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WHEN IT DETERMINED THE MILITARY JUDGE COMMITTED  
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TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).<sup>1</sup> The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."<sup>2</sup>

Statement of the Case

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas,<sup>3</sup> of making a false official statement and aggravated assault with a means or force likely to produce death or grievous bodily harm upon a child under the age of 16 years, in violation of Articles 107, and 128 of the UCMJ.<sup>4</sup> The panel sentenced appellant to confinement for six months and a bad conduct discharge.<sup>5</sup> The

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<sup>1</sup> Joint Appendix (JA) 1; UCMJ, art. 66(b), 10 U.S.C. § 866(b).

<sup>2</sup> UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3).

<sup>3</sup> Supplemental Joint Appendix (SJA) 1.

<sup>4</sup> JA 282-283. Appellant was found not guilty of the greater offense of aggravated assault-intentional infliction of grievous bodily harm, also in violation of Article 128, UCMJ.

<sup>5</sup> JA 284.

convening authority approved the adjudged sentence.<sup>6</sup> The Army Court affirmed the findings and sentence.<sup>7</sup>

### Statement of Facts

Katie Clifton was born December 3, 2008 via C-section to appellant and Mrs. Kimberly Clifton.<sup>8</sup> The Cliftons have another daughter, Ashley, who turned two in September 2009.<sup>9</sup> Following her C-section, Mrs. Clifton remained in the hospital for three days recovering with Katie.<sup>10</sup> Katie and Mrs. Clifton returned home on December 6, 2008.<sup>11</sup> On December 18, appellant informed Mrs. Clifton that Katie's left leg was swollen and she wasn't using it very much.<sup>12</sup> Mrs. Clifton and appellant brought Katie to the American hospital facility on December 18, where Katie was diagnosed with a fractured femur.<sup>13</sup> Katie was transferred via ambulance from the American hospital to the German Kinder Klinik that same day.<sup>14</sup> Appellant and Mrs. Clifton discussed the potential causes for Katie's fracture.<sup>15</sup> Appellant wondered to his wife if it was from him changing her diapers or playing with

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<sup>6</sup> Action.

<sup>7</sup> JA 5.

<sup>8</sup> JA 25.

<sup>9</sup> JA 27. Ashley would have been 13 or 14 months old at the time of Katie's birth.

<sup>10</sup> JA 25.

<sup>11</sup> JA 25.

<sup>12</sup> JA 26.

<sup>13</sup> JA 30.

<sup>14</sup> JA 30-31.

<sup>15</sup> JA 32.

her doing bicycle kicks with her feet.<sup>16</sup> Mrs. Clifton wondered if it was from stumbling with Katie in her arms.<sup>17</sup> Katie was released from the hospital on 22 December with a cast on her left leg.<sup>18</sup> Katie's cast was removed somewhere between the 11th and 13th of January, according to Mrs. Clifton.<sup>19</sup> Between December 22 and mid January, no one else besides Mrs. Clifton and appellant watched Katie.<sup>20</sup> Appellant left for training the last week of January until the end of the first week of February, coming home for the weekend in between.<sup>21</sup> During appellant's absence, Katie slept in a bassinet beside Mrs. Clifton's bed while Ashley slept in her own room.<sup>22</sup> Appellant was home for the weekend bridging his two week training in Vilseck.<sup>23</sup> In the early morning hours of February 7, Katie ran a fever of 102.5, resulting in appellant and Mrs. Clifton bringing her to the Kinder Klinik again.<sup>24</sup> The physicians treated Katie with Tylenol and released her.<sup>25</sup> Coincidentally, Katie was scheduled for her two-month well baby exam with Dr. Ellwood two days later, on Monday, February 9, 2009.<sup>26</sup> Mrs. Clifton informed

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<sup>16</sup> JA 32.

<sup>17</sup> JA 32.

<sup>18</sup> JA 32-33.

<sup>19</sup> JA 33.

<sup>20</sup> JA 34.

<sup>21</sup> JA 37.

<sup>22</sup> JA 39.

<sup>23</sup> JA 40.

<sup>24</sup> JA 42.

<sup>25</sup> JA 42.

<sup>26</sup> JA 43.

