

**IN THE
UNITED STATES ARMY
COURT OF CRIMINAL APPEALS**

**UNITED STATES
Appellee**

v.

**FIRST LIEUTENANT (0-2)
SAMUEL B. BADDERS,
U.S. Army
Appellant**

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20200538

FIRST LIEUTENANT (O-2)
SAMUEL B. BADDERS,
United States Army
Appellant

Tried at Fort Hood, Texas, on 21
January, 15 and 22–24 September, and
19 November 2020 before a general
court-martial, convened by the
Commander, First Cavalry Division,
Colonel Douglas K. Watkins and
Colonel Maureen A. Kohn, military
judges, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS**

The Appellant, First Lieutenant Samuel B. Badders, through undersigned appellate defense counsel, respectfully files this Brief on Behalf of Appellant. Good cause exists to believe error occurred which prejudiced 1LT Badders' substantial rights. Specifically, the military judge committed reversible error with respect to evidentiary rulings and there were significant issues with the panel composition.¹ We ask the Court to set aside the findings and the sentence.

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), 1LT Badders respectfully requests that this Honorable Court consider the information provided in the Appendix.

Assignments of Error

I. THE EVIDENCE WAS INSUFFICIENT.

II. THE MILITARY JUDGE REVERSIBLY ERRED BY EXCLUDING EVIDENCE REGARDING TEXT MESSAGES BETWEEN 1LT BADDERS AND THE COMPLAINANT.

III. THE MILITARY JUDGE REVERSIBLY ERRED BY ALLOWING MAJOR [REDACTED] TO TESTIFY OVER DEFENSE OBJECTION.

IV. THE MILITARY JUDGE REVERSIBLY ERRED BY DENYING PRODUCTION OF THE COMPLAINANT'S MENTAL HEALTH RECORDS IN ACCORDANCE WITH MILITARY RULE OF EVIDENCE 513.

V. THE MILITARY JUDGE REVERSIBLY ERRED BY DENYING THE MEMBERS' REQUEST FOR ACCESS TO TEXT MESSAGES NOT ADMITTED IN EVIDENCE.

VI. ACTUAL AND APPARENT UNLAWFUL COMMAND INFLUENCE EXISTED.

VII. SEVERAL MEMBERS WERE SUBJECT TO CHALLENGE FOR ACTUAL AND IMPLIED BIAS.

VIII. "ON OR ABOUT 1 JANUARY 2019" LANGUAGE IN THE SPECIFICATION CONSTITUTED AN EX POST FACTO VIOLATION/THE FINDING IS AMBIGUOUS.

IX. THE MILITARY JUDGE PLAINLY ERRED IN ADMITTING EVIDENCE OF THE CONTENTS OF WRITINGS WITHOUT ADMITTING THE ORIGINAL WRITINGS.

X. CUMULATIVE ERROR OCCURRED AND WARRANTS RELIEF.

Statement of the Case

First Lieutenant Badders was charged with one specification of fraternization in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2019) [UCMJ] and one specification of sexual assault in violation of Article 120, UCMJ. (Charge Sheet). Both allegations involved 1LT Badders' relationship with SPC [REDACTED], whom he met on the social media site Tinder and had an ongoing consensual sexual relationship. The sexual assault specification alleged that he committed a sexual act upon SPC [REDACTED] by penetrating her anus with his penis, without her consent. (Charge Sheet). On 19 December 2019 the convening authority referred the case to a general court-martial. (Charge Sheet).

First Lieutenant Badders pleaded not guilty to all charges and specifications. (R. at 12). The military judge entered a finding of not guilty to the fraternization allegation under Rule for Courts-Martial (R.C.M.) 917. (R. at 510). However, a panel of members convicted 1LT Badders of the charged sexual assault. (R. at 570). The military judge sentenced him to twelve months of confinement and a dismissal. (R. at 596). The convening authority took no action on 20 November 2020. (Action).

On 16 February 2021, the military judge granted a defense post-trial motion for mistrial, finding two evidentiary errors and implied bias. (App. Ex. LXV). The Government appealed the ruling under Article 62, UCMJ. (App. Ex. LXVII). This

Court reversed. *United States v. Badders*, ARMY MISC 20200735, 2021 CCA LEXIS 510 (Army Ct. Crim. App. 30 Sept. 2021) (mem. op.).² The Court of Appeals for the Armed Forces [CAAF] granted review only on the issue whether this Court had jurisdiction to hear the Government's appeal, and affirmed. *United States v. Badders*, 82 M.J. 299 (C.A.A.F. 2022). This appeal under Article 66, UCMJ followed.

General Statement of Facts

This was a hotly contested case with strong consent and mistake of fact as to consent defenses. SPC [REDACTED] and 1LT Badders met on Tinder, an online dating forum, in 2017. (R. at 328, 387). They had a mutually consensual sexual relationship that lasted approximately two months at the end of 2018 while they were both on active duty in Germany. (R. 330-37, 341-42, 401-02, 465-66). In April 2019, SPC [REDACTED] filed an unrestricted report alleging that on 31 December 2018, during otherwise consensual sexual activity in a hotel room she had secured for New Year's Eve, 1LT Badders inserted his penis into her anus without her consent. (R. at 346-49, 362).

Additional facts pertinent to each Assignment of Error are set out below.

² <https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/350>

Errors and Argument

I. THE EVIDENCE WAS INSUFFICIENT.

Relevant Facts

SPC [REDACTED] and 1LT Badders met on Tinder (a dating website/application) in the Spring of 2017. (R. at 328). She was in college at the time, but had a National Guard obligation; she went to AIT at Fort Sam Houston in San Antonio and became a combat medic. (R. at 328, 368). She knew 1LT Badders was affiliated with the military but did not know the specifics. (R. at 328-29). SPC [REDACTED] graduated from AIT and returned to college. (R. at 330).

They continued to communicate via social media, and in late 2018, discovered they were both on duty in Germany; they met in person for the first time in November 2018 for a date. (R. at 331-32, 388). She went in physical fitness gear to the motor pool where 1LT Badders was working. They got into a Humvee, she ate a sandwich, then they talked and “made out.” (R. at 332-33). A week later, she went back to the motor pool. (R. at 334). They got into a vehicle, made out, she gave him a “hand job,” and she gave him “head” (oral sex). (R. at 335). She asked him to reciprocate the oral sex but he declined. (R. at 336). The following day, she went back to the motor pool, they got into a box truck, she performed oral sex on him, and he again declined to reciprocate. (R. at 336-37). On 20 December, she went to the motor pool again where they had sex on the floor of an office and

she performed oral sex on him. (R. at 338, 341). In addition to the three occasions of oral sex and the intercourse, they sent text messages to each other about having sex. (R. at 391, 402, 465-66). In particular, just days before this event (on 20 December 2019) she sent a text stating, “Tango Hombre Homeboy” with an emoji (picture) of an eggplant, which represents a penis. (R. at 392, 400-01). Two days before the event in question, she sent a text to 1LT Badders saying he could take out frustration he was having with his unit on her, and included a peach emoji, which represents the buttocks. (R. at 391-92, 407, 424-25).

SPC [REDACTED] reserved a hotel room for New Year’s Eve in Grafenwohr and on 30 December, 1LT Badders came to stay with her there. (R. at 342-43). The next morning, they had sex on the couch in the living room. (R. at 342). She made dinner in the hotel room that night and hooked her computer up to the television so they could watch the ball drop.³ (R. at 344). SPC [REDACTED] went to a couple of parties in the hotel while 1LT Badders stayed in the room. (R. at 344). She testified she had some wine with dinner and later one sip of a mixed drink. (R. at 344-45, 425). There was no testimony that 1LT Badders consumed any alcohol.

³ The “ball drops” in Times Square at midnight, eastern time zone, on 31 December each year. See https://en.wikipedia.org/wiki/Times_Square_Ball (“the ball descends down a specially designed flagpole, beginning at 11:59:00 p.m. ET, and resting at midnight to signal the start of the new year” every year since 1907 except during WWII). Midnight in New York in January is 0600 in Germany. See <https://globaltimeconverter.com/time-converter/detroit-time-to-berlin-time>.

When she returned to the hotel room, they watched the New Year's Eve ball drop in New York. (R. at 425). Afterwards, in the living room area, SPC [REDACTED] and 1LT Badders began kissing, then she gave him oral sex for 30 to 45 minutes. (R. at 345, 426). During this time he undressed her with her consent. (R. at 345, 426). He also undressed. (R. at 426). They mutually decided to move to the bedroom and she bent over the edge of the bed. (R. at 345). She testified that she thought they were going to have vaginal sex "Because that's what we had done previously." (R. at 346). According to SPC [REDACTED], 1LT Badders then penetrated her anus with his penis. (R. at 346). She testified she tried to push him away and said, "No," "Stop, what are you doing?" but he twisted her wrists behind her back and said, "Shut the fuck up you dumb bitch." (R. at 347-48).

At trial, SPC [REDACTED] claimed she passed out and assumed it was from asphyxiation from the blankets on the bed. (R. at 349). She said she woke up on her side in the bathtub with the water running, and she saw "poops of blood" coming out of her when she sat up. (R. at 349-50). She also testified 1LT Badders was in the bathroom standing over her, and she heard him say, "What the fuck is wrong with you?" before she passed out again. (R. at 349-50).

The next memory she claimed to have was waking in the bed in the morning. (R. at 351, 355). According to her direct examination, she had a conversation with 1LT Badders about him having "anal" with her without her consent. (R. at 356).

On cross, she admitted she told CID the next morning she woke up laughing because she earlier had made a joke about having rough sex. (R. at 428, 461).

Immediately after the conversation, she testified she watched through the window as 1LT Badders walked to a nearby Burger King. (R. at 357, 430). After she “watched him leave” she went to clean up in the bathroom. (R. at 358). She noticed “Twinkie size” lines of blood on towels in there. (R. at 359, 430). She did not take photos of the towels or take any other action except to put them under the sink. (R. at 359, 431).

Although SPC [REDACTED] testified multiple times that it was 1LT Badders who went to Burger King to get breakfast, she admitted on cross *she* was the one who went; while there, she texted 1LT Badders she was order number 69,⁴ and he replied, “It’s open; thank you Jesus.” (R. at 429). That text message traffic was at 0326. (R. at 461).

On direct, SPC [REDACTED] explained 1LT Badders returned with breakfast for them, and they sat on the bed to eat – the same bed in which he had just allegedly anally sexually assaulted her. (R. at 357, 430). She testified he asked her to sign a

⁴ The number 69 is often used to describe a sexual position. <https://www.dictionary.com/e/slang/69/> (“69 is slang for when two partners arrange their bodies to perform oral sex on one another at the same time in a way said to look like the number 69.”).

“nondisclosure agreement” stating they did not have sex or they had consensual sex, which she refused. (R. at 357).

