IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Daniel H. WILSON Colonel/O-6 United States Marine Corps, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201800022

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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IV.

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ADMISSIBLE EVIDENCE MUST BE BOTH RELEVANT AND NOT SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE. DID THE MILITARY JUDGE ERR IN ADMITTING OVER DEFENSE OBJECTION, MRS. P'S TESTIMONY THAT SHE HAD LEARNED OF BEHAVIOR ON COLONEL WILSON'S PART THAT "SHOCKED" AND "CONCERNED" HER AS A PERSON, "NOT JUST AS A MOTHER," WHERE WHAT SHE LEARNED HAD NOTHING TO DO WITH SEXUAL OFFENSES AGAINST CHILDREN?

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Statement of the Case

A general court-martial consisting of a panel of officer members tried Colonel Daniel Wilson on 17 February 2017, 18 April 2017, 11 May 2017, 7 and 8 June 2017, 13 July 2017, 28-31 August 2017, 1-2 September 2017, and 4-10 September 2017, at Camp Lejeune, North Carolina. *See* General Court-Martial Convening Authority's Action, Jan 5, 2018, at 3. Contrary to his pleas, the members convicted him of the following: one specification of sexual abuse of a child who had not attained the age of 12, in violation of Article 120b, Uniform Code of Military Justice (UCMJ); six specifications of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ; and one specification of absence without leave, in violation of Article 86, UCMJ. *Id.* at 3-7.

Consistent with his pleas, the members acquitted Colonel Wilson of two specifications of sexual abuse of a child who had not attained the age of 12, in violation of Article 120b; four specifications of assault consummated by a battery upon a child under the age of 16, in violation of Article 128, UCMJ; three specifications of engaging in conduct unbecoming an officer and a gentleman, in

violation of Article 133; four specifications of sexual assault, in violation of Article 120, UCMJ; and two specifications of assault consummated by a battery, in violation of Article 128. *Id*. In addition, the military judge dismissed a charged specification of violating a lawful general order, in violation of Article 92, UCMJ. *Id.* The members sentenced Colonel Wilson to a dismissal and confinement for five and a half years. *Id.* at 7. The convening authority approved the sentence as adjudged. *Id.* at 7.

Statement of Facts

Like many men in their mid-fifties who suddenly find themselves empty-nesters, Colonel Dan Wilson—who successfully raised his now-grown daughter and step-daughter, R. at 2098, 2015— continued to enjoy the presence, laughter, and vivaciousness of children. He played games with the children of his friends, rough-housing and wrestling with them until he ran out of energy—and then, pausing to catch his breath, he would often sit on the couch and watch movies next to the children.

So when Major B.P.—an old acquaintance of Colonel Wilson's—and his family moved just down the street at Camp Lejeune in the early summer of 2016, it was no surprise that the colonel and his wife quickly became "Uncle Dan" and "Aunt Susan" to the Ps' three daughters, S.P., M.P., and B.P. R. at 896-905, 974-1012. The Wilsons invited the Ps over for meals, they took the Ps shopping, and

they did what they could to help a fellow Marine and his family relocate to Camp Lejeune, North Carolina. *Id*. The Wilsons opened their home to the Ps, who still had not received their household goods from their last assignment in Okinawa. *See id*. Characteristic of the Wilsons' welcoming nature, they offered to let the Ps use their washing machine and dryer. R, at 891-92. The Ps readily accepted. *Id*.

A. Mrs. P claimed B.P. told her, after repeated questions, Colonel Wilson had touched her.

On 13 July 2016, the Ps were over at the Wilsons for dinner. R. at 947-48, 1018, 1255. Susan Wilson and Mrs. P were in the kitchen. R. 1018-19. In the living room were Major P, his friend Dr. Jeff Ashley, Colonel Wilson, and the three girls. R. at 914. At one point, there was a playful conversation about bellybuttons. *Id.*; *see also* R. at 950. B.P.—who was six years old at the time—said she had an "outie." R. at 914. Major P glanced in B.P.'s direction and saw that B.P. and M.P. were "like in [Colonel Wilson's] lap, and they're jumping all on him and all that." R. at 914. At one point, B.P. raised her shirt enough to show off her "outie" before she was pushed off the couch by her sister, causing B.P. to hit the floor. *Id.* B.P. ran into the kitchen, crying. *Id.* M.P. followed her into the kitchen and tattled on B.P., telling their mother that B.P. had lifted up her shirt to show off her "outie." R. at 1019.

Major P followed the girls into the kitchen, and overheard a conversation between Mrs. P and B.P. about the appropriateness of showing off her bellybutton.

R. at 914. "We don't do that," Mrs. P told B.P. "We don't show people our outies. You shouldn't be showing your bellybutton to anyone." R. at 914. Major P returned to the living room, and Mrs. Wilson left the kitchen—leaving Mrs. P and B.P. alone. R. at 1022. Mrs. P used this opportunity to tell B.P. that females' breasts are private. *Id.* Mrs. P then asked B.P. if Uncle Dan had ever touched B.P. inappropriately. R. at 1066. Mrs. P would testify that she asked B.P. the question because of suspicions she had about Colonel Wilson—suspicions based on a conversation she had had with Mrs. Wilson, wherein Mrs. Wilson disclosed her marital problems and allegedly told Mrs. P about some of Colonel Wilson's behaviors. R. at 1019-20. Over defense objection, Mrs. P testified that these purported behaviors "shocked" and "concerned" her—not only as a mother, but as a person. R. at 1019-20.

B.P. told her mother "no," that Colonel Wilson had not touched her inappropriately. R. at 1066-67. Mrs. P asked again, and again B.P. said no. *Id.*; *see also* R. at 1073. Finally, upon being asked the same question a third time, B.P. purportedly said that yes, Colonel Wilson had touched her inappropriately. R. at 1086.

Mrs. P then took B.P. into a bathroom next to the kitchen. R. at 1024. Mrs. P testified, "[a]fter she showed me what he would do to her, I then pulled her pants down and her underwear down a little further and I pointed to her vagina and I

said, ‘Does he ever touch you there?’” R. at 1024. B.P. said that nobody had touched her “there,” before adding that nobody had touched her “privacy.” R. at 1066. Mrs. P continued to ask B.P. questions. Eventually, B.P. “put her hand inside of her underwear and said that [Colonel Wilson] would rub around her area and say ‘[y]ou’re such a good girl.’” R. at 1086. According to Mrs. P, B.P. added,

> I don’t know why he does this, mommy, but he goes to pick me up and scoot me higher on his chest, he doesn’t pick me up like you and daddy do by my arms. He puts his hand between my legs and he pushes really hard and it burns and it’s been burning a lot.

R. at 1086. Mrs. P pulled up B.P.’s pants, picked her up, told her “he will never touch you like that again,” and left the bathroom. R. at 1024.

Mrs. P entered the living room and told Major P they needed to leave immediately. R. at 953, 1025. As her three daughters congregated around her, Mrs. P confronted Colonel Wilson. *E.g.*, R. at 1258-59. Mrs. P was “extremely angry” and “spoke sternly” to Colonel Wilson. R. at 1258. According to Dr. Ashley—Major P’s friend who also had been invited to dinner at the Wilsons’ house—the colonel and his wife “were confused and dazed and wondered what had just happened.” R. at 1260.

Once outside, Mrs. P told her husband that Colonel Wilson had “touched” B.P.” R. at 953. Mrs. P was upset during the short drive home. R. at 1262. From the back of the van, the girls “were trying to figure out what was going on . . . .”

R. at 961. At some point—whether during the drive or shortly after the Ps arrived at home—Mrs. P said she wanted to get a knife and kill Colonel Wilson. R. at 1191. The girls heard their mother's comment about wanting to stab and kill Colonel Wilson. R. at 1076. In fact, one of the girls asked Mrs. P why she had said that. *Id.* That night, the Ps talked to all three of their daughters, telling them, "Hey, this happened" and that the girls would be asked questions about it. R. at 955 and 1077.

B. The first government interview of B.P.

The next day, the Ps took B.P. to a local child advocacy center. R. at 1030. There, B.P. was interviewed by Ms. Beth Pogroszewski, a child forensic interviewer. *Id.* After a period of rapport building, Ms. Pogroszewski asked B.P. if B.P.'s parents were "worried about you or worried that something has happened to you?" Pros. Ex. 35 at 7. B.P. responded,

> They were super duper worried last night because I told them, like, my sister pushed me and then I fell. And then I went crying to my mom. And then she told me, 'Did Dan do anything to you?' And I was like, ''No. Maddie accidentally pushed me.' And then she's like – and then I said, 'Well he has done other things to me at different times when we go to his house.' And he's been doing inappropriate weird things to me and I don't really like it, and it's been hurting.

Id. at 7-8. In response to Ms. Pogroszewki's follow-up questions, B.P. said the purported "inappropriate" touching had occurred "one time"—and that it had taken

place "maybe a few days ago." *Id.* at 8. Ms. Pogroszewski told B.P. she was "brave" and was in a "safe place," and explained that Ms. Pogroszewski's job was to "make sure that kids are safe." *Id.* B.P. eventually alleged that, while she was sitting on Colonel Wilson's lap, he "used [B.P.'s] parts to scoot [her] up." *Id.* at 9-10. B.P. described Colonel Wilson's hands as making a "cupping" motion and that he had touched her "private," which she used to go "potty[.]" *Id.*

Later in the interview, B.P. clarified that the body part allegedly touched by Colonel Wilson was her "bottom." *Id.* at 13. After more follow-up questions, B.P. added that she had been sitting on Colonel Wilson's knee and that "he scooted [her] up a little bit." *Id.* at 10. According to B.P., when Colonel Wilson scooted her up in his lap a little bit, her "private" was "kind of burning" and "was stinging and it felt on fire." *Id.* In response to additional questioning by Ms. Pogroszewski, B.P. said this one-time touching was "sometimes under and sometimes over" her clothes. *Id.* In response to additional questioning by Ms. Pogroszewski, B.P. later added that Colonel Wilson had touched her underneath "her shorts" and, as he did so, he said, "You're a good girl. Good girl. Good girl." *Id.* at 11.

At one point, Ms. Pogroszewski left the room to consult with law-enforcement officials, who had been observing the interview. When she returned, she asked B.P. the following:

> Q. So, [B.P.], you've helped me understand so much. I just have a couple more questions for you. Okay?

Now, is there anything else that you can think of that you think is important for me to know about what happened?

A. Well, I don't really know a lot of stuff --

Q. I think you know a whole lot of stuff. I think you're really smart. -- about what happened because he didn't really do a whole lot of stuff. What about yesterday? I know that you said that y'all were over there yesterday and that [M.P.] had pushed you or something and you fell, and that's when you told -- you went in the kitchen and told your mom. Did anything happen yesterday on his lap?

A. No.

Q. Okay.

A. He didn't do anything wrong.

Q. He didn't. Okay. Well, when you were talking about the things that he did about sitting on your lap, did you sit on his lap more than one time and he did something inappropriate?

A. Maybe like six times.

Q. Six times. Okay.

A. About six times.

Q. Okay. And when you were helping me understand about, you know, how you told me sometimes he would scoot you up and you said it would be over your shorts, and then sometimes he would put his hands in your shorts on the underwear, was it ever any other place besides on the underwear?

A. I don't know.

Q. Would his hand go under the underwear?

A. Under, yeah.

Q. Okay. Tell me about that.

A. Well, he's been doing it very strangely and I don't like it.

Q. What does he -- what is he doing when he's doing it strangely?

A. Well, no one ever has been really doing it strangely everyone whose done it before. So he's been -- he's been pushing it.

Q. Pushing it. Okay. What does he use to push it?

A. Just his hand and his fingers.

Q. Okay.

A. And he really just does, like, this to go up.

Id. at 14-15.

According to a Government expert in the field of child psychology and child forensic interviews, B.P. is intelligent for her age. R. at 1287. The same expert said that, throughout the interview, B.P. was articulate and quickly adopted and used words she had heard from her mother, Mrs. P. *Id.*

<u>C. B.P.'s Sexual Assault Forensics Exam showed no signs of sexual abuse.</u>

The day after the child forensic interview, Ms. Ann Parsons examined B.P. R. at 1201. A pediatric nurse practitioner, Ms. Parsons is experienced in

performing sexual-assault forensic exams. R. at 1197. She became involved in the case when she fielded a call from a special agent from the Naval Criminal Investigative Service (NCIS), who "felt the services that [Ms. Parsons and the clinic] provided would be useful for the family and child, but also for him in his work." R. at 1201. The agent shared with Ms. Parsons what he knew about the allegation, as well as what B.P. purportedly had said during the child forensic interview. *Id.* Based on her discussion with the agent, Ms. Parsons understood "[t]hat an adult man had put his hand inside B.P.'s underwear and grabbed – reached to her genital area and pulled her against his chest holding the child's genital area." R. at 1202. Ms. Parsons also spoke with Major and Mrs. P before examining B.P. *Id.*

Ms. Parsons performed a head-to-toe examination of B.P., looking for evidence of sexual abuse. R. at 1199. The examination included using a colposcope to visually magnify B.P.'s genitalia and anus so that Ms. Parsons could more easily see whether there was any irritation or even small tears in the tissue. *See id.* Ms. Parsons did not find any physical evidence of sexual abuse. *Id.* at 1205. She deemed the results of the exam to be "normal." *Id.* at 1206. Ms. Parsons did not check or obtain B.P.'s vital signs, such as her temperature, heart and respiratory rate, or blood pressure. *Id.* at 1212-13. Ms. Parsons acknowledged a urinary tract infection can cause stinging and burning in a girl's genital area, and

that polyester underwear—like the kind B.P. wore—has been known to cause vaginal discomfort in young girls. *See id.* at 1213-14. Ms. Parsons also acknowledged under oath that she did not ask B.P. any questions about the alleged incident out of fear that B.P. would recant or make statements inconsistent with her child forensic interview. *Id.* at 1203, 1209. Despite the lack of any physical findings, and despite not asking B.P. any questions, Ms. Parsons diagnosed B.P. as a victim of sexual abuse. *Id.* at 1206.