Dr. Ellwood of the fever Katie had over the weekend.<sup>27</sup> Based on this information, Dr. Ellwood ordered blood tests and a chest x-ray of Katie.<sup>28</sup> Dr. Ellwood informed appellant and Mrs. Clifton that Katie had multiple fractures in different stages of healing on her rib cage.<sup>29</sup> Based on the suspicious nature of her injuries, Katie went in to foster care around this time.<sup>30</sup> Supervised parental visitation was allowed within days of Katie's release from the hospital.<sup>31</sup> On February 10, 2009, appellant was questioned by Special Agent (SA) Ortiz of the Heidelberg Criminal Investigation Division (CID). Appellant generally denied grabbing and shaking the baby, but did offer an explanation for her injuries by stating that he had accidentally dropped her from about two feet up and she hit her head and face on the corner of an exposed laptop computer.<sup>32</sup> Additionally, appellant offered that his toddler daughter, Ashley had also smacked the newborn baby.<sup>33</sup> Approximately two weeks later, on February 24, 2009, appellant was interviewed by another CID agent, SA McMullen. In this interview, appellant confessed that he became so frustrated at Katie's crying that he squeezed and

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<sup>27</sup> JA 43.

<sup>28</sup> JA 43.

<sup>29</sup> JA 44.

<sup>30</sup> JA 49.

<sup>31</sup> JA 51.

<sup>32</sup> JA 222.

<sup>33</sup> JA 222.

shook her, and said to her "something along the lines of 'why don't you just be quiet.'"<sup>34</sup>

### THE ISSUE

**WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT DETERMINED THE MILITARY JUDGE COMMITTED ERROR BY DENYING A PANEL MEMBER'S REQUEST TO CALL TWO ADDITIONAL WITNESSES FOR QUESTIONING, BUT FOUND THIS ERROR TO BE HARMLESS.**

### Summary of Argument

The government's evidence in the case was overwhelming. The defense's agreement with the military judge's ruling to not allow a member to recall two witnesses either: a) waived the issue for appeal, or b) was consistent with their strategy to argue reasonable doubt, and therefore any potential for the panel member in question to resolve any lingering doubt would have been detrimental to appellant.

### Standard of Review

In order to grant relief, the military judge's error in not recalling two witnesses must have materially prejudiced appellant's substantial rights. Because the error is non-constitutional, the government must demonstrate "the error did not have a substantial influence on the findings."<sup>35</sup>

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<sup>34</sup> JA 228-229.

<sup>35</sup> Article 59(a), UCMJ. *United States v. Rios*, 64 M.J. 566, 569 (Army Ct. Crim. App. 2007), (quoting *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005)).

## Law and Argument

As a threshold issue, appellant has waived this issue for consideration. Unlike in *Lampani*, where appellant was silent, and the court declined to "equate this silence with a waiver of appellant's rights;"<sup>36</sup> here appellant affirmatively agreed with the military judge's ruling and replied "no objection."<sup>37</sup> This affirmative agreement with the military judge equated to an intentional waiver of a known right, and thus extinguishes appellant's right to raise this issue on appeal.<sup>38</sup>

If this Court declines to find that appellant has waived this issue for consideration, the military judge's error was harmless because the record supports the defense strategy in not objecting and the government's evidence was overwhelming.<sup>39</sup>

### **A. The Prosecution**

The government's theory of the case was that appellant became so frustrated and enraged at Katie's crying that he squeezed her and shook her into compliance, thereby causing multiple rib fractures, a fractured clavicle, and a fractured skull. In support of this theory, the prosecution called four physicians, both CID agents who interviewed appellant, and appellant's squad leader. The prosecution also called Mrs.

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<sup>36</sup> *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982).

<sup>37</sup> SJA 194.

<sup>38</sup> *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009) citing *United States v. Olano*, 507 U.S. 725, 733-734 (1993).

<sup>39</sup> *United States v. Rios*, 64 M.J. 566, 569 (A.C.C.A. 2007).

Clifton in order to rebut the anticipated defense that she caused the injuries, as well as to establish the timeline of events. The government also relied upon appellant's confession that he squeezed and shook Katie in a manner that will cause "nightmares for the rest of [his] life."<sup>40</sup> Finally, the government relied upon the admission to his squad leader that "[he] can't believe [he] did it ... it seemed like a dream."<sup>41</sup> Essentially the government's case was that appellant had the unique opportunity to commit the offenses, confessed to CID that he did commit the offenses, and the medical evidence supported that the confession corroborated the medical findings. Finally, the additional admission to his squad leader, SSG Himburg, was the proverbial final nail in appellant's coffin.

