Dec. at 3 ¶ 11).

Appellant denies that any such conversations occurred.

In an affidavit submitted contemporaneously with this reply brief, Appellant explains that his trial defense counsel did not consult with him about their decision to not present evidence of his good character. Appellant's affidavit is corroborated by the fact that both of Appellant's trial defense counsel acknowledge that Appellant repeatedly expressed the importance of good character evidence in his defense, yet neither defense counsel recalls substantial protest when they told him that it would not be used, nor did they memorialize the decision in writing. (CDC Dec. at 1, ¶ 3; 3 ¶ 10); (DC Dec. at 2, ¶ 5; 3 ¶ 11). A strategy so central and important would not have been abandoned so casually. These factors compellingly demonstrate the improbability that Appellant was consulted prior to his counsel deciding to forego a good character defense. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

When Appellant's counsel failed to consult with him prior to deciding to forego such a readily available defense, they denied him his Sixth Amendment right to the effective assistance of counsel.

C. There was no reasonable justification for Appellant's trial defense counsel to introduce evidence of the prior trial.

Appellant's civilian trial defense counsel asserts that the military judge's denial of admission of Defense Exhibit B for identification was a major setback for Appellant's defense:

> As I state above, the decision of the military judge to disallow the email as a result of a failure to establish the foundation of its authorship was astonishing and shocking to the Defense. The entirety of the trial, in my opinion, was shaped by that ruling.

(CDC Dec. at 5, ¶ 22). Appellant's military trial defense counsel's declaration contains near-identical language. (DC Dec. at 6, ¶ 25). Additionally, both declarations contain the identical assertion that:

> I do not regret the decision to not raise the matter outside the members' presence for an in limine ruling because the effect of eliminating the surprise would have been catastrophic.

(CDC Dec. at 5, ¶ 23). (DC Dec. at 6, ¶ 26). This asserted need for surprise is the basis for their decision to introduce evidence of the prior trial, as Appellant's civilian defense counsel asked Appellant's ex-wife a series of questions about Defense Exhibit B for identification during cross-examination that allowed the prosecution to reference previous proceedings including the prior trial. (*See* R. at 986).

The declarations, however, compellingly demonstrate that there was no objectively reasonable basis for such surprise.

Appellant's civilian trial defense counsel's declaration describes Appellant's ex-wife as manipulative and conniving, and explains that "during pretrial interview and during trial, it was

clear to [him] that [the ex-wife] was skilled at creating a façade of a kind and gentle character . . . despite the clear manipulation. . .” (CDC Dec. at 4-5, ¶ 19). The declaration of Appellant’s military trial defense contains nearly-identical language. (DC Dec. at 5, ¶ 22). Surprise is not an objectively reasonable strategy to address such manipulation. Rather, with an issue as crucial as the prejudicial reference to a prior trial and conviction, caution is demanded. Appellant’s trial defense counsel were instead cavalier, forgoing the opportunity to obtain a preliminary ruling on the admissibility of Defense Exhibit B for identification in order to surprise a master manipulator. Such a reckless decision caused overriding prejudice to Appellant and denied him his Sixth Amendment right to the effective assistance of counsel.

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

CONCLUSION

Appellant was wrongly convicted, despite factually insufficient evidence, after a deeply flawed trial tainted by serious legal errors. This 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 own 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 718-724 (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).

The prosecution team deliberately sought to characterize Appellant as a child molester during the findings phase of the court-martial and intentionally sought to unduly inflame the passions or prejudices of the members. The senior trial counsel committed prosecutorial misconduct in opening statement, and the trial counsel committed prosecutorial misconduct in closing argument. The prosecution's sentencing argument was similarly tainted. Absent these improprieties, Appellant would have been acquitted.

The military judge improperly admitted the uncharged allegations of M.P. and wrongly suppressed powerful evidence of the bias of Appellant's ex-wife. Had those rulings been the opposite, with the remote and uncertain uncharged allegation suppressed and Appellant allowed his right of confrontation, Appellant would have been acquitted.

Appellant's trial defense counsel were ineffective. They failed to present a complete defense that was available and that Appellant wanted presented to the members. They failed to impeach the character of the alleged victim whose testimony was the only direct evidence against Appellant. And they introduced Appellant's prior trial and conviction for an objectively unreasonable – and fundamentally nonsensical – reason. Absent these deficiencies, Appellant would have been acquitted.

But even if this Court is not convinced that any one of these serious legal errors would have resulted in Appellant's acquittal, their cumulative effect clearly affected the outcome of Appellant's court-martial. The prosecution of Appellant was a she-said presentation centered on the fragmented and uncertain memory of C.G. This evidence was weak. The combined effect of the errors, on the other hand, is strong. When viewed objectively and 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.

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

ZACHARY SPILMAN
Civilian Appellate Defense Counsel
29 North Main Street #97
Sherborn, MA 01770-0097
Phone/Fax: 844-SPILMAN
zack@zacharyspilman.com

PATRICIA ENCARNACIÓN MIRANDA,
Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
patricia.encarnacionmiranda.mil@mail.mil

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.

PATRICIA ENCARNACIÓN MIRANDA,
Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
patricia.encarnacionmiranda.mil@mail.mil