Ms. Diana Faugno testified on behalf of the defense. Ms. Faugno is a nurse examiner and Sexual Assault Nurse Examiner with 30 years' experience in pediatrics. *Id.* at 1101. The court recognized Ms. Faugno as an expert in sexual assault forensic examinations ("SAFE") and in child development. *Id.* Ms. Faugno assessed Ms. Parsons' SAFE and her accompanying report, identifying several deficiencies. *Id.* at 1101-12. Ms. Faugno was particularly alarmed that Ms. Parsons had not ruled out alternative explanations for B.P.'s reports of burning and stinging sensations in her genital area. *Id.* at 1105, 1112. Ms. Faugno explained that urinary tract infections can cause pain upon urination, frequent urination, fever, and sometimes accidental urination (which had happened to B.P. during the relevant timeframe). *Id.* at 1106. UTIs can eventually heal without antibiotics, and can be exacerbated by both polyester underwear (which B.P. typically wore) and humid weather (such as the weather in North Carolina in July).

Id. at 1106-07. Even bubble baths and certain soaps can cause the kind of pain of which B.P. complained, but Ms. Parsons had not ruled out any of these alternatives. *Id.* at 1105. Compounding these deficiencies, Ms. Parsons had not taken B.P.'s vitals, preventing Ms. Faugno or any other medical provider from assessing whether B.P.'s pain may have been from a minor UTI. *Id.* at 1108-10.

D. Inconclusive, incomplete DNA analysis from B.P.'s clothing was unable to rule out any male person as a possible contributor.

The US Army Criminal Investigation Laboratory (USACIL) conducted DNA analysis on swabs taken from B.P. during the sexual assault forensic exam, as well as swabs from soiled underwear worn by B.P. R. at 1575-76, 1599. The various DNA tests were either negative or inconclusive. *Id*. at 1576-78, 1601. The only conclusions that could be drawn was that there was no semen present, and that there was male DNA on both the inside and outside of a pair of B.P.'s soiled underwear that Major P had collected and placed inside a plastic bag (along with other dirty laundry). *Id*. at 1576-77; *see also id*. at 1235. The source of this male DNA could not be determined. *Id*. at 1576, 1601. At trial, one of the Government expert DNA analysts—who performed follow-up testing—testified that the *outside* of B.P.'s underwear was not examined. *Id*. at 1602.

E. NCIS used Major P to make a pretext phone call to Colonel Wilson.

The day after B.P. purportedly accused Colonel Wilson of having inappropriately touched her—which the Government repeatedly called "Disclosure

Night" throughout the trial—law enforcement arranged a pretext phone between Major P and Colonel Wilson. R. at 956. The goal of the call was to get Colonel Wilson to confirm or deny the allegations against him. *Id.* When told of the allegations, Colonel Wilson said "[y]ou know that's crazy. You know that, right?" Pros. Ex. 6 at 1. Colonel Wilson repeatedly said that he was never alone with the girls, that he had been horse-playing with B.P. and her sisters but that he had never done anything inappropriate, that nothing had happened, that he "would never do that to any kid," and that while he understood the Ps' emotions "nothing untoward ever happened between" him and the girls. *Id.* at 1-6. Maj P was "disappointed" at the end of the call because Colonel Wilson had not confessed. R. at 957.

F. The government repeatedly interviewed B.P.

Approximately eight months after the purported sexual abuse, a different child forensic interviewer questioned B.P. R. at 1287. This follow-up interview took place at the recommendation of Dr. Mark Everson, who had been retained by the Government to assess the quality of the initial child forensic interview. *Id.* At the follow-up interview, B.P. claimed Colonel Wilson had licked her feet and hair, had struck her buttocks, and had offered her alcohol. Her twin sister M.P. also claimed Colonel Wilson had licked her, had struck her buttocks, and had offered her alcohol. Their older sister S.P. also claimed to have been offered alcohol by Colonel Wilson. The government never introduced any of these forensic

interviews into evidence at trial, leaving the members unaware of these contradictory claims.

G. The government tried Colonel Wilson for several unrelated, non-judicial punishment-level offenses which dated back to the time he spent in Australia.

In early 2016, Colonel Wilson assumed command of the Marine Rotational Force Battalion in Darwin, Australia. R. at 1743. After a "social gathering" with the outgoing CO and members of the Australian Defense Force where Colonel Wilson had been drinking, R. at 1744, the outgoing CO's wife remarked that her thighs were sore from a workout. R. at 1741. Colonel Wilson joked in response that she must have been having sex with her husband. *Id.* The government charged Colonel Wilson with conduct unbecoming an officer at a general court-martial—effectively a felony-level offense—for this off-color joke.

While in Darwin, Colonel Wilson reconnected with a friend and fellow former enlisted Marine assigned there, Captain B. R. at 1750, 1760. The two frequently talked on Facebook messenger, and in phone calls and text messages. R. at 1760-61. They would regularly send pictures back and forth of naked and scantily-clad women. R. at 1766. In one conversation, Colonel Wilson jokingly asked if Captain B had sent him a dirty picture of Ms. B. R. at 1762-63. Captain B, who did not believe this was an order to send a photograph, responded "What's your number. I might have some." R. at 1763, 1765. Colonel Wilson provided his number and messaged "[s]end pic, bro." R. at 1764. Captain B sent him a

boudoir-style photograph of Ms. B, and asked Colonel Wilson if the picture as good enough. R. at 1764, Prosec. Ex. 59. Colonel Wilson and Captain B kept socializing and discussing vulgar topics up to the time Colonel Wilson moved to Camp Lejeune. R. at 1774-75. The government charged Colonel Wilson with conduct unbecoming an officer for asking Captain B for a photograph of Ms. B.

Shortly after arriving in Australia, Colonel Wilson visited the apartment of the senior Australian Defense Force officer and counterpart, Commander M. R. at 1719, 1730. After they had exchanged instant messenger addresses and Colonel Wilson had "consumed a fair amount of alcohol," Colonel Wilson sent Commander M the photograph of Ms. B and told him it was Captain B's wife. R. at 1720. The government charged Colonel Wilson with conduct unbecoming an officer for sharing the photograph with Commander M.

Colonel Wilson shared an office with Australian Defense Force members Commander M, Major W, and civilian employee Ms. E. Colonel Wilson used Ms. E's computer to send an e-mail to Commander M in her name, asking Commander M for a date. R. at 1799-1800, Prosc. Ex. 58. Commander M viewed this as an inappropriate prank, R. at 1734, but the government decided to charge this as a general court-martial offense. Colonel Wilson told Major W about his personal and family issues, and her sent a strange Facebook message after she had accepted his friend invitation and had observed him drinking: "[y]ou pinched all my cash and

left a dead body in the boot of my renty [rental car]! Lol." R. at 1782-83, Prosec. Ex. 60. The government charged this as conduct unbecoming an officer.

H. The government tried Colonel Wilson for alleged offenses against J.W. and an unauthorized absence, in addition to alleged offenses against B.P. and M.P.

In addition to the allegations made by the P children, an adult woman—J.W.—claimed Colonel Wilson had sexually assaulted her during a trip from Camp Lejeune to Beaufort, South Carolina. J.W. also alleged Colonel Wilson had jumped on her multiple times and had, on more than one occasion, put his fingers inside her mouth. The government also charged Colonel Wilson with an unauthorized absence during his time at Camp Lejeune near the 2016 holidays.

The charges included, *inter alia*:

Charge I, Article 120b	**Charge II, Article 128**	**Charge IV, Article 133**	**Additional Charge I, Article 120**
~~Specification 1: digitally penetrating B.P.'s vulva~~	~~Specification 1: licking B.P.~~	~~Specification 7: offering B.P. alcohol~~	~~Specification 1: digitally penetrating J.W.'s vulva~~
Specification 2: touching B.P.'s genitalia with his hand	~~Specification 2: striking B.P.'s buttocks with his hands~~	~~Specification 8: offering M.P. alcohol~~	~~Specification 2: digitally penetrating J.W.'s vulva~~
~~Specification 3: kissing B.P.~~	~~Specification 3: striking M.P.'s buttocks with his hands~~	~~Specification 9: offering S.P. alcohol~~	~~Specification 3: digitally penetrating J.W.'s anus~~
	~~Specification 4: licking M.P.~~		~~Specification 4: digitally penetrating J.W.'s anus~~

The members found Colonel Wilson not guilty of all of charges and specifications crossed out above; including all alleged misconduct against J.W. The members only but found him guilty of the Australia offenses and the unauthorized absence offense not in the table, and Charge I, Specification II involving B.P. R. at 2060.

I. B.P. testified at trial.

At trial, the Government called Major P, Mrs. P, the three P girls, and various expert witnesses to testify. B.P. testified that she remembered going to the Wilsons' house and playing a game called "washers." R. at 1139.[1] Trial counsel asked B.P., "Were there things that you didn't like about going to Mr. Dan's house?" *Id*. B.P. answered, "He touched me somewhere I didn't like." *Id.* After the military judge sustained an objection to trial counsel's leading question ("Did he touch you on your privacy?"), trial counsel asked B.P. where on her body had Colonel Wilson touched her. *Id.* B.P. responded, "My private part." *Id*. at 1140.

While B.P. initially said she did not remember details about the alleged touching, she ultimately testified that Colonel Wilson had touched her while she sat on his lap and that it "just felt like he was touching me with his hand." *Id.* at 1141-42. During the Government's case-in-chief, B.P. testified that Colonel Wilson had "touched [her] somewhere [she] didn't like." *Id*. at 1139. In response

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[1] "Washers" is a game similar to cornhole.

to trial counsel's follow-up questions, B.P. said that Colonel Wilson had touched her "private part" with his hand while she was sitting on his lap. *Id*. at 1140-42. She also testified that Colonel Wilson had licked her, on her foot, hands, and hair. *Id.* at 1142, and had touched her once "inside" her, but she could not remember what this touching felt like. *Id*. at 1144.

On cross-examination, B.P. said she had been in the courtroom before—having practiced her testimony twice. *Id.* at 1148-49. Defense counsel then asked B.P. if she had talked with her parents, prior to trial, about testifying:

> Q. Did you talk to other people about – like, your mom and dad, did you talk to them about in to testify?
>
> A. Yes
>
> Q. Did you talk about what you were going to say?
>
> A. Yes – or, sort of, yeah.
>
> Q. Maybe not exact words, but, sort of, the stuff?
>
> A. Yeah.
>
> Q. Did they ever tell you about anything that was important to make sure that these men knew?
>
> A. Yes.
>
> Q. And it's important to get that stuff, right?
>
> A. Yeah.

Id. at 1150. Defense counsel did not cross-examine B.P. on any inconsistencies between her in-court testimony and prior statements she had made, such as during her two child forensic interviews. *See id.* at 1148-53.

J. The military judge also admitted one of B.P.'s video interviews, the only interview the government sought to admit.

Near the conclusion of the Government's case-in-chief, trial counsel again moved to admit the video of the child forensic interview as residual hearsay. The Government argued the video met the third prong of MILITARY RULE OF EVIDENCE (M.R.E.) 807, commonly called the "necessity prong." Trial counsel argued the video would clear up inconsistencies from B.P.'s in-court testimony, and that the video's admission was necessary to dispel the possibility that Colonel Wilson allegedly had touched B.P. on "Disclosure Night" when he was in a room full of other adults. R. at 1310. Trial counsel specifically asserted, "So if we're going to be stuck with 'this happened on disclosure night,' that's going to be a significant impediment for the government to prove its case." *Id*.

Rather than address the Government's argument regarding residual hearsay, the military judge *sua sponte* raised whether the defense's cross-examination of B.P. had opened the door to the admission of the video as a prior consistent statement under M.R.E. 801(d). *Id.* at 1326. The military judge asserted "[t]he defense put in front of the members a possible improper influence" when asking B.P. about having practiced her testimony in the courtroom prior to trial, adding

that "[t]he implication is clear that by meeting with [trial counsel], that somehow the kids were coached, influenced in some way prior to their testimony in court." *Id.* at 1313.