**B. The Defense**

The defense strategy was to argue reasonable doubt based on their claim that the government could not disprove the source of Katie's injuries was Mrs. Clifton,<sup>42</sup> her sister Ashley,<sup>43</sup> or some unknown third party who came into the house while appellant was away and Mrs. Clifton left the door unlocked.<sup>44</sup> Additionally, defense argued that the government could not disprove that

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<sup>40</sup> JA 229.

<sup>41</sup> SJA 165.

<sup>42</sup> JA 831-833.

<sup>43</sup> JA 261.

<sup>44</sup> JA 260.

Katie's injuries were from a genetic disease,<sup>45</sup> and thus, that the injuries could have been accidentally caused through normal handling of the baby.<sup>46</sup> The defense also attempted to undermine appellant's confession by attacking the methods used by CID in obtaining it. This strategy, that the government could not disprove the above, was consistent throughout the trial. Based on the overwhelming nature of the evidence and testimony presented at trial that withstood significant cross-examination, the resolution of any lingering questions by a panel member at the close of the evidence could only have served to further remove any trace of doubt regarding the source of Katie's injuries. Allowing resolution to such questions would have been anathema to the defense's strategy.

**C. The Witnesses**

1. Dr. (Major) Thomas Ellwood

*The Prosecution Direct Examination*

Dr. Ellwood was the Clifton's primary care physician at the Heidelberg US Army Health Clinic.<sup>47</sup> He was also the Chief of Pediatric Services.<sup>48</sup> Dr. Ellwood conducted Katie's well-baby examination on February 9, 2009.<sup>49</sup> During the examination, Dr. Ellwood was notified that Katie had been running a fever. As a

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<sup>45</sup> JA 834.

<sup>46</sup> JA 209.

<sup>47</sup> JA 75.

<sup>48</sup> JA 75.

<sup>49</sup> JA 78.

result, Dr. Ellwood ordered blood work, a urine screen, and a chest x-ray.<sup>50</sup> Dr. Ellwood was concerned that Katie might be suffering from a "terrible infection," which was the impetus for ordering the chest x-ray.<sup>51</sup> The x-ray results were interpreted by Dr. Hicks, the radiologist.<sup>52</sup> Dr. Hicks informed Dr. Ellwood that there was no pneumonia, but there were broken ribs.<sup>53</sup> From there, Dr. Ellwood went to where Dr. Hicks was located, and the two looked at the x-rays together.<sup>54</sup> The fractures were located on the posterior portion of the ribs near the spinal column.<sup>55</sup> As a result of these fractures, Dr. Ellwood notified Social Work Services.<sup>56</sup> Dr. Ellwood also testified that he ran tests to rule out Osteogenesis Imperfecta.<sup>57</sup> Osteogenesis Imperfecta (OI) is also known as brittle bone disease. Children with OI are easily susceptible to breaking of bones during normal handling, and classically, also during child birth.<sup>58</sup> Katie was seen by a geneticist, and had extensive testing. All test results concluded that she had "no known [OI] genes within her DNA."<sup>59</sup> Essentially, "there was no evidence to support the diagnosis of osteogenesis imperfecta or one of its cousins. [There was] no

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<sup>50</sup> JA 82.

<sup>51</sup> JA 82.

<sup>52</sup> JA 85.

<sup>53</sup> JA 85.

<sup>54</sup> JA 86.

<sup>55</sup> JA 87.

<sup>56</sup> JA 90.

<sup>57</sup> JA 94.

<sup>58</sup> JA 94.

<sup>59</sup> JA 95-96.

evidence that the bones, the connective tissues were actually, in fact, weaker than any other child her age."<sup>60</sup> Although defense attempted to argue later that OI had not been definitively ruled out, the evidence supports a contrary conclusion. Dr. Ellwood testified that the tests run on Katie "are considered about as conclusive as the medical system can afford that Katie does not suffer brittle bone disease ... essentially ... we have no more tests."<sup>61</sup>

#### *The Defense Cross-Examination*

The cross examination of Dr. Ellwood focused on lack of any bruising visible during the February 9, examination.<sup>62</sup> Ostensibly, the defense was trying to argue that if there were broken bones caused by squeezing, there would be evidence of bruising around the application of force site. Additionally, the defense pointed out that Katie did not appear to be in "acute pain."<sup>63</sup> The defense also questioned Dr. Ellwood on his interpretation of the mood, manner, and interactions of and between appellant and Mrs. Clifton; essentially noting that they were not aggressive and there did not appear to be any "yellow flags."<sup>64</sup> Defense counsel next questioned Dr. Ellwood on the

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<sup>60</sup> JA 98.

