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

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| UNITED STATES<br>Appellee | **REPLY BRIEF ON BEHALF OF APPELLANT** |
| v. | Docket No. ARMY 20220140 |
| Chief Warrant Officer Two (CW2)<br>**JONATHAN K. CUNNINGHAM,**<br>United States Army,<br>Appellant | Tried at Fort Bragg, North Carolina, on 9 November 2021 and 22-25 March 2022, before a general court-martial appointed by the Commander, Headquarters, Fort Bragg, Colonel G. Bret Batdorff and Colonel J. Harper Cook, military judges, presiding. |

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

## I. WHETHER APPELLANT'S CONVICTIONS ARE FACTUALLY SUFFICIENT

### Argument

**A. The government failed to prove beyond a reasonable doubt that Master [redacted] did not send the June 2020 messages to Miss [redacted]**

The government contends that the messages sent to Miss [redacted] read "like an adult writing to a teenage girl." (Gov't Br. 9). Appellant agrees that these messages read like an adult talking to a teenager. What the government misses is that this was Master [redacted] whole point—changing his writing style to better reflect that of his father, a man Master [redacted] lived with, had presumably texted with before, whose social media he was familiar with, and whose Instagram messages Master [redacted] looked over prior to beginning his conversation with Miss [redacted]. (R. at 589). Despite

the government's contention to the contrary, there is nothing unbelievable about Master [redacted] having basic biographical knowledge about his father. At trial, Master [redacted] stated that he was familiar with appellant's height, age, medical procedures, and that it was not hard to replicate the way appellant typed. (R. at 588).

At trial, Master [redacted] identified several stylistic features of appellant's messaging that Master [redacted] sought to emulate, and that he would sometimes use when trying to communicate with others in a more formal manner like his "bosses." (R. at 589). However, despite Master [redacted] efforts, he admitted that he "messed up" and slipped back into his normal messaging style at some points in the conversation. (R. at 609, 624-25, 627-29). These "mess-ups" show that contrary to the government's assertions, Master [redacted] did not "perfectly imitate his father," his sending the messages was not unreasonable. (Gov't Br. 9).

The government asserts that Master [redacted] gave no reason for why he logged into appellant's Instagram. (Gov't Br. 5). However, Master [redacted] explained at trial that he logged into appellant's Instagram "to see like who he was following, what he was doing." (R. at 631). Master [redacted] also explained how he came to have appellant's passwords for his social media accounts—their mutual use of appellant's video game account. (R. at 578, 543). Nothing about how Master [redacted] came to have appellant's Instagram password or his reasons for logging into appellant's Instagram is unreasonable.

Lastly, the government points to Master [redacted] sworn statement to CPT [redacted] as proof that appellant forced his son to take the blame for the messages to Miss [redacted], changing his answer "in a way that was more helpful to appellant." (Gov't Br. 8). However, it is not clear why Master [redacted] accessing appellant's Instagram account prior to June 2020, would be of any benefit to appellant. After all, the only messages sent from appellant's account to Miss [redacted] that raised any possible issue of impropriety were those sent in June 2020. The messages that appellant had admittedly sent to Miss [redacted] prior to that were positively wholesome. Regardless, Master [redacted] explained at trial why he actually changed his answer on his sworn statement:

> CDC: [. . .] [W]hy did you change it?
>
> WIT: My dad told me to be truthful about my answers.
>
> CDC: So he just told you to tell the truth?
>
> WIT: Yes.
>
> CDC: Did he threaten you?
>
> WIT: No.
>
> CDC: He just encouraged you to be honest?
>
> WIT: Yes.
>
> CDC: And the original answer that you provided, was it correct or incorrect?
>
> WIT: The original answer was incorrect.

(R. at 600). The above exchange is a far cry from that painted by the government and weighs in favor of this court finding the government failed to prove beyond a reasonable doubt that Master [redacted] did not sent the June 2020 Instagram message to Miss [redacted].

**B. The only evidence at trial as to appellant's character for truthfulness was that appellant is a truthful person**

The government's brief fails to address the only admissible character evidence adduced at trial, evidence of appellant's character for truthfulness. In its attempt to prove that appellant gave a false official statement to SA [redacted], the government admitted appellant's interview as Prosecution Exhibit 14. In response, in its case-in-chief, the defense called six senior leaders with extensive experience with appellant, who all testified to his honesty.