Her testimony continued: “So I knew that this was a very bad situation, and that I needed a reason to see him again, to have something. So I left my laptop with him and I allowed him to watch movies on my laptop. I allowed him to extend his stay in the hotel room until the next day I believe, just one night. And I said I expect you to give me money for this hotel room, tomorrow I want you to meet me at the PX and I want money for the hotel room and my laptop back.” (R. at 357-58).

The next day, she and her Sergeant went to the PX, where 1LT Badders gave her money and her computer and she returned to the barracks. (R. at 360). About 30 days later, she filed a restricted report and then changed it to unrestricted. (R. at 360). She testified that she showed her Sergeant bruises on her. (R. at 361). He did not testify at trial. She took no photos of the bruises. (R. at 431).

In the meantime, however, she continued to communicate and flirt with 1LT Badders. (R. at 361). She told him on 2 January that she had a good time with him on New Year’s Day, and admitted texting that to him (but did not remember sending a text thanking him for his service with a “thumbs up” emoji”).⁵ (R. at 432, 439). On 10 January she again told 1LT Badders it was very nice hanging out with him on New Year’s Eve. (R. at 442). She even told him she wanted to engage in further

⁵ See Issue II.

sexual activity with him. (R. at 361). As one example, 1LT Badders texted her on 1 February, "I am staying in the hotel where I've fucked your brains out, wish I could do it again." (R. at 443). Her immediate response was, "Laugh out loud me too especially because it's my birthday." (R. at 443). She also texted him on 1 February that she missed him and as late as 11 February, told him she wanted to keep in touch. (R. at 444, 453).

She testified she wanted an apology from 1LT Badders and an assurance it was a "one-time thing" but that never happened; and that she thought having consensual sex with him again would help her "cope." (R. at 362, 463). She explained, "And I continue to reach out to him in that way after the conversations of us potentially meeting up and having sex again, after those things never happened at all settled in, and I had a severe emotional response to the entire situation." (R. at 362). Finally, "eventually he stopped replying to me completely until I told him that I had filed a report, then he immediately replied" and apologized. (R. at 467). His apology was "I'm sorry for what I did" and "I didn't mean to leave you like that." (R. at 468).

According to SPC [REDACTED], she "ended up having night terrors," and in March or April 2019 she "talked at length" with then-Captain [REDACTED], who referred her to various sexual assault counseling resources. (R. at 362-63). MAJ [REDACTED] testified over Defense objection at trial, purportedly as a lay witness, that she did not find it

unusual that SPC [REDACTED] continued to communicate with 1LT Badders after he allegedly assaulted her.⁶

At the time, SPC [REDACTED] frequently took photos of herself and posted them on Facebook. (R. at 370). However, the Government did not offer any photos showing injury – no bruising, no bloody bathtub, no bloody towels or sheets or clothing – nor did any other forensic evidence support the claims of injury.

SPC [REDACTED] testified that in late October, before she had her first date with 1LT Badders, she was “having a rough time.” (R. at 371). She had lost her alcohol privileges and medic bag. (R. at 382). In early November her commander ordered her to be seen by behavioral health, and she was diagnosed with adjustment disorder with mixed anxiety and depressed mood, insomnia, and nightmare disorder. (R. at 383, 386-87).

Finally, when SPC [REDACTED] met with CID, she provided screenshots of some of the text traffic between her and 1LT Badders. She did not provide the messages depicting the eggplant or peach emojis, the one referencing her being number 69 in line at Burger King, or the ones telling 1LT Badders she had a great time with him. (R. at 450-52). On Monday of the week trial began, she turned over to trial counsel the texts stating, “It was very nice hanging out with you on New Year's good luck to

⁶ See Issue III.

you” with two heart emojis, that she missed him, and that she wanted to have sex again in the same hotel where they spent New Year’s Eve. (R. at 452-54).

Argument and Authorities

A. Standard of Review.

This court reviews sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

CAAF has described this Court’s factual sufficiency review as “a special power and duty that Article 66(d)(1), UCMJ, confers only on the Courts of Criminal Appeals.” *United States v. Thompson*, 83 M.J. 1, 3–4 (C.A.A.F. 2022) (citations omitted). That review asks, “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the CCA are themselves convinced of the accused’s guilt beyond a reasonable doubt.” *Id.* (citation omitted). The court must take a “fresh” and “impartial look at the evidence” and apply “neither a presumption of innocence nor a presumption of guilt.” *Washington*, 57 M.J. at 399.

This Court may independently judge the credibility of the witnesses at trial, resolve questions of fact, and substitute its judgment for that of the members. Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). This does not mean that a conviction must be “free from conflict.” *United States v. Lips*, 22

M.J. 679, 684 (A.F.C.M.R. 1986). The evidence must leave no fair and reasonable hypothesis other than the appellant's guilt. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003) (citation omitted). The Government must prove guilt on every element beyond "an honest, conscientious doubt" and beyond "mere conjecture." R.C.M. 918(c), Discussion.

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citations omitted).

B. The Evidence is Insufficient on the Issues of Whether the Anal Penetration Occurred, Consent, and Reasonable Mistake of Fact As To Consent.

An intentional penetration is required for conviction of this offense. Also, both actual consent and an accused's honest and reasonable mistake of fact that a complainant consented are complete defenses to the offense of conviction. R.C.M. 916(j)(1); *United States v. Carr*, 18 M.J. 297, 301 (C.M.A. 1984). Therefore, if the penetration did not occur, if SPC [REDACTED] actually consented to the sexual activity with 1LT Badders, or if he had an honest and reasonable mistake of fact that she consented to the activity, he is not guilty. The Government has the burden of proving beyond a reasonable doubt 1LT Badders' actions were without actual consent and he did not have an honest and reasonable mistake of fact as to consent.

United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019); Dep't. of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [Benchbook], para. 5-11-2 (29 Feb. 2020).

The conviction relied exclusively on the testimony of SPC [REDACTED]. However, her testimony lacks sufficient credibility to believe 1LT Badders committed the offense beyond a reasonable doubt. Not only are there significant problems with the content and consistency of her testimony, she had a clear and compelling motivation to fabricate the nature of her consensual encounter with 1LT Badders – retribution for him rebuffing her attempts to continue the relationship she enjoyed.

This is important on the issues of whether the assault – anal penetration – occurred at all or if it did, it occurred with her consent or when he had an honest and reasonable mistake of fact she consented. Under any of these theories, there was no crime.

1. Consent

This case relied entirely on SPC [REDACTED] uncorroborated testimony. Her credibility was the sole issue in the case. Based on several factors, her allegations are unworthy of belief.

a. Timeline

Her testimony set forth the following series of events on 31 December 2018: morning sex, gym, dinner, her parties, watching the ball drop at midnight New York time/0600 Germany time, oral sex for 30-45 minutes, expected vaginal sex but instead having nonconsensual anal sex with him yelling at her, waking up in the bathtub with him yelling at her again and seeing blood, waking up in the bed, laughing about rough sex, one of them going to Burger King at 0326, seeing bloody towels, breakfast in the same bed where the assault occurred, discussion, she leaves her computer with him overnight, she tries to continue the sexual relationship, he declines, she files a report of sexual assault.

This timeline is impossible. They could not have watched the ball drop at 0600 and then engaged in sexual activity, with breakfast around 0300.

b. No corroboration

SPC [REDACTED] had her phone and could have taken photos and videos, but she did not document any of her alleged injuries – no bruises, no bleeding from her body, no blood on towels or clothes or bedsheets. Not a single witness testified they saw bruises anywhere on her at any time. No witnesses from the hotel testified about bloody linens in the hotel.

She did not use the hotel phone or her own phone to call for help or report the alleged assault either while in the room or after she left, except possibly her Sergeant,

who did not testify to corroborate her testimony at trial, and until she spoke to MAJ [REDACTED] months later. No medical or other forensic evidence supports the claims whatsoever.

c. Why would 1LT Badders treat her that way?

It defies logic and common sense that 1LT Badders would treat SPC [REDACTED] the way she testified. Apparently he just had to call her and she would meet him to engage in sexual activity, which occurred on several occasions. She hosted him for New Year's Eve in a civilian hotel, including making him dinner and giving him oral sex for 30-45 minutes. There was no testimony regarding an argument or fight between them. There was no mention of him drinking alcohol at all, much less getting so drunk that he would behave irrationally or violently, or evidence that he ingested anything else that would affect his behavior. There was no evidence of any past history or propensity toward violence on his part toward her or anyone else.

The behavior SPC [REDACTED] described from 1LT Badders is an extreme departure from their previous pattern of interaction, with nothing to explain it. It strains credulity to believe he spoke to her in that way, physically manhandled her, and most importantly, anally penetrated her without her consent.

d. Her conduct immediately following the alleged assault

At no time after the alleged assault did SPC [REDACTED] use the hotel phone or her own phone to call or text or email or send a social media message to anyone for help; leave the hotel room to seek help; leave the hotel to return to base without 1LT Badders; ask him to leave; lock him out of the room when he left; or in any other way express any displeasure with or fear of 1LT Badders. Instead, when she woke in the morning, she joked with him about rough sex and then enjoyed breakfast in bed with him. As previously explained, she then left her computer with him for the express purpose of seeing him again, and tried for weeks in vain to maintain a sexual relationship with him. The sum total of these actions leads to the conclusion that events did not occur as she described them.

e. Why would she want to continue the relationship?

Not only did SPC [REDACTED] leave her laptop computer with 1LT Badders so that she could see him the next day to retrieve it, she told him she enjoyed her time with him on that night and she missed him. She actively pursued a continuation of the relationship, to include its sexual component. She even told him she wanted to have sex with him again in the very same hotel where this allegedly traumatic event happened. Her texts said things like, “It was great hanging out with you on New Year’s Eve,” and she wanted him to “fuck her brains out again” a month later in the same hotel to celebrate her 1 February birthday. These efforts persisted for several

weeks . . . until he stopped responding to her and it became clear he was not interested in her anymore. Then she made her complaint.

f. Mental health and other credibility issues

Finally, it is undisputed that before SPC [REDACTED] ever had her first date with 1LT Badders, she was undergoing significant distress. She lost her alcohol privileges and medic bag. Her issues were so severe her commander ordered a behavioral health screen, which resulted in several diagnoses. In fact, though she tried to create the impression on direct that her night terrors resulted from 1LT Badders assaulting her, on cross she admitted she was diagnosed with nightmare disorder six weeks or more before New Year's Eve.

She testified initially (more than once) that 1LT Badders went to Burger King, even claiming she saw him through the window walking there and while he was there she saw the bloody towels in the bathroom. But then she admitted she had gone. Not only did she go, she was texting sexually-charged jokes about her order number, 69, to 1LT Badders while she was there. She did that after he anally penetrated her without her consent? Whether due to inability to perceive/remember, or untruthfulness, the testimony is unreliable.

Finally, there is no motive more powerful than a desire for retribution from a lover scorned. Even she admitted when her efforts to maintain the relationship failed, she had "a severe emotional response to the entire situation." (R. at 362).