<sup>61</sup> JA 113.

<sup>62</sup> JA 99.

<sup>63</sup> JA 101.

<sup>64</sup> JA 101-102.

December 2008 femur fracture.<sup>65</sup> That fracture was located on the bottom portion near the joint where the femur joins with the knee.<sup>66</sup> Defense was clearly attempting to establish Mrs. Clifton as the source of this injury based on her admission that she believed she may have caused it. This allowed defense to then argue that she was the likely source of the other injuries.

The defense would not benefit from any clarification pertaining to the linkage of Katie's femur fracture and Mrs. Clifton's idea that she caused it. It would be wholly inconsistent with the defense strategy to allow a panel member to resolve any doubt about the femur fracture, because that would prevent the defense from arguing that Mrs. Clifton caused Katie's other injuries based on her belief that she may have caused the femur injury.

#### *The Panel Questions*

Two panel members had questions for Dr. Ellwood. Colonel (COL) Glenn asked a question about the nature of the femur fracture, and based on Dr. Ellwood's response, COL Glenn had a follow-up question.<sup>67</sup> The follow-up asked if Dr. Ellwood learned of the clavicle and skull fractures, to which he replied that he had.<sup>68</sup> Sergeant (SGT) Morrisey's questions focused on the

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<sup>65</sup> JA 103.

<sup>66</sup> JA 104.

<sup>67</sup> JA 111.

<sup>68</sup> JA 114.

definitive nature of the rib fractures as opposed to them being abnormalities, and the ruling out of OI.<sup>69</sup>

2. Dr. (Major) Robert Hicks<sup>70</sup>

*The Prosecution Direct Examination*

Dr. Hicks testified that he was the radiologist who interpreted Katie's x-rays from February 9, 2009. He explained to the panel that Katie's rib fractures were "bilateral contiguous posterior bone fractures."<sup>71</sup> Dr. Hicks also testified to the fractured clavicle, and that the significance of the locations of the rib fractures were such that they were "highly specific for non-accidental trauma in child abuse."<sup>72</sup> Additionally, Dr. Hicks testified that the fractures had been healing, and were most likely not caused within the previous ten to fourteen days due to the level of calcification visible.<sup>73</sup> It is at this moment where the government established the opportunity for appellant to have committed these offenses because it coincided with his time at home during the training exercise. Finally, Dr. Hicks testified that based on his experience, he believed that "if you grab the child in the chest and squeeze, that there is essentially a posterior movement of

<sup>69</sup> JA 111-113.

<sup>70</sup> Dr. Tonya McDonald was also called as a witness, but offered no evidence on the facts in issue, therefore her testimony is not addressed here. Dr. McDonald's testimony indicated that she had cared for Katie since February 2009, and there had been no additional fractures during that time.

<sup>71</sup> JA 117.

<sup>72</sup> JA 118.

<sup>73</sup> JA 119.

the ribs relative to the spine ... and that acts as kind of a very robust fulcrum, and as you push the ribs posteriorly they eventually give way and crack."<sup>74</sup> This opinion, as to the most likely mechanism of injury, is nearly identical to appellant's confession to CID on February 24.

*The Defense Cross-Examination*

Defense counsel questioned Dr. Hicks on the femur fracture, and how "highly suspect" it was for child abuse.<sup>75</sup> Again, the defense attempted to offer Mrs. Clifton as an alternative suspect. Turning their attention to the rib fractures, defense attempted to get support for their theory that the rib fractures were from more than one episode. Here, it is evident that, consistent with their strategy, the defense hoped to make Mrs. Clifton a contributor to the injuries, resulting in the inability to distinguish between what fractures could have been caused by appellant. Dr. Hicks however, testified that while it was possible to be from more than one episode, it was just as possible that they were from one episode.<sup>76</sup>

Additionally, defense counsel inquired about the amount of application of pressure on the rib cage and correlating locations for fractures. Defense was setting up support for their theory that appellant had applied unilateral pressure from

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<sup>74</sup> JA 120.