COL [redacted] testified that he interacted with appellant "probably twice a day," and that appellant is "always very respectful," and that he had "no doubt" that appellant was honest. (R. at 640-1). Colonel [redacted] added that he "trusted and valued [appellant's] input, his candor." Lieutenant Colonel [redacted], a person that appellant worked with "every single day," testified that appellant's "integrity is unmatched with nearly anyone that [LTC [redacted]] has worked alongside in the Army." (R. at 645). Chief Warrant Officer Five [redacted] testified to having known appellant for years and having worked with appellant on a daily basis prior to trial for a period of nine months. (R. at 652). Chief Warrant

Officer Five [redacted] testified that in his opinion, appellant was "very trustworthy." Master Sergeant [redacted] testified to knowing appellant for years prior to his trial, and to having worked with him on a daily basis from 2017-2018. (R. at 659). Master [redacted] testified that appellant was "very honest." (R. at 660).

The defense also called SFC [redacted], who worked with appellant on a daily basis for around a year. (R. at 663). Sergeant First Class [redacted] stated that she believed appellant is "completely honest . . . has a lot of integrity . . . always does what's right, even when nobody is looking." (R. at 664). Finally, defense called CW4 [redacted], who had thirty-three years of service, and who had originally been introduced to appellant through her family members. (R. at 666). Chief Warrant Officer Four [redacted] testified that she worked with appellant on a weekly basis for the past two years. (R. at 667). Chief Warrant Officer Four [redacted] also testified that she would socialize with appellant outside of work at car shows on weekends. (R. at 667). Like all the other witnesses, CW4 [redacted] testified that appellant is an honest person. (R. at 668).

In a case that was all about the truthfulness of appellant and his family members, the government's failure to introduce any evidence to the contrary must weigh heavily in this court's analysis of whether the government met its burden.

**C. Argument conflated with fact**

"By the next morning appellant had decided to have his fourteen-year-old son, Master [redacted], assume responsibility for the messages between appellant and Miss [redacted]" (Gov't Br. 4). This argument-without-citation, embedded in the middle of the government's recitation of the facts, epitomizes the government's overall approach to this case—speculation and innuendo conflated with fact. The direct evidence, as sworn to by two witnesses at trial and appellant himself in two admitted sworn statements to investigators and supported by the unrebutted opinions of six senior leaders, reveal how thin this case of unbridled suspicion truly was. Therefore, this court after independently weighing the evidence, cannot be convinced beyond a reasonable doubt that appellant is guilty of the charges and specifications.

## II. WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A HEARSAY STATEMENT OF APPELLANT'S WIFE

### Argument

### A. The government failed to show by a preponderance of the evidence the necessary predicate of a startling event

Contrary to the government's assertion, there was no evidence adduced at trial that Ms. [redacted] saw any particular messages from appellant's Instagram to Miss [redacted], let alone any "sexually charged" ones. In fact, the opposite conclusion would seem to be more likely, as SSG [redacted] admitted that Ms. [redacted] "had the phone and saw the first set of text messages between [Miss [redacted]] and who

[he believed] to be [appellant].” (R. at 432). The “first set of text messages” between Miss [redacted] and appellant’s Instagram account are reflected in Prosecution Exhibit 2, messages appellant admittedly sent to Miss [redacted] in February 2020. (Pros. Ex. 2). These “startling” messages include such benign subject matter as Miss [redacted] sending a photo of herself clothed in a hoody to appellant, appellant telling Miss [redacted] “don’t get eaten” [by sharks at the aquarium], Miss [redacted] asking appellant how he was feeling, appellant responding “good, not as much pain,” and appellant wishing Miss [redacted] a “safe trip back!” (Pros. Ex. 2).

Moreover, SSG [redacted] admitted that he did not know if Ms. [redacted] read “sit and spin,” as part of her review of the messages. It is unlikely that she would have read that part of the conversation on appellant’s Instagram as it came much later than the “first set of text messages.” (Pros. Ex. 3, p. 23). What is clear is that the military judge had a picture in his mind inconsistent with the testimony presented at trial. The military judge decided what Ms. [redacted] must have seen without there being a sufficient factual basis to support that finding. Therefore, the military judge’s finding that there was a startling event was clearly erroneous.

**B. The government failed to show by a preponderance of the evidence that Ms. [redacted] made the statement while under the stress of excitement**

SSG [redacted] descriptions of Ms. [redacted] as she was reading the messages failed to paint a picture of true shock—crying, shaking, unintelligibility,

unresponsiveness. Instead, SSG [redacted] gave unelaborated, bare descriptions that Ms. [redacted] seemed "angry," later downgraded to "upset." (R. at 429, 432). In order for hearsay to be admissible under the excited utterance exception, the proponent must adduce more proof of the subjective mental state of the declarant than the banal characterizations of SSG [redacted].[1] The military judge's finding that Ms. [redacted] was "angry, upset in the moment," without anything more, is insufficient to show that she was under the stress of excitement and is therefore clearly erroneous.