2. Mistake of fact as to consent

Candidly, if events unfolded exactly how SPC █████ portrayed them, with her saying “no” and him holding her down against her will, there could be no honest and reasonable mistake of fact. However, that testimony is highly suspect and it is likely the anal sex never occurred. Alternatively, if it occurred, she never conveyed a lack of consent to 1LT Badders. Finally, considering all of the evidence, especially that pertaining to her lack of credibility and motive to fabricate, it is probable that 1LT Badders did honestly and reasonably believe whatever sexual activity took place was consensual. Imagine, for example, when she bent over the bed, he decided to try having anal sex because he thought she would enjoy it; she objected, and he stopped. Or, it is possible that his penis accidentally made contact with her anus. When 1LT Badders cut off the relationship, that contact morphed into the false claim of sexual assault.

C. Conclusion.

SPC █████ narrative about the events of 1 January 2019 is not credible. The anal sex did not happen at all, it was consensual or 1LT Badders had an honest and reasonable mistake of fact as to consent. No rational trier of fact could have found, and this Court should have a reasonable doubt about whether, the Government proved the anal penetration occurred, and disproved the defenses of consent and mistake of fact as to consent; the Court should set aside the findings and the sentence.

II. THE MILITARY JUDGE REVERSIBLY ERRED BY EXCLUDING EVIDENCE REGARDING TEXT MESSAGES BETWEEN 1LT BADDERS AND THE COMPLAINANT.

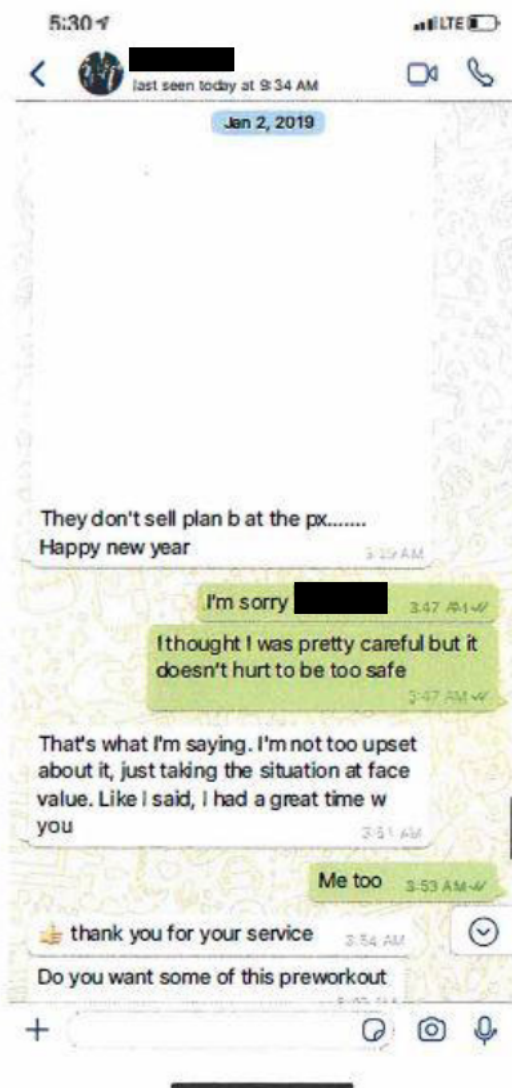
Relevant Facts

The central issue in the case was SPC [REDACTED] credibility. The defense was that contrary to her testimony, the anal sex did not happen at all, or if it did, it was consensual (or 1LT Badders had an honest and reasonable mistake of fact as to consent).

The military judge permitted Defense Counsel to cross-examine SPC [REDACTED] on the fact she sent text messages to 1LT Badders after the alleged assault saying, “I had a good time with you.” (R. at 432). However, the military judge sustained a Government hearsay objection to a series of text messages that were sent and received on 2 January 2019, *the day after* the alleged sexual assault. (R. at 433).⁷

⁷ However, in her post-trial ruling, the military judge recognized she had ruled incorrectly, and concluded that the evidence was, in fact, admissible under Military Rule of Evidence [Mil. R. Evid.] 803(3) (state of mind/emotional condition). (App. Ex. LXV, p. 17).

The texts at issue read:



DEFENSE EXHIBIT J FOR ID

(Def. Ex. J FID).

Argument and Authorities

A. Standard of Review.

This Court will review the military judge's ruling for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citation omitted).

B. The Text Message Traffic Was Admissible.

Although the Government has conceded this issue, out of an abundance of caution 1LT Badders will address it. There are several bases upon which the excluded text message traffic was admissible: to refresh the witness' recollection; pursuant to a hearsay exception; or as a prior inconsistent statement.

1. To refresh the witness' recollection

The subject of the text messages at issue first arose when Defense Counsel asked SPC [REDACTED] whether she sent the text at issue, and she responded, "I don't remember that, Sir." (R. at 432). Defense Counsel then asked her, "Would reviewing that text message refresh your recollection?" and the witness indicated that she did want to see the text message. (R. at 432). Clearly Defense Counsel should have been able to show her the text message to see if it refreshed her recollection;⁸ if it did, she could then testify that she had, in fact, sent it.

⁸ See Military Rule of Evidence [Mil. R. Evid.] 612(a) (indicating counsel may refresh a witness' recollection with a written document).

2. Under a hearsay exception

Generally, statements made out of court offered for the truth of the matter asserted are not admissible. Mil. R. Evid. 801, 802. However, there are several exceptions.

a. then-existing state of mind/emotional condition (Mil. R. Evid. 803(3))

This exception involves the “then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health).” Mil. R. Evid. 803(3). As argued and as the military judge correctly found post-trial, the statement that SPC [REDACTED] “thanked” 1LT Badders for his “service” indicated how she was feeling right after the night they engaged in sexual activity that she later alleged was without her consent.

“Subsequent conduct showing a subsequent state of mind may be relevant to show an earlier state of mind at issue.” *United States v. Colon-Angueira*, 16 M.J. 20, 25 (C.M.A. 1983) (citation omitted). The texts indicate SPC [REDACTED] had a playful and thankful state of mind toward consensual conduct soon after the alleged assault. This evidence was admissible to show she actually consented to the sexual activity.

b. recorded recollection (Mil. R. Evid. 803(5))

The text also served as a recorded recollection, because it was “on a matter the witness once knew about but now cannot recall well enough to testify fully and

accurately; was made or adopted by the witness when the matter was fresh in the witness' memory; and accurately reflects the witness' knowledge." Mil .R. Evid. 803(5). She wrote the text message about how she was feeling right after the night in question but did not remember at trial whether she wrote the message.

3. As a prior inconsistent statement

The text messages indicate SPC [REDACTED] consented to the sexual activity at issue, which is inconsistent with her trial testimony that she did not consent. Specifically, this series of texts did not support SPC [REDACTED] testimony that she enjoyed some of the sexual activity but objected to some of it. It also is inconsistent with a person who is "processing" a genuine assault; if 1LT Badders truly had behaved the way she described (calling her names, using profanity, holding her wrists between her shoulder blades while penetrating her anus without her consent), it was fair for the members to see the words she chose to use, and view the tone of messages just hours later thanking him for "servicing" her, in order for them to properly assess her credibility.

A witness' prior inconsistent statement may be admissible either for impeachment or for impeachment *and* substantively. When a witness testifies that she cannot remember the answer to a question, counsel is permitted to introduce extrinsic evidence of a prior statement that the witness gave containing the requested information as a prior inconsistent statement; such evidence is admissible to impeach

the witness. *United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007) (citations omitted). If the prior statement itself is admissible, such as under an exception to the hearsay rule, the statement is admissible substantively. *United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996) (“many prior inconsistent statements may be admitted for the truth of the matter stated[, including a] statement otherwise admissible as an exception to the hearsay rules.”); *see* Benchbook, para. 7–11–1, note 2 (an inconsistent statement may be admitted as substantive evidence . . . when . . . (3) it is a statement of the witness otherwise admissible as an exception to the hearsay rule”).

SPC ■■■ testified she did not remember making the statement contained in the text message. (R. at 432.) Therefore, the statement itself was admissible to impeach her. Further, because the statement itself was a statement of then-existing emotional condition, the statement also was admissible as substantive evidence that she was, in fact, thankful for his service (and thus, 1LT Badders did not sexually assault her because one would not be thankful for being assaulted).

Finally, it is important to remember that even if SPC ■■■ had remembered making the statements in the text message traffic, but for the military judge’s erroneous ruling sustaining the Government’s objection, the Defense would have been able to argue that the evidence was so compelling – and that its appearance (including the use of an emoji) – was so unusual, that testimony about it alone was

insufficient to convey its full meaning. “While extrinsic evidence of the prior inconsistent statements is generally not admissible when the witness admits making the inconsistent statements, that evidence can be admissible where ‘the interests of justice otherwise require.’” *United States v. Gibson*, 39 M.J. 319, 324 (C.M.A. 1994) (quoting Mil. R. Evid. 613(b)).

C. 1LT Badders Was Harmed By The Exclusion Of The Texts At Trial.

To evaluate for prejudice, the Court considers:

- (1) the strength of the Government’s case,
- (2) the strength of the Defense case,
- (3) the materiality of the evidence in question, and
- (4) the quality of the evidence in question.

United States v. Roberson, 65 M.J. 43, 47-48 (C.A.A.F. 2007) (citations omitted).

Applying the relevant factors, this Court should find prejudice:

(1) The Government’s case against 1LT Badders was weak. It consisted effectively of the uncorroborated testimony of one witness – the complaining witness – who had significant questions as to her credibility and acknowledged a consensual, sexual relationship with 1LT Badders before the alleged offense and wanting to continue their sexual relationship after the alleged offense. The Defense Counsel’s excellent closing argument set forth the many significant weaknesses of the Government’s case. (R. at 528-40).

(2) The Defense rested behind the Government. (R. at 496). However, the cross-examination of SPC [REDACTED], constrained as it was by the erroneous rulings, was nevertheless strong.

(3) The text message traffic was material to the defenses in this case – consent and mistake of fact as to consent.

(4) The quality of the evidence was high. This evidence involved a message that SPC [REDACTED] sent to 1LT Badders shortly after the alleged sexual assault. It was in her own words and went directly from her phone to his phone. While the members did hear about other messages SPC [REDACTED] sent to 1LT Badders saying, for example, she had a good time, they did *not* hear or see evidence that only two days later, she *thanked* him for his *service* – she considered the sexual activity from the prior day “servicing her” and thus consensual, and she not only enjoyed, but was grateful to him, for the sexual conduct in which they had engaged. Especially in context with the language from SPC [REDACTED] about not being upset about a potential pregnancy from the sex they had the night before that preceded the comment and the use of the “thumbs up” emoji, this text conversation is qualitatively different from the other text message traffic the members heard.