<sup>75</sup> JA 124.

<sup>76</sup> JA 129.

clumsily picking Katie up, and that was the cause of the fractures, not a purposeful two handed squeeze. Unfortunately, Dr. Hicks did not subscribe to this theory, although he did agree that the mechanism of grabbing on one side would put greater pressure on that one side.<sup>77</sup> Lastly, defense queried Dr. Hicks on the medical ability to link the fractures with a specific person. Dr. Hicks responded that there was no way to tell who caused the injuries.<sup>78</sup>

On redirect, the government began to debunk the one handed leverage defense, and in so doing, was met with multiple defense objections.<sup>79</sup> These objections highlight the defense strategy that unanswered questions are in appellant's best interest. After the panel members asked their questions, essentially confirming the fractures were caused in a manner consistent with the prosecutions' theory, the defense noticeably shifted to questioning Dr. Hicks on the lasting impact of the broken bones. Arguably, defense was either attempting to blunt the potential impact for sentencing, or jeopardize the facts sufficient to support grievous bodily harm. Defense counsel queried Dr. Hicks on this issue, to which Dr. Hicks replied that once the bones

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<sup>77</sup> JA 138-139.

<sup>78</sup> JA 141.

<sup>79</sup> JA 143.

heal they would more than likely be as strong as any other rib or clavicle.<sup>80</sup>

*The Panel Questions*

The military judge asked if the members had any questions, and several indicated they did.<sup>81</sup> Command Sergeant Major Anbiya's question was about the mechanism of injury, that is, what type of force most likely caused the fracture on the femur. Dr. Hicks stated that the fracture most likely was caused by the leg moving front to back or side to side.<sup>82</sup> Again, this is consistent with appellant's admission to CID. SGT Morrissey asked a question regarding what type and how much of an application of force was likely to have caused Katie's rib fractures. Dr. Hicks testified that it was "much more than is needed in the routine handling of a child ... even if you throw them in the air in a game ..."<sup>83</sup> Continuing, Dr. Hicks opined that "the most likely scenario is in a face to face [position] and just the hands around the chest."<sup>84</sup> COL Glenn asked Dr. Hicks to give the most likely activity that would create the stress on the femur. To which Dr. Hicks opined "the most likely mechanism is shaking the child ... probably front to back."<sup>85</sup>

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<sup>80</sup> JA 168.

<sup>81</sup> JA 152.

<sup>82</sup> JA 153-154.

<sup>83</sup> JA 159.

<sup>84</sup> JA 159.

<sup>85</sup> JA 160.

The military judge asked if there were any additional panel questions based on those, to which SGT Morrissey had one. The question was whether the injury could have been caused by doing "bicycle kicks with the child,"<sup>86</sup> which theory had been previously attributed to appellant by Mrs. Clifton.<sup>87</sup> Dr. Hicks, replied in the negative.<sup>88</sup> Again, the military judge asked if there were any additional panel questions, to which there was one by COL Glenn. COL Glenn wanted to know if Dr. Hicks had seen the other x-rays, and if they indicated a skull fracture.<sup>89</sup> Dr. Hicks, indicated that he had seen them, and they did indicate a skull fracture.<sup>90</sup>

### 3. Dr. (Major) Shelley Martin

#### *The Prosecution Direct Examination*

Dr. Martin was called as an expert in the field of general and child abuse pediatrics from the Armed Forces Center for Child Protection at the National Naval Medical Center.<sup>91</sup> Dr. Martin reviewed all of the medical evidence as well as appellant's confession.<sup>92</sup> Her testimony clarified Dr. Hicks' testimony regarding the rib fractures located directly next to the spinal column and the fact that they "have a much more

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<sup>86</sup> JA 163.

<sup>87</sup> JA 32.

<sup>88</sup> JA 163.

<sup>89</sup> JA 164.

<sup>90</sup> JA 164.

<sup>91</sup> SJA 2-5.