Defense counsel responded to the military judge's *sua sponte* assertion by arguing the defense did not imply a motive to fabricate by simply asking whether B.P. had practiced her testimony. *Id*. at 1326-27. Instead, the question was to demonstrate why B.P. may not have felt as comfortable when answering questions from defense counsel as opposed to when she was questioned by trial counsel. *Id.* The defense further noted that counsel had never impeached B.P. on prior inconsistent statements, and objected to the military judge "coming up with avenues for the government to introduce evidence, considering the government didn't even raise the prior consistent statement" method of admission. *Id.* at 1327-28". The military judge conceded his decision to *sua sponte* raise the applicability of M.R.E. 801(d) would "be an appellate issue, potentially." *Id.*

Ultimately, the military judge admitted the video of B.P.'s child forensic interview as both residual hearsay and as a prior consistent statement. *Id.* at 1335. The judge specifically found M.R.E. 807's necessity prong was satisfied because B.P. was unable to fully remember the details of the alleged touching incident(s) when she testified in-court. *Id.* at 1335. The video, admitted as Prosecution

Exhibit 34, ultimately was played for the members and provided to them for their deliberations.

K. Experts disagreed on the quality of the admitted video interview of B.P.

Both the Government and the defense called several expert witnesses to opine on whether the questions posed to B.P. during the video were suggestive. Linda Steele, who testified on behalf of the Government as an expert in evaluating child forensic interviews, testified that some of the questions asked by Ms. Pogroszewski were "less than ideal"—such as the question about whether the alleged touching was over or under B.P.'s clothes. R. at 1827-29.

Dr. Mark Everson also testified for the Government, grading Ms. Pogroszewski's interview as an A in general, but a B+ under the specific interview protocol he typically used. *Id.* at 1390. While he did not believe Ms. Pogroszewski had asked any *inappropriately* suggestive questions, he acknowledged "there were times where there needed to be follow-up questions, or alternatively, a second interview to follow up." *Id.* He also acknowledged that the term "cupping" had come from Mrs. P, that the idea that B.P. had been touched under the clothes was first introduced by Ms. Pogroszewski, and that Mrs. P's threat to stab Colonel Wilson with a knife—overheard by B.P.—could create a "negative stereotype" of the colonel in B.P.'s mind. *Id.* at 1411, 1421.

The defense called Dr. Jacqueline Bashkoff to share her assessment of the child forensic interview. The court recognized Dr. Bashkoff as an expert in forensic psychology, child abuse and maltreatment, and child forensic interviewing. *Id.* at 1869. Dr. Bashkoff testified there were significant problems with the interview that had been played for the members. For example, she testified that Ms. Pogroszewski occasionally showed bias and had suggested that something improper had been done to B.P., such as when Ms. Pogroszewski told B.P. that she was "safe" and "brave" and that Ms. Pogroszewski's job is "to protect children." *Id.* at 1875. These statements, explained Dr. Bashkoff, communicated to B.P. that "something ominous happened." *Id.*

Dr. Bashkoff also pointed out that (1) Ms. Pogroszewski never asked B.P. about what Mrs. P had said in the Wilsons' bathroom, and (2) Ms. Pogroszewski is the one who introduced the word "lap," the concept of B.P. having been touched under the clothes, and the concept of the incidents possibly happening more than one time. *Id.* at 1878-81. Dr. Bashkoff also criticized Ms. Pogroszewski's failure to follow up with B.P., such as Ms. Pogroszewski's failure to clarify whether B.P. had sat in Colonel Wilson's six times vs. having been touched inappropriately six times, her failure to ask B.P. whether she thought that "Mr. Dan" had meant to hurt her, and her failure to clarify with B.P. what B.P. had meant when she said that Colonel Wilson had "pushed" her. *Id.*

L. The members reached ambiguous findings on Charge I, Specification 2.

At the conclusion of findings, the members were given a charge sheet to guide their deliberations. The charges largely reflected those charges that had been preferred against Colonel Wilson and referred to court-martial. Significant for the purposes of this appeal, Charge I, Specification 2 was phrased as follows:

> Did, on board Camp Lejeune, North Carolina, on divers occasions, between on or about 26 June 2016 and on or about 13 July 2016, commit a lewd act upon B.P., a child who had attained the age of 12 years, by touching the genitalia of B.P. with an intent to arouse or gratify the said Colonel Wilson's sexual desire.

The specification did not follow the model specification listed in the MANUAL FOR COURTS-MARTIAL in that it did not include the language "directly or through the clothes." The members were instructed, however, that one of the elements of the offense was that Colonel Wilson touched B.P. either directly or through the clothes. R. at 1939. The findings worksheet provided to the members contained a provision to find Colonel Wilson guilty of Specification 2 by exceptions and substitutions, but only as to whether he had committed the offense on divers occasions. The members found Colonel Wilson guilty of Charge I, Specification 2, without any amendments or explanation.

Summary of Argument

I. This Court should overturn Colonel Wilson's Article 120b conviction because a fresh, impartial look at the evidence presented at trial cannot leave this

Court convinced beyond a reasonable doubt that Colonel Wilson touched B.P.'s genitalia with the intent to gratify his sexual desires. Even in the light most favorable to the Government, the Article 120b conviction is legally insufficient because of the lack of evidence for *mens rea*.

II. The government failed to state in Charge I, Specification 2 whether Colonel Wilson was charged with touching B.P. above or beneath her clothing. This created a notice issue, and an ambiguous finding in violation of Article 66.

III. The military judge abused his discretion in admitting B.P.'s video interview as residual hearsay: both since B.P. testified at trial to all elements of the alleged offenses that the government asked about, and because the video lacked sufficient circumstantial guarantees of trustworthiness to be reliable. The military judge also abused his discretion by admitting the interview as a prior consistent statement under MIL. R. EVID. 801(d)(1)(B), where the hearsay statements made during the child forensic interview came *after* the alleged improper influence first arose.

IV. The military judge plainly abandoned his role to impartially oversee Colonel Wilson's case when he *sua sponte* suggested B.P.'s video interview was admissible as a prior consistent statement, or as a past recollection recorded.

V. The military judge abused his discretion in admitting Ms. P's statement that Ms. Wilson had told her "concerning" and "shocking" things about Colonel Wilson's behavior, and that was why she suspected Colonel Wilson had touched

B.P. Nothing Mrs. P had learned—that he purportedly wanted Mrs. Wilson to have a threesome with another woman and "a big black guy"—involved children. Any low probative value was thus substantially outweighed by the danger of unfair prejudice that the members would unfairly assume that Colonel Wilson must have prior bad acts against children.

VI. The military judge abused his discretion in refusing defense's request for a mistrial, where trial counsel's opening statement violated Colonel Wilson's constitutional right to a fair trial in three ways: by referencing evidence deemed inadmissible prior to trial; by showing the members a photograph of Colonel Wilson riding a motorcycle with a minor girl not a charged victim to suggest he harmed children; and, by forcing admission of B.P.'s child video interview.

Argument

I.

THIS COURT MAY ONLY APPROVE FINDINGS OF GUILTY THAT ARE CORRECT IN LAW AND FACT. IN CHARGE I, SPECIFICATION II, THE GOVERNMENT CHARGED COLONEL WILSON WITH TOUCHING THE GENITALIA OF B.P., A CHILD UNDER 12 YEARS OLD, WITH THE INTENT TO SATISFY HIS SEXUAL DESIRES. BUT THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THAT HE HAD THIS REQUIRED SPECIFIC INTENT AT ANY TIME HE MAY HAVE TOUCHED HER GENITALIA OVER-THE-CLOTHES. COLONEL WILSON'S CONVICTION FOR CHILD SEXUAL ABUSE WAS NOT FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

Under Article 66(c), UCMJ, this Court can only approve findings of guilty that it determines to be correct in both law and fact. Issues of legal and factual sufficiency are reviewed *de novo*. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

This Court's powers under Article 66(c) serve as a powerful prophylactic against Government abuse and ensure that servicemembers are convicted by proof beyond a reasonable doubt. This authority provides "a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004). This Court's Article 66(c) powers extend even to full-bird colonels accused of offenses against children and is particularly critical in the kind of high-visibility and highly emotional case at bar.

In determining whether Colonel Wilson's conviction for sexually abusing B.P. is factually sufficient, this Court must "weigh[] the evidence in the record of trial and mak[e] allowances for not having personally observed the witnesses" and, ultimately, be convinced of Colonel Wilson's guilt beyond a reasonable doubt. *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). In conducting its

review, this Court must take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. Unlike with factual sufficiency, in assessing the legal sufficiency of a conviction this Court considers "the evidence in the light most favorable to the prosecution" and determines whether "a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002).

NCIS' exhaustive investigation yielded no physical evidence or corroborating eyewitness testimony that Colonel Wilson ever touched B.P.'s genitalia—let alone any evidence whatsoever that he did so with criminal intent. All the government presented were equivocal claims by B.P., mostly in videos made long after the alleged events, and encouraged by her mother.

A. Colonel Wilson did not touch B.P. inappropriately.

B.P. was never clear about *when* Colonel Wilson allegedly touched her genitalia, particularly whether it occurred on 12 or 13 July. The timeline is particularly important in this case, as Colonel Wilson was never fully left alone with B.P. *See* R. at 912, 974, 998, 1018, 1255. On the relatively few occasions when Colonel Wilson interacted with B.P., an adult was always present, either

under the same roof or in the same backyard. *See id.* at 984, 998. On many occasions, in fact, another adult actually was in the same room as Colonel Wilson and B.P. For example, on the night Mrs. P interrogated B.P. P in the Wilsons' bathroom, at least one adult—Dr. Ashley, Major P, or Mrs. P—was in the same room with Colonel Wilson and B.P. at all times. *Id.* at 912, 1018, 1255. As such, either Colonel Wilson—a decorated Marine with no history of any sexual abuse—is so brazen that he would molest a little girl in the presence of her parents or her parents' friend; or, the purported touching never occurred on 13 July.

One of many problems with the Government's case, however, is that trial counsel *did* present evidence that the alleged unlawful touching occurred on 13 July. Critically, in the recorded child forensic interview played for the members, B.P. told Ms. Pogroszewski that Colonel Wilson "started doing inappropriate things" on the night that Colonel Wilson asked Mrs. P to sit on his lap. Pros. Ex. 35 at 9 (B.P. said, "Well, he kind of wanted my mom to sit on his lap. And then my mom said no. And then I went on his lap, and then he started doing inappropriate things to me). As Dr. Ashley made clear, he was present when Colonel Wilson asked Mrs. P to sit on his lap, and the only night Dr. Ashley was at the Wilsons' house was on 13 July. R. at 1268.

During admitted video interview, which took place on 14 July—the day after the alleged "disclosure"—B.P. detailed sitting on Colonel Wilson's lap the night

before and how he used his hands to "scoot" her up. Pros. Ex. 35 at 10. Ms. Pogroszewski asked B.P. whether the touching happened on "different days or different times or something else," to which B.P. responded "*[o]nly one day*." *Id.* (emphasis added). Even the expert hired by the Government to review B.P.'s interviews testified that B.P. was consistent that the touching occurred on 13 July ("Disclosure Night"), and her father and sisters were in the room. R. at 1427.

Law-enforcement officials observed the child forensic interview on 14 July. Apparently concerned about B.P.'s continued insistence that Colonel Wilson had touched her inappropriately only once and that it had happened on 13 July, these officials directed the child forensic interviewer (Ms. Pogroszewski) to get B.P. to provide alternate dates for the purported abuse. This attempt to avoid a timeline in which the alleged touching occurred on 13 July, is reflected by the question Ms. Pogroszewski asked immediately after returning from having conferred with law enforcement. Specifically, Ms. Pogroszewski asked B.P. if "anything" had happened the day before the interview (13 July) while she sat on Colonel Wilson's lap, to which B.P. incongruously said, "No." Pros. Ex. 35 at 14. Then Ms. Pogroszewski asked, "Well, when you were talking about the things that he did about sitting on your lap, did you sit on his lap more than one time and he did something inappropriate?" *Id.* at 15. B.P. said, "Maybe like six times." *Id.* But

Ms. Pogroszewski's question about the number of times B.P. had sat in Colonel Wilson's lap and something inappropriate happened, was extremely problematic:

First, the question is compound, so it never clear whether B.P.'s response—"maybe like six times"—refers to the number of times she sat in Colonel Wilson's lap, or the number of times he allegedly did something "inappropriate" (whatever that means), or both. Second, because Ms. Pogroszewski never clarifies with B.P. what "maybe six times" meant, the end result is a timeline that is, at best, a jumbled mess or, at worst, a fabrication. Under either scenario, this Court cannot be convinced beyond a reasonable doubt that Colonel Wilson ever touched B.P. "inappropriately" when B.P. said he did.