“An accused's Confrontation Clause rights are violated when ‘a reasonable jury might have received a significantly different impression of the witness’ credibility had defense counsel been permitted to pursue his proposed line of cross-

examination.” *United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F. 2013) (citing, *inter alia*, *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). Because the text messages at issue were sent and received so close in time to the alleged assault, they were highly relevant on the issue of consent and were also important pieces of evidence to impeach her. Not only did the members not hear evidence about them, they did not hear argument about them, either. Had the members been aware of this evidence, they might have had “a significantly different impression of [SPC █████] credibility.” *Jasper*, 72 M.J. at 281. The members should have been permitted to hear SPC █████ testimony regarding these texts and see the text message traffic at issue.⁹ Since the texts were highly instructive on the only issues in the case, 1LT Badders was harmed by the exclusion of this evidence.

D. Conclusion.

This Court should find the text message traffic was erroneously excluded and set aside the findings and the sentence.

⁹ See Issue V (military judge denied members’ request to see texts).

III. THE MILITARY JUDGE REVERSIBLY ERRED BY ALLOWING MAJOR [REDACTED] TO TESTIFY OVER DEFENSE OBJECTION.

IV. THE MILITARY JUDGE REVERSIBLY ERRED BY DENYING PRODUCTION OF THE COMPLAINANT'S MENTAL HEALTH RECORDS IN ACCORDANCE WITH MILITARY RULE OF EVIDENCE 513.

*Relevant Facts*¹⁰

At trial, the Government called MAJ [REDACTED], a highly educated brigade surgeon with specialized training in sexual assault forensic examinations. (R. at 474, 477). As a brigade surgeon, she was the senior medical advisor to her brigade commander. (R. at 475). Prior to her testimony, the Defense objected based on multiple grounds, including the arguments that she had no relevant information and would serve only as a “human lie detector,” thus her testimony would be more prejudicial than probative. (R. at 303-14). The military judge overruled the objections. (R. at 488-89).

MAJ [REDACTED] first physically met SPC [REDACTED] in April 2019 when she performed a SANE exam (R. at 478-79). SPC [REDACTED] testified, “her and I (sic) talked at length about what I was going through and things like that.” (R. at 362). During direct examination, the Government asked, and the Defense objected to, the following question:

¹⁰ Issues III and IV are related and thus are argued together.

[TC]. Did she [SPC █████] make you aware that she was continuing to communicate with the alleged perpetrator?

[MAJ █████]. I was aware that she had after the incident had occurred, or the event occurred. And again I'm not sure if it was her or the SARC who told me that.

[TC]. Did that seem unusual to you, ma'am?

DC: Objection, Your Honor.

(R. at 480).

The Defense objected because the question called for an expert opinion. (R. at 480). MAJ █████ had not been, and was never, offered or qualified as an expert witness. (R. at 474-80). The Government incorrectly responded that the question was for her lay opinion based on her assessment as a sexual assault forensic examiner and not an expert opinion. (R. at 480). The military judge called an Article 39(a) session and erroneously overruled the objection. (R. at 489). When the members were recalled, the Government presented the following testimony.

[TC]. Going back to my last question, and just a yes or no answer is fine; did that behavior seem unusual to you?

[MAJ █████]. No.

(R. at 490).

In her post-trial mistrial ruling, the military judge correctly determined she erred in overruling the Defense objection at trial, because the testimony was an improper lay opinion. (App Ex. LXV, p. 19-20).

Furthermore, MAJ [REDACTED] testified that she had access to and did review SPC [REDACTED] medical records, including behavioral health records. (R. at 492-93). The Defense had previously moved to compel production of those records, but the Government opposed the motion and the military judge denied the request. (App. Ex. VIII, App. Ex. XII, App. Ex. XVII (sealed)). At trial, a member asked a question about SPC [REDACTED] medical and behavioral health treatment, but the military judge sustained the parties' objections to the question. (App. Ex. XXVI).

Argument and Authorities

A. Standard of Review.

This Court will review the military judge's ruling admitting evidence for an abuse of discretion. *Erikson*, 76 M.J. at 234 (citation omitted). Review of the Mil. R. Evid. 513 issue is de novo. *United States v. Mellette*, 82 M.J. 374, 377 (C.A.A.F. 2022).

B. MAJ [REDACTED] Testimony Was Inadmissible.

1. The testimony was an improper opinion from a "lay witness"

The Government took the clear position that MAJ [REDACTED] was a lay witness. (R. at 480-81). Opinion testimony of a lay witness is limited to one that is 1) rationally based on the witness' perception, 2) helpful to clearly understanding the

witness' testimony or to determining a fact in issue, and 3) not based on scientific, technical, or other specialized knowledge within the scope of Mil. R. Evid. 702 (Testimony by expert witnesses). Mil. R. Evid. 701. Lay opinion is improper when it is offered to interpret the meaning of or provide conclusions to certain communication, but the "terms [of the communication] are capable of being understood by the layman, and where the [panel] is capable of interpreting the language or slang involved." *United States v. Byrd*, 60 M.J. 4, 7 (C.A.A.F. 2004) (internal quotation marks and citation omitted).

MAJ [REDACTED] had no lay knowledge of SPC [REDACTED] behavior with alleged perpetrators in order to make a determination whether it was usual. Her relationship with SPC [REDACTED] was strictly professional, and she had no specific knowledge about the alleged offense. (App. Ex. LXV, p. 20; R. at 493). The only basis on which she could opine on this issue would have been specialized expert knowledge of victim behavior. However, since the Government never qualified her as an expert and she was clearly only a lay witness, she was therefore prohibited under Mil. R. Evid. 701 from providing this opinion.

Furthermore, her opinion sought to interpret SPC [REDACTED] behavior, to include communications. The plain meaning of these communications were clear in that they demonstrated SPC [REDACTED] enjoyed the sexual encounter underlying the allegation and desired a continued sexual relationship with 1LT Badders. Under *Byrd*, MAJ

██████ lay opinion providing a counterintuitive explanation was improper, because the plain meaning of these communications could have already been easily understood by the panel.

2. The testimony was irrelevant

The military judge overruled the defense objections because she found MAJ ██████ testimony relevant to corroborate the facts that SPC ██████ made a report of sexual assault and got treatment for that assault. (R. at 484, 488-89).

A significant problem is that these two facts are not facts in dispute, nor are they “facts of consequence.” Mil. R. Evid. 401. The defense did not contest the fact that SPC ██████ told MAJ ██████ that she had been assaulted. Nor did the defense contest the fact that after meeting with SPC ██████, MAJ ██████ referred SPC ██████ for treatment and recommended resources for sexual assault victims. Therefore, these two facts did not need to be corroborated because they were not contested. Further, these two facts are not facts of consequence because they have nothing to do with whether 1LT Badders committed the charged offense. The “behavior” testimony exceeded the scope of the military judge’s ruling on admissibility and also was irrelevant – unless the members were permitted, as the defense feared, to consider that this board-certified family practitioner, who had years and years of experience treating patients, especially in the context of sexual assault, believed SPC ██████ report of sexual assault and that is why the doctor made the referrals for treatment.

The harm from that was exacerbated by MAJ ██████ testimony that SPC ██████ behavior improved after she received such treatment, effectively telling the members that evidently the treatment worked because SPC ██████ truly was a “victim.”

Again, respectfully, the military judge’s findings that, “I find that the evidence is relevant because it does have a tendency to make the fact that she made a report more or less probable” and “I do not think the prejudicial effect outweighs the probative value” miss the mark. Whether SPC ██████ made a report to MAJ ██████ does not mean a sexual assault occurred or did not occur, which is the fact of consequence at issue. This is especially so since MAJ ██████ could not remember whether it was even SPC ██████ or someone else who told her a Lieutenant had assaulted her, and she knew no other details of the alleged assault.

3. The testimony was improper “lie detector” evidence

Another significant problem is that trial counsel claimed the testimony was relevant to SPC ██████ “credibility.” (R. at 309). However, if the Government sought to properly rehabilitate SPC ██████ after the defense attacked her credibility, trial counsel could have called MAJ ██████ to testify in her capacity as SPC ██████ supervisor, established the proper foundation, and asked MAJ ██████ whether in her opinion, SPC ██████ character for truthfulness was good or bad. Mil. R. Evid. 608(a). Or, trial counsel could have asked whether MAJ ██████ was aware of SPC ██████ reputation for truthfulness. *Id.* Trial counsel did not do that. Instead, trial

counsel had MAJ [REDACTED] inform the members of all her extensive education, training, and experience as a physician and then opine that someone – either SPC [REDACTED] or someone else – told MAJ [REDACTED] that SPC [REDACTED] had been assaulted by a male Army lieutenant, SPC [REDACTED] got treatment, and SPC [REDACTED] behavior improved. All of this was done in an effort to convince the members that if the doctor had this reaction, the claim must be valid and thus SPC [REDACTED] is truthful. As opposed to whether SPC [REDACTED] sought or received treatment, the real fact at issue in the case was whether her claim that 1LT Badders sexually assaulted her was truthful.

It is well-established that while “human lie detector testimony is an opinion as to whether a person was truthful in making a specific statement regarding a fact at issue in the case, even without an express statement to this effect, testimony may still be excluded as the functional equivalent of human lie detector testimony where the substance of the testimony leads the members to infer that the witness believes the victim is truthful or deceitful with respect to an issue at trial.” *United States v. Lopez*, 76 M.J. 151, 155 (C.A.A.F. 2017) (internal quotes and citations omitted). Courts have described this type of testimony as having a “highly persuasive effect” on members. *Id.* at 156. When a witness provides such testimony, it infringes on the members’ function of determining the credibility of witnesses and is improper.

C. 1LT Badders Was Harmed By MAJ ██████ Inadmissible Testimony.

The erroneous admission of MAJ ██████ impermissible lay opinion testimony was prejudicial to 1LT Badders for numerous reasons:

(1) As discussed *supra*, the Government's case against 1LT Badders was weak and the cross-examination by Defense was strong.

(2) The erroneously admitted lay opinion improperly neutralized strong, highly probative and material defense evidence that SPC ██████ actually consented to the conduct underlying the charge and she sought a continued sexual relationship with 1LT Badders after that incident. The Defense's extensive cross examination of SPC ██████ is an aggravating factor for the harm 1LT Badders suffered from this error since MAJ ██████ improper opinion directly undermined its entire effect.

(3) Further, the admission of MAJ ██████ lay opinion is directly related to SPC ██████ communications with 1LT Badders, to include the text messages underlying the military judge's other erroneous evidentiary ruling. The combination of the two evidentiary errors therefore amplify the harm to 1LT Badders. The unadmitted text message demonstrates continued communication as well as inconsistent behavior and state of mind of SPC ██████ after the alleged incident. The erroneously admitted lay opinion then neutralized the evidence of consent and impeachment value of the unadmitted text message by improperly opining that SPC ██████ communication and behavior therein was not unusual for a victim.