<sup>92</sup> JA 184.

limited mechanism of injury ... squeezing or anterior/posterior compression."<sup>93</sup> Dr. Martin opined that there are really only two other ways to achieve that type of fracture. One being a car wreck where an unrestrained child is "hurled face forward and then slammed against something."<sup>94</sup> The other being if a child was thrown "face forward into the wall."<sup>95</sup> She went on to testify that children's bones are much more pliable than adults and require much more force applied to cause a fracture.<sup>96</sup> Beyond the clarification of Dr. Hicks' testimony, Dr. Martin testified that any reasonable person would know that they were causing the injury, that it would be "excessive-unreasonable ... violent force."<sup>97</sup> The prosecution then linked appellant's confession, explaining how and why he shook and squeezed Katie to the medical evidence. Dr. Martin also debunked the defense's theory that bruising would be evident. Dr. Martin stated that "No. Bruising is not often seen with fractures."<sup>98</sup> Additionally, Dr. Martin testified that the skull "fracture itself and the best descriptions I could get of that fall do not fit well."<sup>99</sup> To the contrary, Dr. Martin testified that Katie's skull fracture branched in two directions, and "that implies a little

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<sup>93</sup> JA 174.

<sup>94</sup> JA 174.

<sup>95</sup> JA 174.

<sup>96</sup> JA 174.

<sup>97</sup> JA 176.

<sup>98</sup> JA 177.

<sup>99</sup> JA 184.

more force to the fall and it implies a more complicated mechanism."<sup>100</sup> Essentially, she debunked appellant's statement that he accidentally dropped the baby on the corner of his laptop. Dr. Martin went on to link the injuries of Katie to child abuse. She also ruled out that Mrs. Clifton could have caused Katie's femur injury based on the tripping episode Mrs. Clifton had described earlier.<sup>101</sup>

*The Defense Cross-Examination*

The defense immediately questioned Dr. Martin on the inability to link the clavicle fracture to anyone, including appellant, because to date, there was no history provided which would be consistent with that fracture.<sup>102</sup> Likewise, the defense crossed Dr. Martin on the inability to associate the skull fracture to a person, based on the history provided.<sup>103</sup> Moving on, the defense attempted to get Dr. Martin to agree to their theory that appellant could have caused the injury simply by picking the baby up with one hand on one side of her body. Dr. Martin however, did not believe that was a possibility, stating "I've not read anything in the literature proposing if they're kind of off-weighted like that."<sup>104</sup> She did not believe that it would cause a fracture, and most likely not one in the area

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<sup>100</sup> JA 184.

<sup>101</sup> JA 191.

<sup>102</sup> JA 195.

<sup>103</sup> JA 196.

<sup>104</sup> JA 209.

where Katie's were found.<sup>105</sup> It is apparent that the defense continued to adhere to their strategy of creating reasonable doubt and that this theory was appellant's best chance to prevail on the merits.

*The Panel Questions*

Command Sergeant Major (CSM) Anbiya had one question for the witness.<sup>106</sup> The question was whether Dr. Martin had seen Ashley's medical records, and if there was any evidence of prior injuries. The answer was that Dr. Martin had reviewed her medical records, and there appeared to be no indication of prior injuries "that concerned me about her."<sup>107</sup> SGT Morrissey had two questions. The first was where did Dr. Martin observe the bleeding on the brain, to which Dr. Martin responded "it is in the area, under those two fractures."<sup>108</sup> The second question was, what was the cause of that bleeding, to which Dr. Martin responded that she believed the bleeding and the fractures were from the same event.<sup>109</sup>

4. SA Andres Ortiz

*The Prosecution Direct Examination*

The government put on SA Ortiz in order to introduce the February 10, 2009 sworn statement, wherein appellant denied that

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<sup>105</sup> JA 210.

<sup>106</sup> JA 220.

<sup>107</sup> SJA 11.

<sup>108</sup> SJA 12.

<sup>109</sup> SJA 12.

he had ever shaken or squeezed Katie, and that he had accidentally dropped her on the corner of his laptop.<sup>110</sup> The statement served as the alleged false official statement which made up Charge I and its specification.<sup>111</sup>

*The Defense Cross-Examination*

The defense crossed SA Ortiz on his method of interrogation, and that SA Ortiz wrongfully had appellant not take his recently prescribed anxiety medication.

*The Panel Questions*

After an invitation from the military judge for panel questions, CSM Anbiya asked if appellant had indicated during his interview with SA Ortiz that he took Katie to the hospital after the alleged accidental drop. SA Ortiz replied that appellant indicated he did not bring Katie to the hospital following the alleged drop.<sup>112</sup> SGT Morrissey asked a question regarding why SA Ortiz did not audio or video record the interview. SA Ortiz replied that his office did not record interviews at that time.<sup>113</sup> Master Sergeant (MSG) Helms asked a couple of questions regarding any interviews of Mrs. Clifton. SA Ortiz responded that he did not interview her because he had

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<sup>110</sup> JA 221-225.