At trial, the Government theorized Colonel Wilson did not touch B.P.'s genitalia on 13 July, but rather had *possibly* done so on other dates, such as 3 July, 8 July, or 12 July R. at 996. But just as Colonel Wilson was not alone with B.P. on 13 July, he was not alone with her on any of these other occasions. On all of the dates identified by the Government as possible times when Colonel Wilson allegedly abused B.P., either or both Mrs. P or Major P were present.

For example, on 8 July, Mrs. P and the girls went over to the Wilsons' house for dinner. R. at 996-97. Major P could not come due to a work emergency. *Id*. at 997. Mrs. P testified she was in the kitchen with Mrs. Wilson for most of the

night, purportedly with her back to the living room[2]—where Colonel Wilson and the girls were playing. *Id*. at 998. But the Wilsons' house had an open floorplan, with the kitchen opening up to the living room. As such, while Colonel Wilson may have been "alone" with the girls in the sense that another adult was not sitting two feet from him for the entire night, there still were adults—including Mrs. P—within eyesight of where he and the girls were playing and interacting. Again, either Colonel Wilson is so brazen that he abused B.P. while her mother was essentially in the same room (to say nothing of B.P.'s siblings actually being in living room with him), or the touching itself never happened.

The Government also advanced a vague theory that Colonel Wilson's use of a bathroom located in the maid's quarters of his home somehow demonstrated that he had sexually abused B.P. The Wilsons' house had three toilets and bathroom sinks: one in the master suite, one in a room called the "maid's quarters," and one right off the kitchen. Mrs. P testified that, on some of the nights when she and her daughters were visiting the Wilsons, Colonel Wilson would absent himself from

[2] Mrs. P's claim that she sat with her back to the living room the entire time she was at the Wilsons' house not only defies logic, but is contradicted by her own testimony. For example, on the night of "problems at the barracks" (8 July), Mrs. P claimed she sat in the kitchen with Mrs. Wilson with her back to the rest of the house. R. at 1012. But Mrs. P testified that she saw Colonel Wilson go into the maid's quarters (at the opposite end of the Wilsons' house from the kitchen), and saw B.P. "peering around the corner looking for him." R. at 1012. Given the layout of the Wilsons' house, Mrs. P could not have observed these activities if her back was to the living room.

the living room—where he had been playing with B.P.—and disappear into the maid's quarters for up to five minutes at a time, and that on at least one occasion he washed his hands in the bathroom next to the kitchen immediately before going into the maid's quarters. R. at 1000-01, 1012.

This was not evidence of anything more than Colonel Wilson using the toilet in the maid's quarters—a reasonable explanation given the proximity of the other toilet to the kitchen, where Mrs. P and Mrs. Wilson were. Not a single witness testified that Colonel Wilson went into the maid's quarters or any of the bathrooms alone with B.P., making this no proof beyond a reasonable doubt of any touching.

B. Colonel Wilson did not touch B.P.'s genitalia.

The Government needed to prove beyond a reasonable doubt that Colonel Wilson touched B.P.'s genitalia, but the evidence presented on this point could not have left a reasonable person firmly convinced. During the child forensic interview, B.P. claimed Colonel Wilson had touched her "private." Pros. Ex. 35 at 9. When Ms. Pogroszewski asked her to clarify "what private you're talking about," B.P. said that she went "potty with it." *Id.* But Ms. Pogroszewski never clarified what B.P. meant by going "potty" with it. This failure is all the more problematic considering that, later in the interview, Ms. Pogroszewski asked B.P. what B.P. called the private part that was touched. *Id.* at 13. B.P. said, "Well, I

usually call it, 'bottom.'" *Id.* As the defense's expert witness in child development and child forensic interviews explained to the members,

> Now, I would have like[d] a lot more clarification. The bottom – is that a buttocks? Is bottom the butt? What kind of potty? Tell me a little bit more about what you use that part for. I know that is to go potty, but tell me a little bit more because I'm not really sure what you're saying. So we still don't [k]now.

R. at 1883.

Adding to the reasonable doubt that Colonel Wilson touched B.P.'s genitalia is the sequence during the child forensic interview when Ms. Pogroszewski laid out an anatomical drawing and asked B.P. to mark where she had been touched. As noted by the defense expert, B.P. "doesn't immediately go to the vagina. She does look at both and then does the circle." *Id.* The military judge never explains B.P.'s hesitation, nor does he ever reconcile B.P.'s use of the words "bottom," "privates," and "potty" to describe where Colonel Wilson allegedly touched her.

While B.P. was just six years old at the time of the interview, the Government's own expert in child psychology observed that B.P. was intelligent for her age and articulate. R. at 1832. Significantly, that intelligent, articulate girl described the body part that Colonel Wilson touched in a way that reasonably could have referred to her buttocks. Of course, the Government did not charge Colonel Wilson with sexually abusing B.P. by touching her buttocks; instead, the Government charged him with touching B.P.'s genitalia.

Compounding this is the complete lack of physical evidence in this case. As Ms. Faugno—the defense's recognized expert in sexual assault forensic exams—testified, however, if a patient complains about burning and stinging sensations, "you might see abrasion or focal redness." *Id*. at 1105. Despite B.P. claiming to feel a burning sensation, and despite using a special tool (the colposcope) to visually magnify B.P.'s vulva and anus, there were no findings of any disturbance from the sexual assault forensic exam. R. at 1206.

Not only were there no anomalous physical findings from the extensive head-to-toe exam, there was no DNA evidence presented establishing that Colonel Wilson had touched B.P.'s genitalia. Even the Government's own DNA analysts testified there was no male DNA on the vaginal swabs collected from the 14 July sexual assault forensic exam—and that while there was male DNA on the soiled underwear, it did not match Colonel Wilson's. *Id*. at 1576-78; *see also id*. at 1601.

Due to the absence of physical evidence, the Government's case rested almost entirely on B.P.'s in-court testimony, and the erroneously admitted video interview. But as discussed *supra*, B.P. was not clear in her claims about where she had been touched—certainly not clear enough for the Government to meet its extraordinarily high burden of proof.

<u>C. The government did not prove that Colonel Wilson intended to arouse his sexual desires by any touching of B.P.</u>

Even touching of areas normally under clothing is not illegal unless it is accompanied by sexual intent. *See*, *e.g.*, *United States v. Loeffler*, 2016 CCA LEXIS 331, at *11-12 (N-M. Ct. Crim. App. May 31, 2016) (finding Loeffler's conviction for aggravated sexual contact—touching his wife's outer thigh while ripping off her underwear—factually insufficient because the government failed to prove beyond reasonable doubt that Loeffler "intended to arouse or gratify" his sexual "desires through the specific touching of his wife's outer thighs").

In fact, as Article 120b recognizes, not every touch of a child's genitalia is illegal. The touching of a child's genitalia, if it occurs at all, is illegal only if done with (1) the intent to gratify someone's sexual desires or (2) with the intent to abuse, humiliate, harass or degrade any person. MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2016), Part IV, ¶45b.b(4)(a)(ii). Here, the Government charged Colonel Wilson with touching B.P.'s genitalia with the intent to gratify his sexual desire. In many cases, this intent can be inferred: there is evidence the accused was visibly aroused, there is recovered physical evidence (such as seminal fluid); or, there are inculpatory statements.[3]. In other cases, an accused's intent

[3] *See*, *e.g.*, *United States v. Guin*, 75 M.J. 588, 594-95 (N-M. Ct. Crim. App. 2016) (finding shower with victim, victim towel-dried her nude father, and accused had history of sexually abusing his own children); *United States v. Whitley*, No. 201500060, 2016 CCA LEXIS 188, *11-12 (N-M. Ct. Crim. App., Mar. 29, 2016)

can be inferred from the circumstances under which he touched the victim.[4] But here, none of these scenarios apply.

Despite an exhaustive investigation, the Government did not present any evidence that Colonel Wilson was aroused, that he had any history of abusing

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(unpub. op.) (finding convictions for sexually abusing two children demonstrated legally and factually sufficient "intent to. . . arouse or gratify his own sexual desires" where (1) his ritualistic spanking was strikingly similar to his sexual activities with his adult partners; and (2) he possessed and viewed sadistic child pornography focused on spanking); *United States v. Rambharose*, No. ACM 38769, 2016 CCA LEXIS 756, *9-10 (A.F. Ct. Crim. App., December 15, 2016) (unpub. op.) (finding accused's conviction for abusive sexual contact both legally and factually sufficient where he intentionally touched victim's breast immediately after victim said, "I thought you were going to grope me," which "indicates [his] sexual state of mind"); *United States v. Winston*, 2014 CCA LEXIS 757, *12-13 (A.F. Ct. Crim. App., October 8, 2014) (unpub. op.) (finding abusive sexual contact conviction legally and factually sufficient because factfinder "could infer . . . intent to gratify his sexual desires" where accused kissed one victim shortly before touching her breast and genitalia and where he told another victim that he would "tear that ass up"); *United States v. Webb*, No. 891724, 1991 CMR LEXIS 817, *10-11 (N-M.C.M.R. May 31, 1991) (unpub. op.) (finding that accused touched victim's thigh with intent to gratify his sexual desire where he was found pinning victim underneath a bed, and had earlier in the evening propositioned young boys for oral sex).accused's conviction for abusive sexual contact was legally and factually sufficient in light of evidence that accused's semen and male DNA was found on inside of victim's underwear); *United States v. Wilson-Crow*, No. ACM 38706, 2016 CCA LEXIS 107, *12-13 (A.F. Ct. Crim. App., February 25, 2016) (unpub. op.), *vacated on other grounds*, 76 M.J. 334 (C.A.A.F. 2017) (citing testimony that accused's penis was partially erect as "sufficient circumstantial evidence for a reasonable factfinder to conclude that he exposed himself to gratify his sexual desires")

[4] *See*, *e.g.*, *United States v. Tanksley*, 54 M.J. 169, 173-77 (C.A.A.F. 2000) (finding accused's conviction for taking indecent liberties with his six-year-old daughter legally sufficient on the issue of "appellant's intent to arouse, appeal to, or gratify his sexual desires" where he took a

children, that he had any predilection or sexual interest in children (e.g. in child pornography), or that he engaged in other pseudo-romantic behavior such as by kissing. Nor was there any physical evidence—such as semen—that would have allowed a factfinder to conclude beyond a reasonable doubt that Colonel Wilson possessed the requisite *mens rea* to be guilty of sexual abuse of a child.

D. The government's "grooming" expert testimony is circular reasoning insufficient to prove any sexual intent.

Instead of presenting evidence to support a finding of having the intent to gratify sexual desires, the Government presented "grooming" testimony from their expert forensic psychologist, Dr. Everson. Over defense objection, the military judge allowed Dr. Everson to testify that child sex abusers often "groom" their victims by plying them with gifts, compliments, and attention. R. at 1280. Dr. Everson's insinuation was clear: that by befriending the Ps and their daughters, by buying the girls the occasional gift, by helping Major P set up a trampoline for the girls, by showing them attention, and by playing with them, Colonel Wilson set the Ps up for his supposed sexual advances. Thus, went the Government's theory, because Colonel Wilson was "grooming" B.P. to be a victim of sexual abuse, he surely *must* have intended to arouse his sexual desires when—so he therefore must have sexually abused B.P.

This alleged "grooming" behavior is so broad and innocuous that, standing alone, it cannot constitutionally establish that an accused had the requisite criminal

mens rea. Moreover, it is circular on the issue of intent. As even Dr. Everson acknowledged, purported "grooming" behaviors are much easier to detect in retrospect and are similar "to innocent behavior intended to broaden a young person's experience." R. at 1285-86. In other words, because he touched B.P.'s genitalia, Dr. Everson argued that Colonel Wilson's behaviors must have been grooming. At the same time the government argued that because Colonel Wilson's behaviors were grooming, he must have touched B.P.'s genitalia with intent to gratify himself.[5] The fact that Colonel Wilson bought B.P. and her sisters some gifts and helped their father set up a trampoline does not prove beyond a reasonable doubt that he intended to gratify his sexual desires when he allegedly touched B.P.'s genitalia.

Relief Requested

This Court should set aside the finding of guilty to Charge I, Specification 2; and order a sentence rehearing. *See United States v. Winkelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

[5] During its findings argument, other than referencing Colonel Wilson's supposed "grooming" behavior, the Government never argued he had touched B.P. with the intent to arouse his sexual desire. Not only did trial counsel never mention the words "sexual," "desire," or "intent" as it relates to B.P., but trial counsel never even advanced the theory that Colonel Wilson must have had the requisite *mens rea* simply by virtue of purportedly touching B.P.'s genitalia. R. at 2009 ("Dr. Everson talked about how adults will place themselves in a child's life, become a trusted person–gifts, attention–and then ramping up of touching").