**C. The military judge should have instructed the panel to disregard the hearsay statement of Ms. [redacted]**

The military judge made no ruling on whether the subject statement was relevant to an element of any offense besides the service discrediting element of appellant's later-dismissed Article 134, UCMJ, charge of indecent language. Had

[1] *See e.g. United States v. Henry*, 81 M.J. 91, 98 (C.A.A.F. 2021) (in which the court, in finding the child declarant was under the stress caused by the startling event, noted that he was: "shaking . . . pounding on the door of a stranger . . . in December at 2 a.m. . . . clad only in pajamas . . . with a look of fear on his face, while yelling about his mother being beaten."); *United States v. Arnold*, 25 M.J. 129, 131 (C.M.A. 1987) (noting the stark difference in demeanor between the child declarant's "normally very bubbly" personality and her disposition as she stated her father had sexually abused her; "she seemed really agitated . . . very subdued, was crying."); *United States v. Johnson*, 2024 CCA LEXIS 184, *15 (Army Ct. Crim. App. 17 April 2024) (mem. op.) (in finding the declarant was not under the stress of excitement, the court noted she was "not a child, but a person in her early 20s . . . [and although she was] crying uncontrollably . . . had physical pain . . . and felt 'gross' emotionally . . . [there was no] evidence of what [declarant] was thinking or feeling at the time she was making the statement.").

the relevance been solely predicated on identity, the military judge would have had to have conducted a new Mil. R. Evid. 403 balancing test and realized that the probative value was substantially outweighed by the risk of unfair prejudice due to the ambiguity in the statement made by Ms. [redacted]—when she had originally told the appellant to "stop talking to [Miss [redacted]]," and whether Ms. [redacted] statement was made in refence to the early Instagram message conversation of February 2020 or the later one of June 2020. The military judge had a duty to instruct the panel to disregard the improper evidence before them. His failure to do so was error.[2]

## III. WHETHER THE MILITARY JUDGE IMPROPERLY ALLOWED OPINION TESTIMONY AS TO THE MEANING OF "SIT AND SPIN"

### Facts and Argument

**A. All of the witnesses who gave definitions of "sit and spin" lacked sufficient special basis for determining the speaker's true meaning**

The government appears to misapprehend the essential holding of *Byrd*, mistaking the court's citation of Mil. R. Evid. 701 for the "special basis" test the court held is required before a witness may opine on a speaker's true meaning. (Gov't Brief 14); *see United States v. Byrd*, 60 M.J. 4, 8 (C.A.A.F. 2004) ("For a

[2] The government does not argue prejudice, and this court should, therefore, consider any argument waived. *See United States v. Hornick*, 815 F.2d 1156, 1159 (7th Cir. 1987) (discussing that arguments not raised in briefs are considered waived).

lay opinion interpreting another person's meaning to be admissible, the proponent must establish that the witness has *some special basis* for determining the speaker's true meaning.") (emphasis added). In doing so, the government makes the same error as the military judge did at trial.

The government contends that the prosecution "was entitled to present evidence on what the words used during the sexually charged conversation between appellant and Miss [redacted] meant." (Gov't Brief 15). While the government was entitled to present such evidence, the government was required to lay the proper foundation for the opinion testimony on the meaning of the phrase prior to that evidence being introduced. However, the government never elicited any testimony from any of the witnesses that they heard appellant use the phrase "sit and spin." This important foundational predicate is underscored in this case since none of the three witnesses were even parties to the conversation between Miss [redacted] and the person using appellant's Instagram. *See Byrd*, 60 M.J. at 8 ("Once that foundation is laid, the witness may clarify conversations that are abbreviated, composed of unfinished sentences and punctuated with ambiguous references to events that were clear *only to the conversation participants*[.]") (internal citation omitted).

Whether a given phrase is indecent is a matter for the factfinder to decide. The particular meaning of the phrase as used by appellant may have been relevant

to whether the factfinder found the phrase to be indecent, but that does not mean that just anyone could have been called to give their opinion on the phrase's meaning. In its brief, the government seems to imply that the prosecution should have been able to call random members of the public to poll them on what the phrase "sit and spin" means to them and opine on whether it is indecent.[3] *Byrd* requires more—a *special basis* for the opinion—and the inadequate framework used by the military judge in admitting the three definitions failed to provide that special basis and consequently, invaded the province of the factfinder.