<sup>111</sup> JA 7.

<sup>112</sup> SJA 45.

<sup>113</sup> SJA 46.

seen the German police interview her, and based on that he determined no further interview was needed.<sup>114</sup>

5. SA (Retired) David McMullen

*The Prosecution Direct Examination*

SA McMullen was called to introduce the confession of appellant and the circumstances surrounding the interview.<sup>115</sup> SA McMullen testified that after some initial blame on brittle bone disease, appellant offered that "I had a vision or a dream that I did it."<sup>116</sup> SA McMullen dismissed the possibility of a dream, to which appellant leaned forward in his chair, began crying and said "I'm a monster ... I can't believe that this happened."<sup>117</sup> From there, appellant confessed to squeezing and shaking Katie out of frustration.<sup>118</sup> Appellant went on to describe how he was holding Katie, by saying "I was sitting down and I had my thumbs kind of upwards on the front of her chest and four fingers on each hand around her sides."<sup>119</sup> SA McMullen asked appellant how hard he squeezed Katie, to which appellant said "I would say pretty hard because I remember her arms lifting up on their own and her facial expression. I'll have nightmares for the rest of

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<sup>114</sup> SJA 50.

<sup>115</sup> JA 226-230.

<sup>116</sup> SJA 96.

<sup>117</sup> SJA 97.

<sup>118</sup> SJA 100.

<sup>119</sup> JA 228.

my life."<sup>120</sup> The confession was reduced to writing, and admitted as Prosecution Exhibit 14.<sup>121</sup> The medical evidence presented by the government was consistent with appellant's confession.

#### *The Defense Cross-Examination*

The defense vigorously cross examined SA McMullen on his interview techniques and his failure to record the interview. The defense went on to cross-examine SA McMullen about his role as a polygrapher, and the possibility of false confessions. Lastly, the defense questioned SA McMullen on the word choices appellant made, and whether SA McMullen put those words in appellant's mouth. Ultimately, the defense attempted to do everything possible to blunt the fatal impact this confession had on appellant's case.

#### *The Panel Questions*

On invitation from the military judge, CSM Anbiya had a question for SA McMullen about why he did not record the interview. SA McMullen stated he had never recorded an interview in his whole career.<sup>122</sup> CSM Anbiya had a follow up question on any medical training SA McMullen may have had, and asked the military judge if they could get an answer from a doctor.<sup>123</sup> The military judge replied "if the panel members feel

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<sup>120</sup> JA 229.

<sup>121</sup> JA 228-230.

<sup>122</sup> SJA 154.

<sup>123</sup> SJA 156.

you need to hear something from another witness, say you have a question from another witness and if that witness is available, then we can call that witness back if the question, again, hasn't been answered by that witness previously. So that's again up to you to decided whether or not you need to recall or you feel you need to recall, hear from an additional witness."<sup>124</sup>

#### 6. Staff Sergeant (SSG) Timothy Himburg

##### *The Prosecution Direct Examination*

SSG Himburg testified that he was appellant's squad leader, and picked him up from CID on February 24, 2009 following his interview with SA McMullen.<sup>125</sup> SSG Himburg testified that when he asked appellant if he was okay, appellant cried and replied "I can't believe I did it; it seemed like a dream."<sup>126</sup>

##### *The Defense Cross Examination*

The short cross-examination of SSG Himburg was that appellant did not directly admit that he hurt Katie.<sup>127</sup>

##### *The Panel Questions*

The panel had no questions for this witness.

#### **D. The Verdict**

Ultimately, the government's evidence was overwhelming, especially in light of the two confessions appellant made. The

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<sup>124</sup> SJA 156.

<sup>125</sup> SJA 164.

<sup>126</sup> SJA 165.

<sup>127</sup> SJA 166.

medical evidence supported the mechanism of injury appellant admitted to applying. Additionally, the medical evidence ruled out the possibility that Mrs. Clifton could have caused the femur fracture in the manner she described, and conversely, that it was likely that the femur broke from the shaking employed by appellant. Moreover, the medical evidence ruled out OI or any of its cousins as a contributor to the fracture. Despite appellant's attempt to shift the blame to his toddler daughter, or unidentified would-be-intruding-baby-shakers, the evidence against appellant was insurmountable.