II.
A CHARGED SPECIFICATION MUST STATE ESSENTIAL ELEMENTS OF THE OFFENSE TO PROTECT CONSTITUTIONAL RIGHTS TO NOTICE AND THE PROTECTION AGAINST DOUBLE JEOPARDY. IN CHARGE I, SPECIFICATION II, THE GOVERNMENT DID NOT INCLUDE THE ENTIRETY OF THE FIRST ELEMENT, SPECIFICALLY NEGLECTING TO CHARGE HIM WITH TOUCHING B.P. "DIRECTLY OR THROUGH THE CLOTHING." THIS FAILURE TO STATE AN OFFENSE DEPRIVED COLONEL WILSON OF CONSTITUTIONAL RIGHTS, AND REQUIRES THIS COURT TO SET ASIDE THE CONVICTIONS.

Standard of Review

"Whether a charge and specification state an offense is a question of law that [this Court] review[s] *de novo*." *Guin*, 75 M.J. at 592. Whether a finding of guilt is ambiguous is reviewed *de novo*. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). When a defect in a specification is raised for the first time on appeal, "dismissal of the affected charges or specifications will depend on whether there was plain error[.]" *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012) (citation omitted). The test for plain error is whether "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009) (internal quotation marks and citation omitted).

Law & Analysis

An ambiguous finding of guilt precludes a legal and factual sufficiency review under Article 66(a). *Walters*, 58 M.J. at 396. In *Walters*, the accused was charged with divers uses of ecstasy. *Id.* The members found him guilty, by exceptions, of just one use—but did not specify which particular use formed the basis for the conviction. *Id.* Given the uncertainty, the C.A.A.F. explained that, "[w]ithout knowing which incident the Accused had been found guilty of and which incidents he was found not guilty of," it was "impossible" for the Court of Criminal Appeals to review for legal and factual sufficiency. *Id.*

The military is a notice-pleading jurisdiction. A specification is sufficient only if (1) it "contains the elements of the offense and fairly informs a defendant of the charge against which he must defend," and (2) it "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (internal quotation marks and citations omitted).

The elements of Article 120b, *Sexual Abuse of a Child*, are as follows:

> (i) That the accused committed sexual contact upon a child by touching, or causing another person to touch, *either directly or through the clothing*, the genitalia . . . . of any person; and
>
> (ii) that the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

MCM, Part IV, ¶ 45b(b)(4)(a) (emphasis added). The model specification incorporates these elements as follows:

> In that (personal jurisdiction data), did (at/on board location), on or about ______, 20__, commit a lewd act upon __________, a child who had not attained the age of 16 years, by intentionally [(touching) (causing ________ to touch)] ***[(directly) (through the clothing)]*** the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _________, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___________________.

Id. at ¶ 45b(f)(4)(b) (emphasis added).[6]

Here, the Government failed to specify whether Colonel Wilson touched B.P. directly or through the clothing. *Cf. United States v. Armstrong,* 77 M.J. 465, 2018 CAAF LEXIS 366, at *12 (C.A.A.F. 2018) ("The Specification averred that Appellant "did . . . commit sexual contact upon [a woman]., to wit: touching through the clothing the genitalia . . . .) (first alteration in original). This failure to commit to a theory of touching created a notice issue as in *Reese*. Not only was Charge I, Specification 2 insufficient to provide notice, but it resulted in an ambiguous finding that makes it impossible for this Court to determine whether the conviction is factually and legally sufficient.

[6] In the electronic version of the 2016 MCM, the model specification is improperly printed with subsection (b) swapped with (c).

A. The specification as drafted was insufficient to provide notice, and therefore materially prejudiced Colonel Wilson's rights.

In *United States v. Reese*, the Court of Appeals for the Armed Forces reviewed a change the government made to the lewd act on a child ("EV") that it had alleged in an Article 120b specification; the specification originally charged Reese "with committing a lewd act upon EV . . . 'by licking the penis of EV with [Reese's] tongue." 76 M.J. 297, 299 (C.A.A.F. 2017) (third alteration in original). At trial, the government amended this language to "touching the penis of [EV] with [Reese's] hand. *Id.* The Court of Appeals of the Armed Forces (CAAF) held that this change—from alleging Reese committed a lewd act *by* licking EV's penis with his tongue, to alleging Reese committed a lewd act *by* touching EV's penis with his hand—was a "major" change requiring a new preferral because of lack of notice. *Id.* at 301.

The CAAF rejected the argument that "Reese was on notice of the potential change in the charge because he was aware of the nature of EV's testimony"—that Reese had used his hand to touch EV's penis. *Id.* The CAAF questioned "whether Reese was on notice that he would need to defend against a touching [by hand] charge, since it was not alleged." *Id.*

In *United States v. Dear*, the Court of Military Appeals held that the "standard for determining whether a specification states an offense" is determined by "a three-prong test requiring (1) the essential elements of the offense, (2) notice

of the charge, and (3) protection against double jeopardy." 40 M.J. 196, 197 (C.M.A. 1994); *see also Guin*, 75 M.J. at 592. The first element of sexual abuse of a child required the Government to prove Colonel Wilson touched the B.P.'s genitalia either *directly or through the clothing*. In fact, the military judge instructed the members that an element of Charge I, Specification 2 was that Colonel Wilson touched B.P. either directly or through the clothing. R. at 1939. While an accused *can* be found guilty of sexual abuse of a child under either scenario—by either touching the child's genitalia directly (i.e., skin on skin) or touching the child's genitalia through the clothes—the military's notice-pleading rules required the Government to allege which of these theories the prosecution intended to pursue at trial. *See Reese* 76 M.J. at 301; *Fosler*, 70 M.J. at 229.

In *United States v. Wilkins*, the CAAF stated "the failure to expressly allege a specific body part in a specification may render such a mistake prejudicial." 71 M.J. 410, 414 n.3 (C.A.A.F. 2012). This is such a case where it was plain error for the military judge to both (1) tacitly permit the Government to proceed to findings with a fatally insufficient specification and (2) provide the members with a charge sheet (just prior to closing for deliberations) that contained the flawed specification. First, the Government erred in failing to charge an element of the offense, thereby subjecting Colonel Wilson to the possibility of future prosecution. That error was plain and obvious. While model or sample

specifications are not law, they do serve as valuable guidance—guidance that is readily available to military justice practitioners, and here, that guidance required the Government to allege whether the touching was direct or through the clothes. *See* MCM, Part IV, ¶ 45b(f)(4)(b).

B. The deficient specification precludes a full Article 66 review, which is inherently prejudicial to Colonel Wilson's rights.

Whether Colonel Wilson touched B.P. directly on her genitalia or through her clothes is not academic. It is perhaps the difference between the Article 120b conviction surviving the factual and legal sufficiency challenge or being dismissed with prejudice. If the members were firmly convinced that Colonel Wilson intentionally touched B.P. *directly* on her genitalia, there would be little reason for an adult man to directly touch a six-year-old girl's genitalia other than to gratify his sexual desires.

But had the government not alleged direct touching, there are many non-sexual, innocent reasons why an adult male could touch the genitalia *through the clothing*—such as readjusting a child sitting on his knee and lap. Critically, the Government did not present any evidence that Colonel Wilson was sexually aroused when he purportedly touched B.P. As such, the only way in which the Article 120b conviction survives a factual and legal sufficiency challenge is if his intent can be inferred. That intent, however, cannot be inferred if the members

convicted him of touching B.P. only through her clothes, as doing so would not be indicative of sexual gratification.

It is reasonable to believe that the members were *not* firmly convinced Colonel Wilson touched B.P.'s genitalia directly: they acquitted him of Charge I, Specification 1, despite being instructed that any penetration, however slight, would amount to a sexual act. R. at 1939. Further, there was no physical evidence of direct contact. The government recovered no DNA recovered from B.P.'s vaginal swabs, and there were no physical findings from the head-to-toe sexual assault forensic exam. While B.P. eventually claimed during the child forensic interview, that Colonel Wilson had "[s]ometimes" touched her under her clothes, it was only after the interviewer (Ms. Pogroszewski) pressed B.P.—a tactic both the Government and defense experts on child forensic interviews found to be suggestive.

Had the Government followed the model specification for sexual abuse of a child, and alleged the manner in which the Government believed Colonel Wilson to have touched B.P.'s genitalia, this Court would know whether the findings could support an inference of criminal intent. Had the Government charged both direct and through-the-clothing touching in the same specification, the members could have rendered a verdict by exceptions. But the Government did neither and thus this Court cannot determine whether Colonel Wilson's Article 120b conviction

survives a factual and legal sufficiency review for evidence of a specific intent to gratify.

Relief Requested

This Court should set aside the finding of guilty to Charge I, Specification 2, and order a sentence rehearing.

III.

HEARSAY IS INADMISSIBLE UNDER THE RESIDUAL HEARSAY EXCEPTION UNLESS IT IS BOTH NECESSARY, AND HAS CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS. THE MILITARY JUDGE ABUSED HIS OBJECTION WHEN, OVER DEFENSE OBJECTION, HE ADMITTED UNCORROBORATED, NON-SPONTANEOUS VIDEOTAPED HEARSAY BY B.P. AS BOTH RESIDUAL HEARSAY AND PRIOR CONSISTENT STATEMENTS.

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (citations omitted). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *Id.*

Law & Analysis

"The residual hearsay exception embraced by M.R.E. 807 permits, in *rare circumstances*, the introduction of hearsay testimony otherwise not covered by

M.R.E. 803 or M.R.E. 804." *United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008). One military court has noted that he "government has the burden, as the proponent, of demonstrating" the "statement possesses sufficient indicia of reliability to overcome the presumptive unreliability" of this hearsay. *United States v. Dunlap*, 39 M.J. 835, 836-37, 839 (A.C.M.R. 1994) (citing *Idaho v. Wright*, 497 U.S. 805, 825-27 (1990)).

A hearsay statement not specifically covered by the exceptions contained in M.R.E. 803 and 804 may be admitted as residual hearsay, but only if the following predicates exist:

> (1) The statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

M.R.E. 807(a). The CAAF has summarized the requirements for admissibility as "(1) materiality, (2) necessity, and (3) reliability." *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996).

By admitting into evidence the out-of-court recording of B.P.'s child forensic interview, the military judge abused his discretion in three distinct ways. First, in light of the fact that B.P. testified at trial and established the elements of the charged Article 120b offenses trial counsel asked about, the military judge

erred by finding the interview met the necessity requirement of M.R.E. 807. Second, the interview did not meet the M.R.E. 807 requirement for circumstantial guarantees of trustworthiness, because it was not spontaneous and was riddled with suggestive questioning. Third, the military judge erred by finding the interview was admissible as a prior consistent statement, as the interview did not "rebut an express or implied charge that the declarant *recently* fabricated or acted from a recent improper influence or motive in so testifying." M.R.E. 801(d)(1)(B)(ii) (emphasis added).

A. As B.P. testified at trial in support of the elements of the offenses, the video interview was not *necessary* as required by the residual hearsay exception.

In *United States v. Giambra*, the CAAF held that out-of-court statements may only be admitted as residual hearsay where they are "necessary to the Government's case." 33 M.J. 331, 334 (C.A.A.F. 1991). Because the alleged child sexual abuse victim testified at trial that Giambra had sexually abused her, the CAAF found that admission of her mother's written statement which described in detail the child's allegations of sexual abuse "on the previous night" before the statement was inadmissible. *Id.* at 333-34 (distinguishing these facts from a case where residual hearsay was "*absolutely necessary* for the Government's case") (emphasis added).

In *United States v. Knox*, this Court held that drawings made by two alleged child sexual abuse victims created during social worker sessions were inadmissible. 46 M.J. 688, 692, 694 (N-M Ct. Crim. App. 1997). This Court noted the drawings

were not admissible under the "residual hearsay rule," because the child victims' "in-court testimony is the most probative evidence of the abuse"—even for the one child whose trial testimony was "less straightforward" than the other's. *Id.* at 695.

In *United States v. Pablo*, a military appellate court found an abuse of discretion in admission of a seven-year-old alleged child victim's "hearsay statements" to a school counselor about sexual abuse during a game of hide-and-seek—made shortly after the alleged sexual abuse—under the residual hearsay exception. 50 M.J. 658, 658-61 (A. Ct. Crim. App. 1999), *rev'd on other grounds*, 53 M.J. 356 (C.A.A.F. 2000). The military judge claimed this hearsay was "necessary" because the child's testimony "about how the [hide-and-seek] game started, how the game was played, how she went into the bedroom . . . what occurred in the bedroom" and "how she told—reported the incident, who she told it to, what she told her" were "vague and unclear." *Id.* at 660-61 (first alteration in original). The *Pablo* Court noted the "imprecision" of the testimony about how the alleged child victim "entered the bedroom does not support the necessity for presenting to the members" the "entire out-of-court statement" about the alleged sexual abuse.