(4) The impact of the improper lay opinion was high. Prior to eliciting the prohibited testimony, the Government improperly bolstered MAJ [REDACTED] as a lay witness. (App. Ex. LXV, p. 20). The Government extensively questioned MAJ [REDACTED] regarding her specialized medical and sexual assault forensic examination experience. The Government also specifically developed her role as a brigade surgeon, which is a position of trust and expertise in advising brigade commanders. Two of the panel members were brigade commanders – including the President – which intensified the harm of MAJ [REDACTED] testimony. Since the Government never sought to qualify her as an expert, the testimony regarding her qualifications was irrelevant. It only served to bolster the impact of MAJ [REDACTED] improper lay opinion, to give it an air of authority without subjecting MAJ [REDACTED] to the crucible of expert qualification or expanded expert cross-examination.

(5) The court provided no instruction to correct its own error, so the full effect of the error manifested when the panel members deliberated with the improper evidence.

This was a hotly contested case involving the defenses of consent and mistake of fact as to consent. SPC [REDACTED] credibility was the sole issue in the case. The Government did not call any witness to properly testify about SPC [REDACTED] character for truthfulness. Instead, the Government was permitted to present what amounted to expert testimony that SPC [REDACTED] made a credible report of sexual assault. This

testimony was beyond the stated purposes on which the military judge found MAJ ██████ testimony relevant – whether SPC ██████ made a report and whether she received services – which were not relevant to a fact of consequence. In fact, the testimony instead served to reassure the members that in fact, SPC ██████ was truthful and her report was worthy of belief; in other words, based on MAJ ██████ training and experience, she believed SPC ██████ and by implication, the members should believe her, too.

As a matter of fact, according to MAJ ██████, SPC ██████ behavior improved after treatment, making the obvious cause and effect connection – she got better after treatment because there was a need for treatment. This was not only improper for the Government to accomplish via any witness, but it is important to note that there were two brigade commanders on the panel. Common sense dictates that brigade commanders put special trust and confidence in their brigade surgeons, which further adds to the harm from this testimony. Any possible probative value of the testimony was substantially outweighed by a danger of unfair prejudice. Mil. R. Evid. 403.

D. The Defense Was Entitled to Production of the Mental Health Records.

As stated earlier, SPC ██████ testified to certain facts in wildly inconsistent ways – for example, that she watched through the window as *1LT Badders* went to Burger King, but then actually *she* was the one who went to get breakfast. (R. at 357, 428-

29). She also testified that the New Years' Eve ball dropped – which would have been at 0600 local – before any sexual activity occurred, but then testified the Burger King trip, which was after the alleged assault, was at 0326. (R. at 425, 461). This testimony indicates a problem perceiving, remembering, and/or recounting events accurately.

SPC [REDACTED] also testified that she had mental health and other issues prior to the alleged assault. (R. at 371, 383, 386-87) (diagnoses of adjustment disorder with mixed anxiety and depressed mood, insomnia, nightmare disorder; could not remember if diagnosed with depression). Finally, she testified that she experienced symptoms such as night terrors and depression *as a result of the alleged sexual assault*. (R. at 362, 382). Respectfully, those grounds alone justified production of the records so that the Defense could have an expert evaluate them and assist in presenting a defense. *See Mellette*, 82 M.J. at 381 (“The military judge’s error may have denied Appellant from reviewing relevant and material evidence before his court-martial.”).¹¹ At a minimum, the dates SPC [REDACTED] visited a mental health provider, the treatment provided and recommended, and diagnoses contained in the records should have been disclosed. *Id.*

¹¹ Note that in *Mellette*, the Court did not know whether the requested records existed, and remanded to the CCA to order a post-trial hearing to determine whether the records existed and whether the appellant in that case was prejudiced by the non-disclosure. *Id.* In the instant case, however, the record is clear that such records exist.

The final touch, however, was MAJ ██████ testimony that she had access to the requested records. (R. at 492-93). Once she disclosed that fact, the military judge should have ordered production of the records MAJ ██████ reviewed so that the Defense could have prepared and conducted a thorough cross-examination of both SPC ██████ and MAJ ██████. This obviously was an important issue, not only to the Defense team, but also to the members. (App. Ex. XXVI).

E. Conclusion.

This Court should find MAJ ██████ testimony was erroneously admitted and the military judge should have ordered disclosure of SPC ██████ mental health records. The Court should set aside the findings and the sentence.

V. THE MILITARY JUDGE REVERSIBLY ERRED BY DENYING THE MEMBERS' REQUEST FOR ACCESS TO TEXT MESSAGES NOT ADMITTED IN EVIDENCE.

Relevant Facts

During deliberations, the president of the panel and the military judge had the following exchange:

PRES: Yes, Your Honor. The question is from the panel can—it's really for some of the evidence that was presented during the trial, can we review that and take a look at that?

MJ: Does this mean you're referring to different documents that you have not received?

PRES: Affirmative.

MJ: Okay. *Any exhibits that have not been admitted into evidence cannot--are not properly before the members. So if you would go back to page 5 where I explained that only matters properly before the court as a whole. So they have not been admitted into evidence then they are not properly before the court.* So you have already received those that have been admitted into evidence. Does that answer your question?

PRES: Partially, Your Honor. *So I think we do understand if it was not admitted as evidence then we are not going to be able to have that information.* But for those text messages portion of the CID report, those things that were admitted.

MJ: They were not admitted. If they had been admitted you would have received them to take back.

PRES: Okay.

MJ: Now if there was some questions of a witness that were in reference to those you could request that portion of the transcript be read back. Otherwise what we normally refer to is to go back to your notes and your memory.

PRES: Okay.

(R. at 560-61) (emphasis added).

Argument and Authorities

A. Standard of Review.

This Court will review a military judge's denial of a member's request for evidence for an abuse of discretion. *United States v. Clifton*, 71 M.J. 489, 492 (C.A.A.F. 2013); *United States v. Rios*, 64 M.J. 566, 568 (Army Ct. Crim. App. 2007). Note that in both of those cases, defense counsel lodged no objection to the military judge's ruling. If this Court applies forfeiture, however, it will review for plain error. "Under the plain error standard of review, an appellant bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right." *United States v. King*, No. 22-0008, 2023 CAAF LEXIS 112, at *16-17 (C.A.A.F. Feb. 23, 2023) (citation omitted).

B. The Members Had a Right to Request Evidence.

Article 46, UCMJ, R.C.M. 801(c), R.C.M. 921(b), and Mil. R. Evid. 614(a) allow members to request additional evidence, even during deliberations. *Clifton*, 71 M.J. at 492; *Rios*, 64 M.J. at 568.

C. The Military Judge Erred By Not Providing the Requested Evidence.

The military judge summarily denied the members' request for evidence and did not follow the proper procedure. Under Article 46, UCMJ, R.C.M. 801(c), R.C.M. 921(b), R.C.M. 614(a), and applicable case law, the military judge should

have treated this request like any other question from members regarding the evidence. “Rather than summarily approving or denying such a request, a military judge must consider factors such as difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be privileged; and the objections of the parties to reopening the evidence.” *Clifton*, 71 M.J. at 491-92 (finding plain error when the military judge denied a member’s request to ask additional questions based on the fact the evidence had closed and the witness was excused, when there was no analysis on the record of all of the relevant factors, even though there was no objection from counsel).

The military judge should have clarified with the members exactly what text messages they sought, and explained their right to request evidence even if the parties had not offered it. There were text messages that SPC [REDACTED] provided to CID during her interview, and there were messages that she testified that she sent to and received from 1LT Badders that she had not provided to CID, but which provided context to the ones CID obtained. There were even text messages SPC [REDACTED] provided to the government on the eve of trial, which she had previously failed to provide to CID or the Government. Some of these texts messages already had been pre-marked for identification. After determining what evidence the members sought, the military judge should have asked the parties whether they objected to the

members' consideration of the specific evidence identified, and then ruled on the admissibility of the evidence considering the relevant factors and the law. This did not happen. Instead, the military judge simply told the members that they could not have access under any circumstances to evidence that had not already been admitted. (R. at 560-61).

D. The Failure to Provide the Requested Evidence was Prejudicial.

The failure to follow the correct procedure harmed 1LT Badders because the members did not receive evidence that they desired to consider in order to fully deliberate on whether the Government proved its case beyond a reasonable doubt. Even though there was testimony regarding some of the text messages, the old adage, “a picture is worth a thousand words” comes to mind. Had the members been able to see the texts themselves in context with the entire conversations, it would have supported 1LT Badders' theory of the case that the alleged anal penetration did not occur or was consensual. It also would have enabled the members to more fully consider and evaluate SPC [REDACTED] credibility because they would have seen the text messages that she selectively provided to CID initially, the ones she provided just before trial, and the ones she did not provide at all. This was crucial information that the members should have been able to consider in evaluating her credibility.

Finally, the harm from this error is even more apparent when considered in conjunction with the military judge's erroneous denial of cross-examination about

some of the texts between SPC [REDACTED] and 1LT Badders. *See* Issue II. The members did not get all of the admissible evidence available relevant to the crucial issue in the case – SPC [REDACTED] credibility.

E. Conclusion.

This Court should find the military judge erroneously summarily denied the members' request for evidence and set aside the findings and the sentence.

VI. ACTUAL AND APPARENT UNLAWFUL COMMAND INFLUENCE EXISTED.

VII. SEVERAL MEMBERS WERE SUBJECT TO CHALLENGE FOR ACTUAL AND IMPLIED BIAS.

Relevant Facts

The convening authority is Major General [REDACTED], Commander of the First Cavalry Division, Fort Hood, Texas. (Convening Orders; Charge Sheet; Action). His staff judge advocate was Colonel [REDACTED]. (Article 34, UCMJ advice letter; R. at 655-56). The Commander was the SJA's rater. (R. at 658).

In the period just before and during 1LT Badders' court-martial, there was an increased focus on problems in the Army in general and Fort Hood in particular, specifically related to issues such as sexual assault and harassment. (R. at 657). In response, the Commander rolled out an initiative he dubbed, "Operation Pegasus

Strength.” He called his senior leaders, to include all of his brigade commanders, the Public Affairs Officer [PAO], and his Chaplain, to a meeting on Saturday, 30 August 2020. (R. at 691-92). Four members who sat on the panel in this case were at that meeting (two brigade commanders, the PAO, and the Chaplain). (R. at 691-92). The program was formally announced publicly on 13 September 2020. (R. at 721).

LTC [REDACTED] was the 1CD PAO just prior to and at the time of this court-martial. (R. at 688). The convening authority is his senior rater. (R. at 689). The PAO served on the panel in this case. (R. at 714).

The PAO was involved with Operation Pegasus Strength from “the beginning” and described it as “a big deal and very important.” (R. at 691, 723). He issued press releases about the initiative “to reassure the public that [the command is] taking action so it doesn’t happen again.” (R. at 720). He also distributed “talking points” with language from Operation Pegasus Strength; he defined talking points as, “things that help describe an operation, or the command’s official position on an operation or situation.” (R. at 690).