The panel members found, however, that the government had not proven the intentional infliction of harm, but rather the force applied by appellant or means of shaking and squeezing likely could cause death or grievous bodily harm. Therefore, the panel found appellant guilty of the lesser included offense.<sup>128</sup>

#### **E. Harmless Error**

The defense strategy *ab initio*, was doubt and confusion. The record "amply supports the defense strategy in not objecting to the military judge's denial of a rehearing of these witnesses."<sup>129</sup> Assuming that the question(s) of Mrs. Clifton and an unspecified physician by the panel member would remove any

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<sup>128</sup> JA 282-283.

<sup>129</sup> *United States v. Rios*, 64 M.J. 566,569 (A.C.C.A. 2007).

doubt, these questions would not have inured to appellant's benefit. As the panel members were instructed by the military judge, any reasonable doubt left in that panel member's mind would necessarily have to have been resolved in favor of appellant.<sup>130</sup> While it is not known what question(s) the panel member would have asked, it is possible the failure to get his questions answered may very well have resulted in that panel member voting for a finding of not guilty to one or both charges or a finding of guilt only as to the lesser included offense. There being a panel composed of five members, four votes were enough to convict. Therefore, as was the case in *Rios*, the military judge's refusal to grant the panel member's request may have actually benefited appellant.

Additionally, the panel members were given substantial opportunity to ask questions of all the witnesses. The record reflects that the military judge gave wide discretion to the panel members in allowing them to ask a total of 23 Appellate Exhibit's worth of multi-layered questions of the witnesses. The military judge disallowed only a single question, after both counsel noted objections.<sup>131</sup> The military judge also allowed SA McMullen to be recalled as a witness at the request of SGT

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<sup>130</sup> R. 804.

<sup>131</sup> Appellate Exhibit LVI asked if SA McMullen could tell if the hand movements made by appellant during his confession was consistent with the rib fractures found on Katie. Both counsel objected to lack of medical knowledge.

Morrissey after the close of evidence, but prior to instructions and closing arguments<sup>132</sup>. The military judge again, asked if any panel member wanted any witness recalled for additional questioning.<sup>133</sup> At this point, all panel members declined.

Assuming that Mrs. Clifton and the unspecified physician were recalled and testified consistent with their prior testimony, their additional testimony would not have had any effect on the outcome of the proceedings. Therefore, any error committed by the military judge in failing to recall the two witnesses after the close of evidence was harmless beyond a reasonable doubt. Lastly, and most importantly, the government's evidence in this case was overwhelming. The testimony of each physician effectively accounted for the mechanism of Katie's injuries and foreclosed any opportunity for reasonable doubt based on any of appellant's alternate theories of how the injuries occurred. Appellant's own words in the form of his confession to CID and admissions to his squad leader effectively sealed his conviction. Therefore, any error committed by the military judge in failing to recall the two witnesses after the close of evidence was harmless beyond a reasonable doubt.

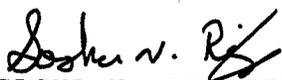
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<sup>132</sup> SJA 169.

<sup>133</sup> SJA 174.

Conclusion

The Government respectfully requests this Court rules as a threshold matter that appellant waived the issue. In the alternative, we ask this Court to affirm the Army Court's decision, and approve the findings and sentence in this case.

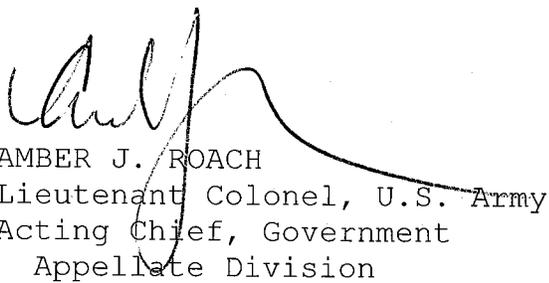


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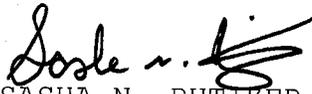
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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to [efiling@armfor.uscourts.gov](mailto:efiling@armfor.uscourts.gov) on October 5, 2012 and contemporaneously served electronically on appellate defense counsel, Captain Kristin McGrory at [Kristin.b.mcgrory.mil@mail.mil](mailto:Kristin.b.mcgrory.mil@mail.mil)

  
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