The military judge abused his discretion in admitting B.P.'s video interview. Unlike other cases admitting a prior statement, B.P. did not recant her claims of sexual abuse. She testified in support of them for over twenty-eight pages of transcribed record, eighteen of which were on direct examination. R. at 1089-93;

1134-56. Contrary to his findings of fact that B.P. did not testify to touching of "her genital area on divers occasions, including both under and over her underwear," Appellate Ex. CLXXVIII at 4, B.P. agreed with trial counsel that Colonel Wilson would sometimes "touch [her] privacy" both "inside" and "outside of [her] shorts. R. at 1144. B.P.'s trial testimony thus allowed the government to establish the essential elements of the Article 120b offenses the government asked about at trial.

The military judge's other findings of fact about alleged insufficiencies in B.P.'s trial testimony do not justify admission of the video interview.[7] He clearly erred in calling these "material facts," *id.* at 10, as none of these were required to establish the elements of the Article 120b offenses. The military judge then applied the wrong law in admitting the video because B.P.'s testimony was "inconsistent in *certain respects* with her" video interview" and she was unable to "fully remember and articulate the acts of abuse previously alleged." *Id.* As with the inconsistency in *Pablo* about how the child ended up in the bedroom, these facts were not *necessary* to the government's case.

If this Court does not find an abuse of discretion here, the residual hearsay "exception" will swallow the normal rule against hearsay. Witnesses rarely testify

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[7] App. Ex. CLXXVIII at 4 (citing as facts justifying admission that B.P. did not testify that: she "experienced burning, stinging, and that 'it felt on fire' when the accused touched her;" that "the accused stated to her 'You're a good girl' when he touched her;" or that "she was not assaulted on 13 July 2016").

identically to pretrial statements, and many witnesses do not testify as vividly in court as the government would like. It cannot be that every time a witness testifies less convincingly at trial than in a video or statement to police officers, medical personnel, or others, that the prior statement is admissible at trial. To so hold would allow the government to build a jigsaw puzzle from in-court testimony and out-of-court statements, to reach its desired result. The government wanted atmospherics of the video in evidence in addition to B.P.'s testimony, and the military judge abused his discretion in finding these necessary under the residual hearsay exception.

B. B.P.'s child forensic interview did not have the circumstantial guarantees of trustworthiness required by the residual hearsay exception.

In determining whether a statement has "equivalent circumstantial guarantees of trustworthiness," the C.A.A.F. has identified a non-exclusive list of "indicia of reliability." *E.g.*, *Donaldson*, 58 M.J. at 488. These indicia include: "(1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated." *Id*. (citations omitted). Reviewing courts also may consider "the declarant's age or the circumstances under which the statement was made." *Id.* (citations omitted). The Supreme Court stated in *Idaho v. Wright* that "evidence of *prior interrogation*, prompting, or manipulation *by adults*," undermines "spontaneity" as an "indicator of trustworthiness" in child interviews. 497 U.S. at 826-27.

The CAAF has stated that "the danger of false testimony from a child is greater when the child is subjected to highly suggestive interviewing techniques such as closed (yes/no) questions and multiple interviews with multiple interviewers." *United States v. Cano*, 61 M.J. 74, 78 (C.A.A.F. 2005) (emphasis added) (citing Stephen J. Ceci and Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 45 n.48 (2000); Thomas Lyon, The New Wave of Child Suggestibility Research: A Critique, 84 CORNELL L. REV. 1004, 1070-72 (1999)). An article cited by the CAAF in support of this conclusion, notes that "[o]nce a child gives an erroneous response" to a question, the erroneous response "becomes incorporated into [the child's] memory," leaving the child less able to "correct [the] wrong answers [in] later" questioning. Ceci and Friedman, at 86.

1. The *Donaldson* factors do not support finding B.P.'s video interview to have been reliable.

Had the military judge properly applied the law to the facts as is required by *Donaldson*, he would have reached the only logical conclusion: that B.P.'s child forensic interview did not contain the necessary guarantees of trustworthiness due to both the lack of spontaneity of her statements and the suggestive questioning that led to the statements. In fact, it is hard to fathom hearsay statements any less spontaneous than the ones ultimately broadcast to the members in this case. Importantly, the interview was held the day after an emotionally charged night in

which B.P. was taken into a bathroom, interrogated by her mother, had her pants pulled down by her mother, whisked from the Wilsons' home, and told that she would need to talk to some adults about what had happened. That same night—the night before the interview—she overheard her mother say that she wanted to stab and kill Colonel Wilson. The following day, she was taken to a facility where she was asked suggestive questions from an interviewer who was, at the very least, working in tandem with law-enforcement officials—and who were observing the interview from a separate room.[8]

Before B.P. said anything at all about what Colonel Wilson allegedly did to her, the interviewer asked B.P. if her parents are worried about her—strongly implying that something bad had happened to B.P. Record of Trial, Pros. Ex. 34 and Pros. Ex. 35 at 7. B.P. vaguely said that Colonel Wilson was doing "weird inappropriate" things, prompting the interviewer to introduce further bias into the equation by telling B.P. that she is "brave" and in a safe place, with a person whose job is to protect children. Pros. Ex. 34; Pros. Ex. 35 at 9. It is only after all of

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[8] Ms. Pogroszewski's ties to law enforcement are problematic as it relates to whether B.P.'s statements were spontaneous and therefore trustworthy. As C.A.A.F. explained in *United States v. Ureta*, the spontaneity of "[s]tatements elicited by law enforcement officials are regarded with caution but are not *per se* inadmissible." 44 M.J. 290, 297 (citation omitted). While Ms. Pogroszewski is not a police officer, she became involved in the case at the behest of law enforcement, she conferred with law enforcement during the interview, and she testified that "[t]he prosecution is part of our team." R. at 1351, 1358.

these events that B.P. said that Colonel Wilson used her "parts" to "scoot" her up while she sat on his lap. Pros. Ex. 34; Pros. Ex. 35 at 10. B.P. described the touching as Colonel Wilson "cupping" his hand—a word/phrase that B.P. learned from Mrs. P before the interview. *Id*.

All of these undisputed facts weigh strongly against a finding of spontaneity. This is not a case where the alleged victim blurted out a statement incriminating the accused, nor is it a case where the alleged victim spontaneously and unusually mimicked the alleged abuse. *Cf. Donaldson*, 58 M.J. at 489 ("we agree with the lower court that J's spontaneous act of pulling her panties aside and placing her finger by her vaginal area was an unusual event that supports a finding of reliability").

Instead, the statements admitted into evidence via the child forensic interview were derived from a calculated effort to extract information from B.P., on the heels of a series of emotional events that may have been colored by Mrs. P. *See id.* (victim's statements to investigator "were preceded by several emotionally charged conversations" overheard by victim, "raising the concern that J's recollection of the events could have been colored by her mother's view of the incident"). Such deliberate statements do not bear the guaranty of trustworthiness required by M.R.E. 807 and, as such, the military judge abused his discretion by admitting the statements into evidence.

<u>2. The government's expert witnesses undermined the reliability of the video interview.</u>

Even the Government's own expert witnesses, who were hired to assess the child forensic interview, testified that Ms. Pogroszewski asked B.P. suggestive questions. Dr. Everson testified that a suggestible question is "one that introduces new information without encouraging a particular response." R. at 1282. He further explained that asking a child "yes/no" questions are more suggestible, and that the power differential between the child and the interviewer (or the child and her parent) can make children more suggestible. *Id*. at 1290, 1296.

While Dr. Everson concluded that Ms. Pogroszewski did not ask any *inappropriately* suggestible questions, he admitted that the concept of Colonel Wilson possibly touching B.P. under her clothes was introduced by Ms. Pogroszewski—and that the questions on that topic were suggestive. *Id*. at 1413. Ms. Linda Steele, who also assessed the child forensic interview for the Government, agreed with Dr. Everson that the first person to introduce the concept of touching underneath B.P.'s clothes was Ms. Pogroszewski—and that this introduction was problematic. *See id*. at 1827.

The sequence of questions and responses involving under-the-clothes touching is just one example of suggestive techniques that resulted in the highly prejudicial statements ultimately admitted into evidence. Dr. Jacqueline Bashkoff, who testified for the defense as a court-recognized expert in forensic psychology

and child forensic interviewing, explained that Ms. Pogroszewski engaged in various suggestive techniques.

For example, right from the beginning, Ms. Pogroszewski suggested to B.P. that something ominous had happened, as reflected by Ms. Pogroszewski's comments to B.P. that B.P was "safe" and "brave," and that it was Ms. Pogroszewski's job to protect children. *Id*. at 1875. Dr. Bashkoff also noted that Ms. Pogroszewski asked close-ended questions, repeated questions until she got the answer she apparently sought, suggested to B.P. that the touching occurred while she was alone in a room with Colonel Wilson, introduced the concept that the touching occurred while B.P. sat in Colonel Wilson's lap, and introduced the concept of under-the-clothes touching. *Id*. at 1876-1884. Yet another suggestive sequence transpired after Ms. Pogroszewski returned to the interview room after conferring with law-enforcement officials. As explained by Dr. Bashkoff:

> Beth [Ms. Pogroszewski] comes back in and starts to ask again, and the child tells her, "I don't know a whole lot of stuff." She empowers her by telling her she knows a whole lot of stuff and she's smart. The child is playing with PlayDoh. And Beth, again, says, "'Was it under your underwear or over your underwear?'" The child says, "I don't know." But what does that tell you? That she doesn't have an answer for that.
>
> Beth doesn't stop there. She says, "Was it under your underwear?" And the child doesn't even make eye contact with her, still playing with the PlayDoh, says, "Yeah." Says, "Yeah. Under." Then, when Beth – now, I've certainly – "tell me about that," the child has no responsive

> answers. She starts doing the thing with strange – you know, it's never been done strangely before. So the child has been asked that question many times, and *now is acquiescing because it's repetitive, it's a rehearsal*, and she must've gotten it wrong the first couple of times. And the child is not even making eye contact with Beth. Beth then says, "That's what I needed to know." *That's the reinforcing statement that you're not supposed to be doing in these interviews. You're supposed to be collecting neutral data.*

R. at 1866 (emphasis added).

But despite this evidence—and despite the opinions of both the Government and defense experts—the military judge still somehow implicitly found the child forensic interview to have circumstantial guarantees of trustworthiness *equivalent* to excited utterances, statements made for medical diagnosis, statements made under the belief of imminent death, statements against interest, certificates of marriage, and statements in ancient documents. *See* M.R.E. 807(a)(1).

Since they did not testify until after the military judge's ruling, he failed to reconcile the opinions of Ms. Steele, and Dr. Bashkoff that Ms. Pogroszewski suggested key incriminating concepts to B.P. Nor did the military judge reconcile his ruling with Dr. Everson's testimony that, "[i]n a forensic interview, we cannot help being suggestive," R. at 1283, or the fact that he thought Ms. Pogroszewski's interview so deficient that a second follow-up interview needed to be done.

3. A lack of corroboration precludes admission under *Donaldson*.

Similarly, the hearsay statements in the child forensic interview were neither spontaneous nor corroborated, and therefore do not bear the indicia of reliability required for admission under M.R.E. 807. *See Donaldson*, 58 M.J. at 488.In *United States v. Crayton*, the Air Force Court of Military Review found that a written statement by a fourteen-year-old child, alleging sex acts by her stepfather did *not* have the "circumstantial guarantees of trustworthiness" required for admission as residual hearsay; it noted that, among other factors, there was "a dearth of" extrinsic "physical or testimonial evidence showing that the out-of-court statement of [the child] represented the truth." 17 M.J. 932, 933-34 (A.F.C.M.R. 1984).

In *State v. Smith*, a Minnesota appellate court considered the admissibility of statements by a child to social workers in which she had alleged sexual penetration by her stepfather; the child made these statements about a year after other statements, in which she alleged other sexual misconduct by her stepfather to a police officer, but *not* penetration. 384 N.W.2d 546, 547-49 (Minn. Ct. App. 1986). The *Smith* Court held that the child's statements to the social workers lacked circumstantial guarantees of trustworthiness required for admission as residual hearsay, in part because in comparison to the child's statements to the police officer, they were "inconsistent concerning penetration and the opportunity for penetration." *Id.* at 549.

As noted at length above in Assignments of Error I and II, this case centered on what B.P. said. There was no physical corroboration, no DNA, and no independent eyewitnesses despite the presence of adults at the time(s) of the alleged abuse. If anything, B.P.'s child forensic interview was a prior *inconsistent* statement, as during the bathroom interrogation she had initially denied Colonel Wilson had touched her and only changed her account after further questioning from Mrs. P. In contrast to the instant case, the *Donaldson* Court ultimately concluded the victim's statements were corroborated by (1) her spontaneous crying and resistance to having her vaginal area cleaned by her mother, (2) the physical injuries to the vaginal area observed by the victim's mother, and (3) her spontaneous statement that "[h]im touched me." 58 M.J. at 480 and 489. Nothing even close to the corroboration found by the *Donaldson* Court is found here, so it was an abuse of discretion for the military judge to admit the uncorroborated hearsay statements contained in child forensic interview.