The PAO disseminated talking points pertaining to Operation Pegasus Strength on 21 September 2020. (App. Ex. XXXVII, Ex. 8). The very next day, this court-martial began. (R. at 33, 658). The talking points included the following language:

The First Cavalry Division is leading the way for our Army and III Corps in building trust and cohesive Teams through Operation Pegasus Strength. . . .Operation Pegasus Strength is a Division operation aimed at eradicating corrosives from our Army while simultaneously building cohesive teams. Suicide, sexual assault, sexual harassment and extremism have no place on our team.

(App. Ex. XXXVII, Ex. 8) (emphasis added). The PAO testified that the language about “eradicating corrosives” came from Commander himself. (R. at 695). The SJA kept the CG informed about “getting a response out to the reporter that evening” (R. at 669).

On 23 September 2020, which was during the trial – on the evening that the evidence closed, with closing arguments and instructions to occur the following morning – the PAO received a press inquiry by email. (R. at 697). The email was sent at approximately 1426 and the PAO read it shortly thereafter, around 1430. (R. at 697). He was in the courthouse when he read the email. (R. at 697-98). He immediately forwarded the email to the SJA and others. (R. at 698).

The reporter asked for a response from Fort Hood to the recent scrutiny by and visit from members of Congress. Among other issues, Congress was concerned about the death of a Trooper within 1CD who had committed suicide after his claim that he had been sexually assaulted was determined to be unsubstantiated. The PAO responded to the reporter’s email around 2045 that evening. (R. at 704). The PAO not only responded to the specific issue at hand (the Trooper who had taken his own life), but also volunteered breaking news about the convening authority’s

bold new initiative, Operation Pegasus Strength. (R. at 704; App. Ex. XXXVII, Ex. 8). The PAO described his objective in responding to the reporter: “So we wanted to highlight and use language in the discussion of Operation Pegasus Strength, which we had already initiated at that point, to highlight how serious we were taking all of those corrosives that we identified as, you know, nested from our higher headquarters and the Army, and how we were trying to get after that problem and eradicate those in our formation.” (R. at 705-06).

The information in the email made its way to several articles in the media. In particular, on 24 September – in the middle of this court-martial, when he was supposed to be acting as a fair and impartial member – the PAO was quoted in an online article published by Task and Purpose: “[CB], the Fort Hood spokesperson, said the 1st Cavalry Division is ‘leading the way’ for the Army and Fort Hood through Operation Pegasus Strength, ‘which aims to eradicate corrosives in the 1st Cavalry Division.’” (App. Ex. XXXII, Ex. 5).

While the members were deliberating on guilt or innocence in this court-martial, Defense Counsel saw the article, brought it to the military judge’s attention, and asked the military judge to stop deliberations so that they could reopen voir dire and make inquiries into this situation based on actual and implied bias. (R. at 565-66). The military judge stated, “I find that the quotes do not establish either actual or implied bias” and denied the request for additional voir dire. (R. at 568).

However, unbeknownst to counsel and the military judge, on the evening in question (in the middle of trial, the night before deliberations began), the PAO went to the SJA's office and met with the SJA, DSJA, and Chief of Military Justice [CoJ] to consult with them about his response to the reporter. (R. at 667, 682, 700-01, 715). The SJA provided suggested edits. (R. at 701). None of the lawyers at the meeting told the PAO to have his NCOIC or someone else handle the inquiry; nobody told him to wait to respond until after the court-martial concluded; and nobody suggested that he be excused from the panel. (R. at 707). The SJA was aware the PAO was a member in this case and also talked with the convening authority that night. (R. at 660, 678).

During voir dire in another court-martial that took place the week following this case, LTC ■■■ testified that people who commit sexual assault are "corrosives" within the context of Operation Pegasus Strength. He also testified, in response to questions from the trial counsel, that there are "two separate levels of truth" regarding claims of sexual assault: those that are true and those that are "true but not true to a legal perspective." (App. Ex. XXXII, Ex. 9).

Argument and Authorities

A. Standards of Review.

This Court will review allegations of unlawful command influence [UCI] de novo. *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020). With regard to apparent UCI, 1LT Badders has the burden “to show some evidence of UCI, or more than mere allegation or speculation.” *United States v. Bergdahl*, 79 M.J. 512, 521 (Army Ct. Crim. App. 2019), *aff’d*, 80 M.J. at 234 (citation omitted). The burden then shifts to the Government, who “bears the burden of proving beyond a reasonable doubt that the facts proffered by appellant do not exist or that the facts do not amount to UCI.” *Id.* Finally, if the Government cannot meet its burden on the facts, “then it must prove beyond a reasonable doubt that the influence of command did not place an intolerable strain upon the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *Id.* (citations omitted).

This Court will review the issue of actual bias for an abuse of discretion and the issue of implied bias “pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review.” *United States v. Hennis*, 79 M.J. 370, 384-85 (C.A.A.F. 2020), *reconsideration denied*, 80 M.J. 145 (C.A.A.F. 2020) *and cert. denied*, 141 S. Ct. 1052 (2021).

B. The Military Judge Was on Notice of Member Error But Denied the Defense Request to Reopen Voir Dire During Deliberations.

The Defense promptly brought the PAO/member's press release and resulting article to the military judge's attention during deliberations, but she denied the Defense request to stop deliberations to question the member. (R. at 568-69). At the time, neither the Defense nor the military judge knew the convening authority called a Saturday meeting with his senior leaders (including four members that sat on this panel) and introduced his intended response to sexual assault issues in his unit – "eradicating" them. Nor did they know that in the middle of this sexual assault trial, a sitting member had a meeting with the SJA, the DSJA, and the CoJ regarding sexual assault issues and the convening authority's grand plan, Operation Pegasus Strength. The military judge did, however, know at the time of the request that the PAO/member communicated the results of that meeting, including the "eradicating corrosives" language, to a member of the press, who broadcast it on the internet, quoting the member by name. That knowledge was sufficient to conduct additional questioning of the member at that time.

Had the military judge allowed the requested additional voir dire about the press release, surely that questioning would have revealed the fact that the two meetings took place and counsel could have explored those issues with the members.

Further, had the parties and the military judge addressed the issue immediately, there was time to conduct additional voir dire, handle potential

challenges, and have the members continue deliberations either with or without LTC ■■■. It was Government conduct – failing to disclose the meetings, objecting to reopening voir dire, and an incomplete proffer to the military judge regarding the press release – that precluded the Defense from having the opportunity for full, effective voir dire and the military judge from taking appropriate action. The result is that a reasonable member of the public, even (or especially) one familiar with the military justice system, would have a serious concern about the fairness of this trial based on this Government conduct and the fact that LTC ■■■ and the other senior leaders of this command sat on this panel under these circumstances. In particular, the mid-trial meeting created an implied bias on the part of LTC ■■■ and the military judge properly found, “The optics of the SJA, chief prosecutor and sitting panel member meeting after hours while the court martial is ongoing does not give the perception of fairness.” (App. Ex. LXV, p. 24).

C. The Government Should Have Disclosed The Existence Of The Two Meetings Because They Were Relevant to the Members’ Impartiality.

“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. Indeed, impartial court-members are a sine qua non for a fair court-martial.” *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (internal quotes and citations omitted).

Although the members’ previously-existing professional relationship with the convening authority, the SJA, and their staffs was not a per se ground for challenge,

there were multiple valid challenges for cause that existed based on the two meetings that occurred in this case. Therefore, the Government should have disclosed the existence of the meetings.

Courts have held for more than 50 years that when the SJA or his staff, including trial counsel, is aware of matters that might lead to a valid challenge, a duty to disclose exists. *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *United States v. Glenn*, 25 M.J. 278, 280 (C.M.A. 1987) (reversing, holding that “Lieutenant Colonel Stine, the deputy and later acting staff judge advocate in this case, had an affirmative duty to inform the staff judge advocate, trial counsel, and defense counsel that Captain Hamlyn was related to him by affinity. His failure to do so has invited needless appellate litigation in this case.”); *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954) (error when the trial counsel and the law officer (now the military judge) failed to disclose to the accused that the law officer had previously served as the staff judge advocate to the convening authority in the accused’s case).

The Rules for Courts-Martial also provide for this mandatory disclosure: R.C.M. 912(c) “requires the prosecutor to state any ground for challenge for cause against any member of which he or she is aware. *R.C.M. 912(c) does not presume that the trial counsel acts as the arbiter of the merits of a challenge.* Rather, the rule was designed to allow the defense to explore the *potential conflict* through voir

dire, with the judge as the decision maker on the merits of the challenge.” *United States v. Dunbar*, 48 M.J. 288, 290 (C.A.A.F. 1998) (emphasis added). The Government’s multiple failures to disclose relevant information “made it impossible for the military judge to exercise [her] discretion.” *Glenn*, 25 M.J. at 280.

1. The pretrial meeting with the convening authority

The Government, via the SJA and DJSA, were aware that the meeting happened because they attended it. They had direct knowledge that the meeting involved the convening authority’s planned response to allegations of sexual assault. They knew 1LT Badders was charged with sexual assault. They should have disclosed the meeting to the Defense prior to voir dire so counsel could ask about the meeting’s effect on the members.

2. The mid-trial meeting with the member

During the court-martial on 24 September 2020, once the Defense alerted the Court about the article written on 23 September 2020 by a sitting member, senior counsel and supervisory lawyers within the 1CD OSJA, from the SJA to DSJA to CoJ, knew of the trial counsels’ in-court conduct through their proffer regarding Operation Pegasus Strength. They also knew that such proffer failed to disclose a meeting on 23 September 2020 between a sitting member, the SJA, the DSJA, and the CoJ during which time they discussed and edited the very article that was subject of the Government’s proffer. Finally, they knew that the basis for the Defense

request to halt deliberations and individually voir dire the member, LTC ■■■, was the press release. On 24 September 2020, at a time when the consequence of the failure to disclose the 23 September 2020 meeting through a complete and truthful proffer was available and could have avoided or mitigated the consequence of the failed disclosure, the SJA, DSJA, and CoJ failed to take remedial action.

The Army Rules of Professional Conduct for Lawyers prohibits the mid-trial meeting that occurred in this case. Army Regulation 27-26, Legal Services, Rules of Professional Conduct for Lawyers; *see, e.g.*, Rule 3.5 Impartiality and Decorum of the Tribunal (“A lawyer shall not . . . (b) communicate ex parte with a judge, court or board or tribunal member, . . . during the proceeding unless authorized to do so by law, regulation, or court order.”); Rule 3.3 Candor Toward the Tribunal (“(a) A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . .”); Rule 3.4 Fairness to Opposing Party and Counsel (“A lawyer shall not (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; . . . (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”); and Rule 5.1 Responsibilities of Senior Counsel and Supervisory Lawyers

(“(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”).