**B. The military judge's findings of fact and ruling should not receive deference as he did not apply the correct legal standard**

The military judge held an erroneous view of the legal standard governing lay opinion testimony on the meaning of another's writings, applying the general test for opinion testimony by lay witnesses rather than the specific and more exacting standard required for opinion testimony on the meaning of others conversations. *See Byrd*, 60 M.J. at 5. As such, this court should find an abuse of discretion.[4]

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[3] The government's citation to *Littlewood* is inapt. In that case the C.A.A.F. held that the lay opinion testimony of the appellant's commander, opining on whether various alleged conduct of appellant was indecent, was an abuse of discretion as it consisted of "bald assertions, unsupported by reasoning or particular facts[.]" *United States v. Littlwood,* 53 M.J. 349, 353 (C.A.A.F. 2000). Moreover, the lay opinion in *Littlewood* is further distinguishable from the present case as the testimony did not include opinion on the meaning of another's writings.

[4] *See* n.1, *supra*.

## IV. WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY REPEATEDLY ATTEMPTING TO ADMIT INADMISSIBLE M.R.E. 404(b) TESTIMONY OVER SUSTAINED OBJECTIONS

### Law and Argument

**A. Appellant's 404(b) objection was not "waived" by the admission of Pros. Ex. 10.**

"Waiver is the intentional relinquishment or abandonment of a known right." *United States v. Edwards*, 82 M.J. 239, 244 (C.A.A.F. 2022). On the other hand, "forfeiture is the failure to make the timely assertion of a right." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). The failure of defense to object to the particular portions of Prosecution Exhibit 10 in which CPT [redacted] asked appellant about his phone, represents a clear case of forfeiture regarding that particular part of that conversation. However, even if this court found that the issue was waived with respect to appellant's conversation with CPT [redacted], this court should find that defense did not waive their objection to the government's later question to S.A. [redacted] as the call of the government's question was substantially different, more incriminating, and the circumstances under which the conversation between appellant and S.A. [redacted] took place is distinguishable—a criminal investigation rather than an administrative one.

The government's question of whether appellant had "got rid of" his phone summons the specter of the intentional destruction of evidence—a crime

potentially punishable under Art. 131b, UCMJ. This is a far cry from the more mundane exchange between CPT [redacted] and appellant in his interview:

Question: Have you gotten a new phone since the incident?

Answer: I got a new phone a few months back.

Question: If so, do you still have your old phone?

Answer: No I didn't keep my old phone.

(Pros Ex. 10, p. 1).

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Mil. R. Evid. 404(b). Contrary to the government's assertions, the military judge clearly believed that evidence related to appellant "getting rid of" his phone was evidence of a crime, wrong, or other act. Just because there were multiple bases for objection does not mean that the military judge did not find that the subject evidence triggered the provisions of Mil. R. Evid. 404(b). The military judge's final ruling on the matter stated: "So there we have a hearsay issues, do we not Trial Counsel? On top of the 404(b). Because this witness didn't have personal knowledge of the subject. It's been filtered through a 15-6 officer. Your objection is sustained." (R. at 507).

**B. The timing of the trial counsel's second question concerning appellant's phone was improper**

The government points out the distinction between the call of the two questions the trial counsel asked about appellant's phone. Trial counsel's second question may have in fact been unobjectionable had it been asked first, with a simple answer of "no" given by S.A. [redacted]. However, the trial counsel intentionally asked the second question after the heightened interest shown by LTC [redacted] that resulted in the military judge being forced to admonish him three times, the last two directly, to disregard the question about appellant's phone.

When the time came for panel member questions, LTC [redacted] persisted in his interest in the phone, even after just being instructed three times to disregard it. It is in this context that the government decided to try one more time to satiate LTC [redacted] hunger for improper evidence by trying to sneak it in through a less objectionable means. The military judge was not fooled and was correct in sustaining the objection from defense without further comment.

**C. Appellant was prejudiced**

The identity of the person messaging Miss [redacted] from appellant's Instagram was of utmost importance in this case. Showing from whose phone the messages originated could have gone a long way to proving the identity of the person messaging Miss [redacted]. The government could have sought and provided evidence of logins to the appellant's Instagram account, geolocation data, or other metadata to show from what device the messages came. The government did none of this, and

their failure to properly investigate should not act to the detriment of appellant, it should not be used as an excuse by the government to bolster its weak case through improper methods.

## Conclusion

Rarely does an accused have the benefit at trial of a complete defense supported by multiple fact witnesses, the accused's own sworn statements, and multiple high-quality character witnesses. Still, because of multiple errors and the improper means employed by the government, appellant was found guilty in a trial by innuendo. When examining whether there is a fair and rational hypotheses other than guilt, this court must conclude that there is, that fairness requires a full reversal of the findings and the sentence and dismissal with prejudice.

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## CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on September 20, 2024.

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