C. The military judge erred by admitting the child forensic interview as a prior consistent statement.

The military judge abused his discretion by admitting the interview as a prior consistent statement under M.R.E. 801(d)(1)(B). The rule states that a prior consistent statement is not hearsay if it "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive in so testifying[.]" But before a statement can be introduced under M.R.E.

801(d)(1)(B), the proponent must establish the proffered statement was "made *before* the point at which the story was fabricated or the improper influence or motive arose." *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990) (emphasis in original). Where "an opposing party alleged multiple motives to fabricate or multiple improper influences, a prior consistent statement need not precede *all* motives or influences, only the one it is offered to rebut." *United States v. Gallardo*, 2016 CCA LEXIS 571, *9 (N-M. Ct. Crim. App., September 29, 2016) (unpub. op.) (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998) (emphasis in original)).

During the cross-examination of B.P., defense counsel asked her whether she had been in the courtroom before. R. at 1148. B.P. said yes, she had—and that she had practiced her testimony two times with the prosecutor. R. at 1148-49. After asking B.P. standard questions to ascertain whether she knew the difference between lying and telling the truth, defense counsel asked:

> Q. So I know you talked about some people in here about – I'm sorry. You did some practicing in here. Did you talk to other people about – <u>*like your mom and dad, did you talk to them about coming in to testify?*</u>
>
> A. Yes.
>
> Q. Did you talk about what you were going to say?
>
> A. Yes – or, sort of, yeah.

Q. Maybe not exact words, but, sort of, the stuff?

A. Yeah.

Q. Did <u>*they*</u> ever tell you about anything that was important to make sure that these men knew?

A. Yes.

Q. And it's important to get that stuff, right?

A. Yeah.

Q. Do you think you got it all right?

A. [Nonbverbal response.]

Q. Pretty good job?

A. Yeah.

R. at 1150 (emphasis added).

Based on the cross of B.P., the military judge concluded defense counsel had alleged an improper influence on the part of *trial counsel*, thereby purportedly opening the door to the prior consistent statements contained in the child forensic interview. *Id*. at 1313, 1335. Specifically, the military judge said, "The defense put in front of the members a possible improper influence . . . . The implication is clear that by meeting with [trial counsel], that somehow the kids were coached, influenced in some way prior to their testimony in court." *Id*. at 1313.

In response, defense counsel argued that he asked the questions about B.P. having met with the trial counsel simply to explain to the members why B.P.

seemed more comfortable answering the prosecution's questions as she was when responding to defense counsel. *Id*. at 1326-27. The military judge rejected this explanation, telling defense counsel, "you went out of your way with every one of those [child] witnesses to ask them [who] they met with." *Id.* at 1327. The military judge also highlighted the fact that one of the members—General Maxwell—had even asked a question about who may have been in the courtroom when B.P. and her sisters were preparing for trial. *Id.*

If the defense did imply that *trial counsel* had improperly influenced B.P. by meeting with her prior to trial, then the prior consistent statements contained in the child forensic interview arguably would be admissible under M.R.E. 801(d)(1)(B)(i). This is because the child forensic interview obviously was conducted before the prosecutors' meetings with B.P. Further, *Allison* makes clear that a consistent statement need not be made before all motives to fabricate or all improper influences but rather the statement must precede the motive or influence it is offered to rebut. But if the defense's implication was that *B.P.'s parents* had improperly influenced her testimony, then the child forensic interview would not be admissible as a prior consistent statement because the interview took place *after* the improper influence had already arisen.

The defense's theory in this case was clear: Mrs. P had improperly influenced B.P., beginning with the conversation in the Wilsons' kitchen, then with

the interrogation in the bathroom (complete with pulling down her daughter's underwear), and continuing through the angry confrontation in the Wilsons' living room, the comment about wanting to stab and kill Colonel Wilson, and the conversation the Ps had with B.P. and her sisters later that night about what had happened to B.P. Because B.P. was interviewed the following day, anything she said during that child forensic interview was made *after* the defense's charge that B.P. had been improperly influenced. This clear timeline renders the statements inadmissible under M.R.E. 801(d)(1)(B)(i).

D. The erroneous admission of B.P.'s video interview materially prejudiced Colonel Wilson's rights.

In evaluating whether the erroneous admission of government evidence was harmless, this Court considers: "(1) the strength of the government's case" without the evidence, "(2) the strength of the defense, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question," and the burden of persuasion is on the government to demonstrate that this erroneously admitted evidence "did not have a substantial influence on the findings." *United States v. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005).

Here, the government had testimony on the elements of the offenses it asked B.P. about, describing "touching" of her private parts. But the government was unable to elicit collateral facts from the video elicited as a result of the suggestive interview tactics of Ms. Pogroszewski, like the "cupping" and "scooting" B.P.

described in response to her questions. These claims played on the emotions of the members, thereby bolstering the government's case. The erroneous admission of the video under the residual hearsay and prior consistent statement exceptions thus materially prejudiced Colonel Wilson.

Relief Requested

This Court should set aside the finding of guilty to Charge I, Specification 2; and order a sentence rehearing.

IV.
RULE FOR COURTS-MARTIAL 902 REQUIRES A MILITARY JUDGE TO IMPARTIALLY RULE ON THE ADMISSIBILITY OF EVIDENCE. THE MILITARY JUDGE ABANDONED IMPARTIALITY WHEN HE *SUA SPONTE* SUGGESTED LEGAL THEORIES TO THE PROSECUTION FOR THE ADMISSIBILITY OF B.P.'S VIDEO INTERVIEW.

Standard of Review

When raised for the first time on appeal, the impartiality of the military judge is reviewed for plain error. *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001).

Law & Analysis

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J 136, 140 (C.A.A.F. 1999) (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)). "[A] military judge *shall* disqualify himself or herself in any

proceeding in which that military judge's impartiality might reasonably be questioned." RULE FOR COURTS-MARTIAL (R.C.M.) 902(a) (emphasis added). When the military judge's impartiality is challenged on appeal, the reviewing court determines "whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." *United States v. Martinez*, 70 M.J. 154, 157-58 (C.A.A.F. 2011) (citation omitted). The reviewing court applies an objective standard, asking whether the judge's actions "would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality reasonably might be questioned." *Id.* (citation omitted). R.C.M. 902(a) is intended to promote public confidence in the integrity of the military justice system, and "to reassure the parties as to the fairness of the proceedings, because the line between bias in appearance and in reality may be so thin as to be indiscernible." *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001) (citations omitted).

Here, the military judge abandoned impartially overseeing Colonel Wilson's case when he, *sua sponte*, suggested that B.P.'s child forensic interview would be admissible as a prior consistent statement. Throughout the trial—including in the motions phase of the proceedings—the Government argued that the interview was admissible as residual hearsay. Never once did the Government advance the theory that the interview was a prior consistent statement. Indicative of the

Government's understanding, during the court-martial trial counsel requested a hearing outside the members' presence to argue that the video should be admitted as residual hearsay. R. at 1308-1310. Trial counsel did not once suggest the interview was a prior consistent statement, nor did trial counsel allege that the defense had opened the door to the interview's admission by implying an improper motive to influence B.P.'s testimony. *See id.*

Despite this, the military judge *sua sponte* raised the issue of prior consistent statements: "From the government's perspective, talk to me about M.R.E. 802(d)(1)(b)(1), prior consistent statements." *Id*. at 1312. Critically, trial counsel initially *disagreed* with the military judge, implying to the court that the rule did not apply: "So I think the issue with the 802(d)(1) statements would be that we would have to find – the opposing party would have to find a time that there is a motive to fabricate." *Id.*

Fully abandoning his impartial role, the military judge then told trial counsel, "I'm not looking at motive to fabricate. I'm looking at improper influence, specifically defense counsel's cross-examination that – the witness has met with you recently?" *Id.* After posing several questions to trial counsel, and after apparently growing frustrated with trial counsel's apparent reluctance to adopt the theory that M.R.E. 801(d)(1) applied, the military judge said, "What I'm

getting at is: The defense put in front of the members a possible improper influence." R. at 1313. The military judge then educated trial counsel as follows:

> MJ: The implication is clear that by meeting with you, that somehow the kids were coached, influenced in some way prior to their testimony in court.
>
> TC: Yes, your honor.
>
> MJ: So is the government's position that any statements made prior to that which would be consistent with their in-court testimony be admissible[?]. So although not perhaps admissible as residual hearsay, it would be consistent statements with their in-court statement, admissible under M.R.E. 801(d)(1).
>
> TC: We would agree with that, your Honor. *<u>But if we can if we can go back to the 807</u>* ….

R. at 1313 (emphasis added).

As further proof of the military judge's abandonment of his impartial role, he also *sua sponte* raised the issue of whether the child forensic interview was admissible as a past recollection recorded. Specifically, during the same Article 39(a) hearing in which the military judge raised the prior consistent statement theory, he asked the trial counsel to recall Dr. Everson. R. at 1313. The military judge then asked Dr. Everson a series of questions about refreshing a witness' recollection—and whether using the child forensic interview to refresh B.P.'s recollection would traumatize her. *Id*. at 1314-15. But the Government never advanced a theory that the interview could—or should—be used to refresh B.P.'s

recollection, a fact the court recognized when the military judge said, "[c]learly, you never asked to refresh [the child witnesses'] recollection, so it's an issue that the Court's dealing with right now." *Id*. at 1315.

While the defense did not move to disqualify the military judge, defense counsel did object to the military judge's attempts to help the Government admit the child forensic interviews as prior consistent statements:

> CC: Well, sir, the prosecutor didn't even bring that up. The Court brought that up.
>
> MJ: I can't bring up – I have to wait for the prosecutor? I'm not allowed to find how that's – the prosecutor doesn't have to argue that. It's clearly admissible under another basis. I can ask the prosecutor that question and get their thoughts on it. The prosecutor said the government *sort of* agrees with that, doesn't disagree with that.
>
> I can't question counsel about the law one or another if it is helpful or not helpful?
>
> CC: Sir, I don't think the Court should give additional methods to introduce evidence against the defense. No, sir.
>
> MJ: I can certainly ask the government what their thoughts on a particular rule and whether it applies or not.
>
> CC: Right, sir. And as I recall, the Court went into some detail with the trial counsel on that.
>
> MJ: Yes. I asked: Does the government think it applies? Does the government think that 801(d)(1)(b) applies to the admissibility of the prior consistent

> statements? The government said yes; however, they really weren't emphatic.
>
> So I will ask you, and it's hard for me not to look at that. So I got it. *If an appellate court says I stepped out of bounds, that'll be an appellate issue potentially.* I just don't think an appellate court is going to not allow a judge to question counsel regarding applicable law.

R. at 1327 (emphasis added).

Even if the military judge may ask counsel about law the court thinks is applicable, the military judge cannot do so in such a way that a reasonable person would question the military judge's impartiality. *See Wright*, 52 M.J. at 140. Here, the military judge did not simply ask the Government questions about applicable law; instead, he advanced two theories of admissibility (prior consistent statements and prior recollection recorded) that were neither contemplated by trial counsel nor wholly endorsed once raised *sua sponte* by the military judge.[9] Taken as a whole, the military judge's impartiality reasonably was called into question—an outcome the military judge himself acknowledged when he admitted to defense counsel that an appellate court may determine he had "stepped out of bounds."

This lack of impartiality materially prejudiced Colonel Wilson, because the issue over which the military judge abandoned his role as an impartial gatekeeper

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[9] The Government's apparent reluctance to embrace the military judge's M.R.E. 801(d) theory of admissibility makes sense, given the rule's problematic application to the instance case (as detailed above).

was the single most significant issue in Colonel Wilson's court-martial. Given the lack of physical or corroborating evidence, the Government's case as it related to the allegations made by the P girls hinged on B.P. and her sisters' testimony. But rather than test their allegations—their recollections and their respective abilities to perceive—through the crucible of cross-examination, the military judge blazed an evidentiary trail that allowed the Government to introduce a highly prejudicial video of B.P.'s non-confrontational child forensic interview. By pushing trial counsel into halfheartedly arguing the video should be admitted as a prior consistent statement (and perhaps as a past recollection recorded), the military judge perfected the Government's case. A reasonable person—knowing all the circumstances—would question the military judge's impartiality.

Relief Requested

This Court should set aside all findings and the sentence.

V.

ADMISSIBLE EVIDENCE MUST BE BOTH RELEVANT AND NOT SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE. THE MILITARY JUDGE ERRED BY ADMITTING OVER DEFENSE OBJECTION MRS. P'S TESTIMONY THAT SHE HAD LEARNED OF BEHAVIOR ON COLONEL WILSON'S PART THAT "SHOCKED" AND "CONCERNED" HER AS A PERSON, "NOT JUST AS A MOTHER," WHERE WHAT SHE LEARNED HAD NOTHING TO DO WITH SEXUAL OFFENSES AGAINST CHILDREN.

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. *Donaldson*, 58 M.J. at 482.

<u>Law & Analysis</u>

Relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. "Evidence which is not relevant is not admissible," and even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 402, 403,

On "Disclosure Night," Mrs. P asked B.P. if Colonel Wilson had touched B.P. inappropriately. Her claimed reason for doing so was that Mrs. Susan Wilson had confided in her that Colonel Wilson engaged in behavior that Mrs. P described as "shocking" and "concerning."