It was not until direct questioning by the military judge on 19 November 2020 that the CoJ, then sitting as assistant trial counsel at the hearing,¹² acknowledged his presence at the 23 September 2020 meeting. At no time prior, despite opportunities on 24 September 2020 and any time after receiving the Defense post-trial motion on 9 November 2020, did he disclose his presence at the meeting on 23 September 2020 or even that the meeting occurred.

The SJA also failed to disclose the 23 September 2020 meeting with LTC [REDACTED] during his interview with the Defense and it is unknown whether he disclosed the meeting to members of his staff during their preparation of the Government’s response to the Defense’s post-trial discovery request. Additionally, the Government failed to disclose to the Defense any of the email communications between the SJA and LTC [REDACTED] on 23 September 2020 regarding the very article that was at issue in the Defense’s post-trial motion. The DSJA failed to disclose the

¹² The SJA detailed the CoJ to serve as assistant trial counsel at the post-trial hearing. (R. at 597, 671-72). Because the CoJ was a percipient witness to the mid-trial meeting with the SJA, DSJA, and member of the court-martial, the Defense moved to disqualify him as counsel at the post-trial hearing but the military judge denied the motion. (R. at 683-86). He conducted the questioning of the PAO at the post-trial hearing. (R. at 714).

existence of the 23 September 2020 meeting and the presence of the CoJ at the meeting to the trial counsel, defense counsel, and the Court on 24 September 2020, and on 17 November 2020 failed to disclose the presence of the CoJ at the 23 September 2020 meeting during the Defense interview. The CoJ failed to disclose the 23 September 2020 meeting to the trial counsel, defense counsel, and the Court, beginning on 24 September 2020 and continuing through 19 November 2020.

The Government should have disclosed the existence and details of the meeting immediately the next morning so that the military judge could have ensured that there was nothing about what happened that would affect the member's ability to sit impartially on the panel. They did not. Nor did they bring it to anyone's attention when they had actual knowledge of Defense's request to reopen voir dire based on the very press release that was the subject of the meeting. In fact, the Government objected to the request to reopen voir dire. (R. at 566). Finally, the Government's pattern of attempting to avoid a full accounting of this issue becomes even more clear considering that the SJA failed to disclose the information entirely to Defense Counsel post-trial, the DSJA, when asked about the meeting, failed to mention that the CoJ was present at the meeting, and the CoJ denied the Defense request to produce him as a witness to answer Defense questions at the hearing (although he was at the hearing as counsel) and to produce the other witnesses to the meeting (the SJA and the member).

The CoJ not only was aware of this issue during deliberations when trial counsel brought it to his attention after the Defense requested additional voir dire, but then advised trial counsel how to address the situation when court resumed. (R. at 687).¹³ However, he sat silently in the gallery during the Government's proffer about the press release and did not inform the Defense or the military judge about the meeting. (R. at 633).

We know that had the military judge known about the previous night's meeting (or "engagement," as the SJA characterized it during his testimony), she would have taken steps to ensure that the meeting would not influence the member and that 1LT Badders' trial was fair. Such steps would have included asking the member questions about the contact and soliciting challenges for cause. *See Modesto*, 43 M.J. at 319 ("The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.")

¹³ On several occasions Civilian Defense Counsel asserted at the post-trial hearing that the CoJ was physically present in the courtroom during the litigation of the Defense request and the CoJ, who was counsel for the post-trial hearing, never once denied being there.

(citation omitted). The SJA, DSJA, and CoJ should have told the trial counsel about the meeting so that she could inform the military judge it occurred; this is especially so since the CoJ was at the meeting the night before and in the courtroom when this issue was discussed during deliberations.

Even if the Court finds that the conduct at issue does not meet the strict criteria set forth in the cited Rules, it certainly violates the spirit of these rules. A reasonable member of the public would have a significant doubt about the fairness of this court-martial based on these facts. Significantly, the military judge determined that had she known about the meeting, she “would have interrupted deliberations to voir dire LTC [REDACTED].” (App. Ex. LXV, p. 21). She further correctly found, “Since the court did not have this information, a perception was created that could lead members of the public to believe that the Accused did not receive a fair trial.” *Id.*

D. The Meetings Resulted in Actual and Apparent Unlawful Command Influence.

This Court reviews the matter de novo. *Bergdahl*, 80 M.J. at 234. There are sufficient facts in the record to support both actual and apparent UCI.

1. Actual UCI

“Actual unlawful influence occurs when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.” *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018).

Certainly that occurred in this case. The convening authority himself was directly involved; he called a meeting on a Saturday to discuss Operation Pegasus Strength with his subordinate leadership, which included LTC [REDACTED] and three other members who sat on this panel, and he was being kept informed of the status of the press release at issue. His lawyer, the SJA, was at that initial Saturday meeting and also discussed Operation Pegasus Strength at the improper meeting with LTC [REDACTED] in the middle of trial. And finally, the CoJ was aware of all of this yet failed to bring it to the military judge's or the Defense's attention, even after he was actually aware it was an issue in the case.

The Government's complete failure to disclose the pretrial meeting and evasive conduct regarding the mid-trial meeting with the member constituted an improper manipulation of the criminal justice process and accordingly negatively affected the fair handling and disposition of this case. *Barry*, 78 M.J. at 77. From the incomplete proffer to the Court regarding the facts and circumstances surrounding the creation of the press release, to the CoJ's silence during the proffer, to the SJA's lack of candor regarding the meeting (or "engagement"), to the Government's denial of the relevant Defense witnesses for the post-trial Article 39(a) session, to the detailing of a material witness to the meeting (the CoJ) as assistant trial counsel for the post-trial 39(a), the Government continuously, deliberately, and improperly sought to manipulate the criminal justice process by

denying the light of truth from shining upon the facts of the OSJA's involvement with the member during the court-martial. These repeated actions constitute actual UCI. Further, the Government cannot meet its burden to prove that at least four of the members who sat on this panel – the ones at the CG's Saturday meeting – were not influenced by the CG's expressed intent to “eradicate corrosives” from the unit.

2. Apparent UCI

In the alternative, “the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.” *United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017). “The question whether there is an appearance of unlawful command influence is . . . judged objectively, through the eyes of the community.... Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an ‘intolerable strain on public perception of the military justice system’” or in other words, “the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *Id.*

It is significant that the Defense need not show knowledge or intent by the convening authority, SJA, DSJA, CoJ, or trial counsel to show apparent unlawful command influence. “The key to our analysis is effect—not knowledge or intent.”

Id. at 251. If we completely and wholly differentially apply the benefit of the doubt to the remarkable, continuous usurpations of the criminal justice process by the OSJA, and thereby strip any knowledge or intent from the OSJA's actions, we are nonetheless left with their actions, which give rise to apparent UCI because of the effect on 1LT Badders' case. The effect of the OSJA's actions alone resulted in incomplete and inaccurate information to the military judge about the real-time relationship between a panel member and the OSJA during the court-martial when a material fact, the facts and circumstances surrounding the press release, was at issue. By withholding accurate and complete information from the military judge, whatever the reason or for no reason at all, the Government lawyers' actions would cause a disinterested observer, fully informed of all the facts and circumstances, to harbor significant doubt about the proceedings simply because the two meetings occurred, and no member of the Government told the military judge or the Defense about the meetings. The effect of this conduct was to deprive 1LT Badders of a fair trial, and cause a member of the public to have grave doubts about the fairness of the process in this case.

3. Cumulative UCI

This Court should also “look to all of the allegations of UCI which met the standard of “some evidence of UCI” and ask the question: “is there a cumulative effect that denied 1LT Badders of a fair trial?” *Bergdahl*, 79 M.J. at 527 (citing

United States v. Pope, 69 M.J. 328, 335 (C.A.A.F. 2011)). Reversible error occurred if a disinterested member of the public could reasonably perceive the cumulative effect of the actions “as improper command influence or otherwise indicative of an unfair proceeding.” *Id.* The Government cannot meet its burden to show that the unlawful command influence did not affect the findings or the sentence. A member of the public would not consider this court-martial fair.

E. The Meetings Resulted in Actual and Implied Bias.

“A member shall be excused for cause whenever it appears that the member [] should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.” R.C.M. 912(f)(1)(N). Courts have made clear there are two types of bias that could disqualify a member: actual and implied; R.C.M. 912 applies to both. *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017).

“Actual bias is personal bias which will not yield to the military judge’s instructions and the evidence presented at trial.” *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012).

The Court of Appeals for the Armed Forces has explained that:

Implied bias challenges stem from the historic concerns about the real and perceived potential for command influence in courts-martial. Implied bias exists when most people in the same position as the court member would be prejudiced. It is evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military

justice system. The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel.

Dockery, 76 M.J. at 96 (internal quotes and citations omitted). “While cast as a question of public perception, this test may well reflect how members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial as well.”

United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015).

It is important to note that, “Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be biased. . . . Mere declarations of impartiality, no matter how sincere, may not be sufficient.” *United States v. Quill*, ARMY 20160454, 2018 CCA LEXIS 390, at *17 (Army Ct. Crim. App. 10 Aug. 2018), *review denied*, 78 M.J. 208 (C.A.A.F. 2018) (mem. op.) (quoting *Nash*, 71 M.J. at 89; *United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997) (“Once facts are elicited that permit a finding of inferable bias, then, just as in the situation of implied bias, the juror’s statements as to his or her ability to be impartial become irrelevant.”)).

Military judges are “mandated to err on the side of granting a challenge. This is what is meant by the liberal grant mandate.” *Peters*, 74 M.J. at 34 (citations omitted). The mandate is based on the unique way military panels are selected – the convening authority’s involvement, which may implicate unlawful command influence issues – and the fact that peremptory challenges are limited. *Id.*

As discussed below, a valid challenge for cause to LTC [REDACTED] and the other members who attended the General's pretrial meeting about Operation Pegasus Strength existed based on actual bias, or at a minimum, implied bias. The same argument applies to the mid-trial meeting.

This is especially so due to the SJA's active involvement in both situations. *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) ("A staff judge advocate generally acts with the mantle of command authority. . . . the scales always become loaded against justice when lectures [about pending courts-martial] attended by court members involve extended discussion of offenses identical or closely related to those for which an accused is shortly to be tried.") (citations omitted). The SJA was at the pretrial meeting, and (with his Deputy and Chief of Military Justice) was front and center of the mid-trial meeting with the member which focused on a press release intended to reassure the public that 1CD was taking aggressive action against sexual assault.

1. Actual bias

In this case, there was direct and uncontroverted evidence that sitting members of this court-martial panel were instructed during an after-hours meeting with their commander – the convening authority – that his intent was to “eradicate corrosives” from the unit. “Corrosives” were specifically defined to cover sexual harassment and sexual assault.

Further, the evidence is undisputed that a sitting member of this court-martial panel was discussing with the press, on behalf of Fort Hood and the convening authority for 1LT Badders' trial, the same 1CD program with its stated intent of "eradicating corrosives" from the unit. The member issued this press release *during* the court-martial, just hours before he began deliberating whether the Government had proved its case that 1LT Badders was a corrosive who had committed sexual assault.