But at a pretrial Article 39(a) session, the defense asked the court to permit questioning into an alternative explanation for Mrs. P's suspicions; specifically, that Mrs. P had herself been sexually assaulted when she was younger. The military judge permitted the defense to ask Mrs. P whether she was the victim of a sexual assault, approximately when it occurred, and to briefly describe the nature

of the assault. *Id*. But if the defense asked these questions, [the court would "allow Mrs. P to testify as to the full reasons why she had the discussion with her daughter and what was motivating those discussions." *Id.* at 599.

Despite making clear that Mrs. P would be allowed to testify about why she asked B.P. if Colonel Wilson had touched her inappropriately only if the defense first opened the door, Mrs. P trial counsel asked Mrs. P on direct examination whether Mrs. Wilson had confided in her about problems in the Wilsons' marriage. *Id.* at 1019. Mrs. P testified she was "very shocked because it was not characteristic –" before she was interrupted by a defense objection. *Id.* at 1020. Despite initially sustaining the objection, the military judge inexplicably allowed Mrs. P to testify as to what Mrs. Wilson had told her. *Id.* Mrs. P then testified that what she learned about Colonel Wilson from his wife concerned her as a person and as a mother. *Id.*

A. Ms. P's testimony about Colonel Wilson's "shocking" and "concerning" behaviors had minimal probative value, and was unfairly prejudicial.

Ms. P's testimony insinuated that Colonel Wilson was a sexual deviant, the type of person a mother would immediately suspect of molesting her daughter upon learning about an innocuous incident in which a child showed off her bellybutton in a room full of adults. But nothing Mrs. P had learned about Colonel Wilson—that purportedly he was interested in Mrs. Wilson having a threesome with another woman and "a big black guy," Appellate Ex. LXXXI—involved

children. This made the probative value of her testimony, which the military judge had previously ruled inadmissible for non-rebuttal purposes,[10] virtually nil.

B. Admission of this testimony materially prejudiced Colonel Wilson's rights.

Admission of Ms. P's testimony created a real danger that the members would believe that she had an actual reason to suspect Colonel Wilson had a sexual interest in children. In a child sex abuse case, the members' baseless belief that such evidence existed is be both highly material and extremely damaging to the defense's case. *See Berry*, 61 M.J at 98. Thus, the erroneous admission of Ms. P's statements implying such evidence existed here was materially prejudicial.

Relief Requested

This Court should set aside the finding of guilty to Charge I, Specification 2; and order a sentence rehearing.

VI.
A MILITARY JUDGE SHOULD DECLARE A MISTRIAL "WHEN INADMISSIBLE MATTERS SO PREJUDICIAL THAT A CURATIVE INSTRUCTION WOULD BE INADEQUATE ARE BROUGHT TO THE ATTENTION OF THE MEMBERS." DURING THE GOVERNMENT'S OPENING STATEMENT, TRIAL COUNSEL

[10] The defense never asked Mrs. P whether she previously had been sexually assaulted. It strongly appears, therefore, that the defense made the strategic decision to avoid opening any doors to Mrs. P's prejudicial claim that she had learned "concerning" and "shocking" information about Colonel Wilson. By allowing trial counsel to mention the "concerning" and "shocking" conversation during opening statement and then during direct exam, the military judge erroneously mooted the defense's strategy.

SHOWED THE MEMBERS A PHOTOGRAPH OF COLONEL WILSON RIDING ON A MOTORCYCLE WITH A PRETEEN GIRL, AND REFERENCED EVIDENCE THAT THE MILITARY JUDGE PREVIOUSLY HAD RULED WOULD BE INADMISSIBLE. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING DEFENSE'S MOTION FOR A MISTRIAL.

Standard of Review

This Court reviews a military judge's decision to deny a motion for mistrial for an abuse of discretion. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

Law & Analysis

Under R.C.M. 915(a), "the military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious errors . . . ." *Id., Discussion*. Declaring a mistrial is appropriate "when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members." *Id.* "In ruling on a mistrial motion, the military judge should examine the timing of the incident, the identity of the factfinder, the reasons for a mistrial, and potential alternative remedies." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citations omitted). "Most

importantly, the military judge should consider the desires of and the impact on the defendant." *Id.* (internal quotation and citation omitted).

Opening statement is not evidence, only "a statement of evidence to be offered" during the trial. *United States v. Moses*, 1995 CCA LEXIS 416, at *16 (N-M. Ct. Crim. App. 2 June 1995) (unpub. op.). The CAAF has implicitly recognized that prejudicial statements made by opening may warrant a mistrial. *See Thompkins*, 58 M.J. at 46-47 (finding trial counsel's reference during opening statement to inadmissible evidence was ameliorated where the military judge (1) sustained two defense objections during opening, (2) interrupted trial counsel and instructed him to not characterize the evidence, (3) *sua sponte* instructed the members during trial counsel's statement that opening is not evidence, and (4) again instructed the members at the conclusion of trial counsel's statement that opening is not evidence).

Here, trial counsel's opening statement violated Colonel Wilson's constitutional right to a fair trial in three separate ways requiring a mistrial.

A. Trial counsel referenced statements by Mrs. P that the military judge had barred.

First, as detailed in Assignment of Error V, the military judge held in a pretrial ruling that Mrs. P would be allowed to testify about her conversation with Mrs. Wilson regarding Colonel Wilson's purported "concerning" sexual proclivities *only* if the defense first opened the door. R. at 599-600. But before the

defense could make that strategic decision, trial counsel blatantly contravened the military judge's ruling and told the members during opening statement, "what you'll hear [Ms. P tell you is that Susan Wilson confided some things in her about Colonel Wilson, about their marriage, and these things were a concern to [Ms. P] *as a mother*." *Id.* at 844 (emphasis added).

The implication was clear: Colonel Wilson was the type of person who engaged in behavior that would make a *mother* concerned. This prejudicial, improper propensity evidence is exactly why the military judge initially prohibited the prosecution from eliciting testimony about the conversation. Yet trial counsel blatantly contravened the judge's ruling and began the Government's findings case by planting the idea in the members' heads that Colonel Wilson was a pervert whose purported activities concerned Mrs. P—a concern that did not arise because Mrs. P generally found Colonel Wilson's purported behavior distasteful but because she was the mother of young girls.[11]

The military judge reasoned that trial counsel's comment on the Mrs. Wilson-Mrs. P conversation was fair, as "the Court did rule that Mrs. P could

[11] Compounding the highly prejudicial comment on inadmissible evidence, trial counsel deprived the defense of determining whether to open the door to the conversation between Mrs. P and Mrs. Wilson. Then, with the proverbial cat out of the bag, the Government walked through the very door it improperly opened during opening statement by asking Mrs. P on direct examination about the conversation she had with Mrs. Wilson.

testify that she had concerns when she spoke to her daughter B.P." *Id.* at 864. The judge added that, while "[t]he Court ruled that Mrs. P could not provide an in-depth explanation as to precisely what those concerns were, but generally speaking, she had concerns." *Id.*

But the military judge's explanation completely ignores what trial counsel actually said during opening statement: that Mrs. Wilson had divulged to Mrs. P things about the Wilson marriage (sexual activity) that concerned Mrs. P as a *mother*. The military judge's explanation also contradicts his own ruling on how trial counsel could reference the Mrs. P-Mrs. Wilson conversation. The judge previously had ruled the Government could not get into why Mrs. P had concerns about Colonel Wilson or what those concerns were based on. R. at 598-99. Those questions, explained the military judge, raised the specter of propensity and would be admissible *only* if defense counsel opened the door by asking Mrs. P if the true reason she was concerned was due to her own history of being a victim of a sexual assault. *Id.* at 599.

As such, the court-martial started with trial counsel infecting the proceedings with improper propensity. The military judge was obligated to cure the infection, and the only way to do so—the only way to remove the resulting substantial doubts about the fairness of the proceeding—was to declare a mistrial.

B. Trial counsel showed a photograph in opening which suggested, without any legitimate basis, that Colonel Wilson had groomed another child.

Second, during opening statement trial counsel showed the members a photograph of Colonel Wilson with J.W.'s minor daughter. R. at 950. Colonel Wilson was never accused of—let alone charged with—any inappropriate conduct with J.W.'s daughter. The Government never sought to pre-admit the photograph, nor aver in any pretrial notices that it intended to introduce the photograph. Yet, trial counsel broadcast the photograph during a portion of the trial meant to highlight *evidence*, to suggest to the members that Colonel Wilson continued to be alone with young girls "even though he was at least rumored or pending child sex assault charges." R. at 950. This could not help but suggest to the members that Colonel Wilson was grooming another child for abuse, and was unfairly prejudicial.

The military judge dismissed trial counsel's use of the photograph as an attempt "to show the close relationship and why J.W. may have gone down to Beaufort and the closeness of the family relationship to the Wilsons and her." *Id.* at 864. But this completely ignored the fact that the prosecution had many photos it could have used to show that close relationship between the Wilsons and J.W.'s family, but instead chose to use the one photograph of Colonel Wilson alone with a minor child. The judge also ignored what trial counsel actually said during opening statement about that photo: that Colonel Wilson was still spending time

alone with children "even though he was at least rumored or pending child sex assault charges." *Id*. at 950. The military judge was obligated to cure this use of inadmissible evidence and unfair comment, but once again chose to do nothing.

C. Trial counsel forced the military judge to admit the forensic videos through improper opening argument.

Specifically, trial counsel told the members that, on the day after "Disclosure Night," B.P. was taken for a forensic interview, which "lasts for about 40 minutes, and B.P. tells as much as she can remember about what has happened." *Id.* Trial counsel then told the members that B.P. is "going to testify" about "what she remembers from over a year ago"—but that the members "might also see that video." *Id.* By starting the case by telling the members about the existence of the video—and juxtaposing the fact that the video was taken a day after "Disclosure Night," against her current testimony ("what [B.P.] remembers from over a year ago")—the Government improperly forced the hands of both the military judge and the defense: either the video would be admitted into evidence, or the members would be left to assume the video was more reliable than B.P.'s testimony and that the defense must have been afraid to let the members see it.

At the conclusion of the Government's opening statement, the defense moved for a mistrial. R. at 862. Without eliciting comment from trial counsel, the military judge denied the motion for mistrial. *Id.* at 863-64.

The judge mistakenly reasoned that trial counsel's reference to the child forensic interviews "was a fair comment" as the "members may see these videos or they may not see the videos." *Id.* at 863. The military judge then explained he would provide a curative instruction *if the videos ended up not being admitted into evidence*. *Id.* But this proposed amelioration does not account for why the comment about the videos was prejudicial to begin with: it does nothing to cure the improper suggestion—at the very beginning of the case-in-chief—that B.P.'s in-court testimony would not be as reliable as the videos. The judge's proposed amelioration also meant that he would only need to try to (impossibly) un-ring the bell if he did not admit the videos.

D. This is the rare case where the drastic remedy of a mistrial is necessary.

A reasonable observer would question the fairness of a proceeding where the military judge allows trial counsel to contravene the court's clear rulings, use inadmissible evidence to suggest improper propensity, and to essentially force the military judge to admit highly prejudicial evidence as residual hearsay. These substantial doubts could not be cured by an instruction, which perhaps the military judge understood as he did not even attempt to curatively instruct the members.[12]

[12] The defense did not request a curative instruction. Asking for a curative instruction, however, is fraught with risk, as it may reinforce prejudicial information in the members' minds. The issue is not whether defense counsel asked for a curative instruction, but rather whether the defense should have been put in a situation where a curative instruction may have been needed in the first place.

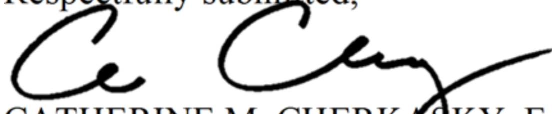
Applying the *Taylor* factors, this Court should find the military judge erred by denying the motion for mistrial. The timing of the prejudice is critical, as it occurred during opening statement and therefore tainted the entire findings case. Further, this was not a military judge-alone trial but rather an extremely high-profile court-martial of a full-bird colonel tried by a panel of general officers. While members are presumed to follow instructions, the military judge never even provided a curative instruction here.

The impact of trial counsel's improper opening statement (and the military judge's failure to ameliorate it) on Colonel Wilson was massive, as it infected the entire court-martial and led to his convictions. The military judge abused his discretion by denying the defense motion for mistrial, as no adequate remedy could clean up the mess trial counsel created during opening statement.

<u>Relief Requested</u>

This Court should set aside all findings and the sentence.

Respectfully submitted,



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Certificate of Filing and Service

I certify that on 24 September 2018 the foregoing in the case of *United States v. Wilson* was delivered to the Court, that a copy was delivered to Director, Appellate Government Division, and that an electronic copy was filed in CMTIS.

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