There is a good faith argument that all of the members who attended the pretrial meeting with the convening authority were actually biased in 1LT Badders' sexual assault trial. Further, LTC [REDACTED] involvement in Operation Pegasus Strength (including working with the convening authority, other command leadership, and the DSJA) and his personal views on "corrosives" and the "truth" of sexual assault claims, support a good faith argument that he was unable to fully and fairly evaluate the evidence in this case and therefore a valid challenge for cause existed based on actual bias on his part.

Furthermore, during voir dire in another court-martial that took place the week following 1LT Badders' trial, LTC [REDACTED] testified that *people* who commit sexual assault are "corrosives" within the context of Operation Pegasus Strength, not just the conduct. (R. at 723-24; App. Ex. XXXVII, Ex. 9 (approx. 4:50)). He also testified, in response to questions from the trial counsel, that there are "two separate

levels of truth” regarding claims of sexual assault: those that are true and those that are “true but not true to a legal perspective.” The fact that a sitting member starts a trial with the preconception that all claims are true to some extent indicates actual bias.

2. Implied bias

Again, the test for implied bias is an objective one, with its “core” being “the public’s perception of fairness in having a particular member as part of the court-martial panel.” *Dockery*, 76 M.J. at 96.

While it is true that LTC [REDACTED] did admit during voir dire that some claims are false, 1) the Court is not bound by his assertions, *Nash*, 71 M.J. at 89; and 2) it is his predisposition to believe that the claim is true without hearing any evidence at all that creates a perception in a reasonable person’s mind that he cannot be fair.

The Court should take particular note of this issue, particularly in light of the liberal grant mandate. It is common knowledge that the military justice system as a whole – and its procedures for selecting members in particular – has come under severe scrutiny in recent years. There already is enough skepticism that a panel can be fair when its members are personally selected by the convening authority. A member of the public who heard about what happened in this case with respect to the convening authority’s meeting with his leadership, with four attendees sitting on

this panel (including LTC [REDACTED]) certainly would “harbor a significant doubt about the fairness of the proceeding.” *Boyce*, 76 M.J. at 248.

Finally, it is important to note that even had the military judge granted a challenge to LTC [REDACTED] or another member, the court-martial likely could have continued without improper participation in the deliberations and verdict. R.C.M. 912B(c)(1)(A) (trial can proceed as long as there are six members). Instead, 1LT Badders now stands convicted by a panel that included members who met personally with the convening authority 1CD’s bold new initiative to eradicate corrosives, including those involved in sexual assault, from the unit (including one who had a mid-trial consultation with the convening authority’s lawyers and spoke publicly about the policy). There is no way to know or assess the impact of the convening authority’s influence in calling special attention to the issues, the impact of each members’ meeting takeaways on the other members, or LTC [REDACTED] influence on the other panel members. Mil. R. Evid. 606.

F. Conclusion.

This trial was not fair, nor did it appear to be fair. This Court should find unlawful command influence and member bias existed, and set aside the findings and the sentence.

VIII. “ON OR ABOUT 1 JANUARY 2019” LANGUAGE IN THE SPECIFICATION CONSTITUTED AN EX POST FACTO VIOLATION/THE FINDING IS AMBIGUOUS.

Argument and Authorities

A. Standard of Review.

Whether 1LT Badders’ conviction violates the Ex Post Facto clause, as a constitutional question, is reviewed de novo. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).

B. 1LT Badders’ conviction violates the *Ex Post Facto* Clause.

On 23 December 2016, Congress amended Article 120, UCMJ by creating the offense of sexual assault without consent, with an effective date of 1 January 2019. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5430, 5542, 130 Stat. 2000 (2016). 1LT Badders is charged with committing sexual assault without consent “on or about 1 January 2019.” (Charge Sheet). As written, the charged offense covered dates on and prior to 1 January 2019. On 31 December 2018, sexual assault without consent was not a cognizable offense without separate or additional elements. Art 120, UCMJ, 10 U.S.C. § 920 (2018).

As discussed *supra*, SPC [REDACTED] testified inconsistently regarding the time of the alleged assault, to include that she went to Burger King after the assault at 0326. Ultimately, the record leaves unclear when exactly the assault occurred, and through

its charging decision, the Government incorporated at least 31 December 2018 into the ambit of the charge.

However, since sexual assault without consent was not yet an offense, such charge violates the *Ex Post Facto* Clause of the Constitution. The prohibition on *Ex Post Facto* laws includes “Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.” *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

Where this court cannot determine with certainty whether an offense occurred before or after a statutory change, it “may affirm the conviction only if: (1) the specification states an offense under both the prior and revised versions of [the offense]; and (2) the evidence is factually and legally sufficient under both the prior and revised versions of [the offense].” *United States v. Muscat*, ARMY 20160534, 2018 CCA LEXIS 511, at *5 (Army Ct. Crim. App. 26 Oct. 2018). Putting aside the second requirement on factual and legal sufficiency addressed *supra*, the first requirement is clearly not met, because the specification does not state an offense under the prior version of Article 120, UCMJ. Accordingly, this Court cannot affirm 1LT Badders’ conviction.

C. Conclusion.

This Court should find an Ex Post Facto violation and/or that the finding is ambiguous, and set aside the findings and the sentence.

IX. THE MILITARY JUDGE PLAINLY ERRED IN ADMITTING EVIDENCE OF THE CONTENTS OF WRITINGS WITHOUT ADMITTING THE ORIGINAL WRITINGS.

Argument and Authorities

A. Standard of Review.

“Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error.” *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citing *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)).

B. The Military Judge Plainly Erred in Admitting the Contents of Writings without Admitting the Original Writing.

An original writing, or a duplicate, is required in order to prove its contents, unless there is an exception. Mil. R. Evid. 1002-1003. A writing consists of letters, words, numbers, or their equivalent set down in any form. Mil. R. Evid. 1001(a). An original for electronically stored information means “any printout or other output readable by sight if it accurately reflects the information.” Mil. R. Evid. 1001(d). Duplicates are limited to counterparts of the original produced by a

mechanical, photographic, chemical, electronic, or other equivalent process or technique. Mil. R. Evid. 1001(e).

Other evidence may be used to prove the contents of a writing under limited circumstances. These exceptions include when the originals are lost or destroyed or the originals are not obtainable by any judicial process. Mil. R. Evid. 1004. The military judge is responsible for determining whether the proponent satisfied the factual prerequisites for an exception under Mil. R. Evid. 1004. Mil. R. Evid. 1004, 1008. The record must establish the proponent has met the exception. *See United States v. Grindstaff*, ARMY 20200315, 2022 CCA LEXIS 524, at *21-23 (Army Ct. Crim. App. 30 Aug. 2022).

Throughout the direct examination of SPC ■■■, the Government improperly elicited the contents of writings, without ever admitting an original of those writings. At the start of her testimony, she discussed the contents of text conversations she had with 1LT Badders on the Tinder application. (R. at 328-29). She then continued to testify about the contents of messages on her Instagram account. (R. at 330). She testified to the contents of the messages setting up their first meeting in Germany and then subsequent text conversations. (R. at 331-32, 334, 336, 338-39). SPC ■■■ also testified on messages she sent to 1LT Badders following the alleged assault. (R. at 362). On redirect, SPC ■■■ testified to the contents of multiple text message conversations with 1LT Badders. (R. at 455-68).

Since the Government failed to admit the messages underlying the testimony of SPC ■■■, the military judge erred in permitting her testimony to the contents of these messages. The error is plain and obvious because SPC ■■■ made it clear she was referencing text messages, and the record supports that such messages existed but were just not admitted. Further, such error was prejudicial. SPC ■■■ testified to the contents of messages addressing the formation of their consensual relationship through post-allegations conversations. Nearly the entirety of the Government's redirect of SPC ■■■ focused on the contents of unadmitted writings, to include an alleged apology from 1LT Badders. The evidence was so important the members asked to see the actual texts, but the military judge erroneously denied the request without the required analysis. *See* Issue V. Without SPC ■■■ erroneously admitted testimony about the texts, without the texts themselves being in evidence, the Government's already less than compelling case is even weaker.

C. Conclusion.

This Court should find the military judge erroneously admitted testimony about texts that were not admitted in evidence and set aside the findings and the sentence.

X. CUMULATIVE ERROR OCCURRED AND WARRANTS RELIEF.

Argument and Authorities

A. Standard of Review.

“The cumulative effect of all plain errors and preserved errors is reviewed de novo.” *Pope*, 69 M.J. at 335.

B. The Cumulative Error Doctrine Applies.

The cumulative error doctrine applies where, “a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.” *Id.* (citing *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)).

As mentioned, this was a strongly contested, “he said – she said” case with powerful evidence of consent but a sympathetic complaining witness. As addressed *supra*, there were multiple evidentiary errors, to include exclusion of evidence regarding text messages between 1LT Badders and SPC [REDACTED], admission of the testimony of MAJ [REDACTED], and admission of testimony in violation of the best evidence rule. The military judge also erred in denying the panel member request for access to unadmitted text messages and refusing to order disclosure of SPC [REDACTED] mental health evidence.

As argued above, each of these errors was independently prejudicial. However, assuming *arguendo*, this Court finds every single error was not separately

prejudicial, the cumulative effect of these various errors is certainly prejudicial. The evidence of guilt was far from overwhelming. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (“[C]ourts are far less likely to find cumulative error . . . when a record contains overwhelming evidence of a defendant’s guilt.”). Especially in such a close case, it is clear that these evidentiary errors affected the integrity of the findings.

C. Conclusion.

This Court should find cumulative error and set aside the findings and the sentence.

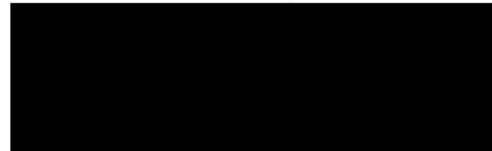
Conclusion

Based on independent and cumulative prejudicial effects of the errors discussed above, this Court should find that 1LT Badders was deprived of his right to a fair trial. We ask that the Court set aside the findings and the sentence.

Respectfully submitted,



TERRI R. ZIMMERMANN
Lead Civilian Appellate Defense Counsel



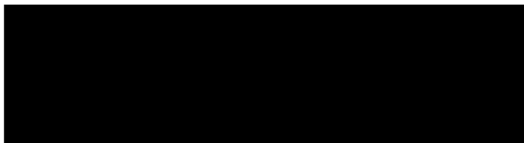
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C. Conclusion.

Because the panel members were not properly instructed on this essential issue, 1LT Badders respectfully requests that this Court set aside the findings and the sentence.

CERTIFICATE OF SERVICE

This Brief on Behalf of Appellant with Appendix was filed by email to the Court and Government Appellate Division on 15 March 2023.

[REDACTED]

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 16 March 2023.



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