18 May 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Cross-Appellee,

v.

Senior Airman (E-4)
DANIEL J. DATAVS,
UNITED STATES AIR FORCE,
Cross-Appellant.

Crim. App. Misc. Dkt. No. 37537

USCA Dkt. No. 12-5001/AF

Brief on Behalf of Cross-Appellant

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WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBTAIN AN EXPERT CONSULTANT IN THE FIELD OF SEXUAL ASSAULT EXAMINATIONS, FAILED TO MAKE CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO WERE BASE VICTIM ADVOCATES, AND FAILED TO PROPERLY IMPEACH S.M.F USING HER PERSONAL TELEPHONE RECORDS.

Cases

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v.	)	
	)	USCA Dkt. No. 12-5001/AF
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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

This brief includes the entirety of Appellee/Cross-Appellant's argument, obviating the need to read other Appellee/Cross-Appellant pleadings for substantive purposes. Additionally, this brief does not incorporate any material from other sources in compliance with Rule 37(c)(4) of this Court's rules.

Issue Presented

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBTAIN AN EXPERT CONSULTANT IN THE FIELD OF SEXUAL ASSAULT EXAMINATIONS, FAILED TO MAKE CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO WERE BASE VICTIM ADVOCATES, AND FAILED TO PROPERLY IMPEACH S.M.F USING HER PERSONAL TELEPHONE RECORDS.

Statement of Statutory Jurisdiction

This case was reviewed below by the Air Force Court of Criminal Appeals pursuant to Article 66(b)(1), UCMJ, and is filed with this Honorable Court under Article 67(a)(3), UCMJ.

Statement of the Case

On 5 May and 30 June – 2 July 2009, Appellant was tried at a general court-martial by a panel of officer members at Cannon AFB, New Mexico. The Charges and Specifications on which he was arraigned, his pleas, and findings of the court-martial were as follows:

Chg	UCMJ Art	Spec	Summary of Offense	Plea	Finding
I	107			NG	G
			Did, o/a 28 Jul 08, w/ intent to deceive make to Det Pitcock and SA Chang official statements, to wit: "I've never, ever had anal sex" or words to that effect, and "it may have slipped if I was going from behind or something" or words to that effect, which statements were totally false, and were then known by SrA Datavs to be so false.	NG	Guilty, except the word "or." Of the excepted word: NG
II	125			NG	G
		1	Did, a/n Clovis, NM, o/a 15 Jun 08, commit anal sodomy w/ S. M. F. by force and w/o the consent of said S. M. F.	NG	G
		2	Did, a/n Clovis, NM, o/a 15 Jun 08, o/d/o, commit oral sodomy w/ S.M.F. by force and w/o the consent of said S.M.F.	NG	Guilty, except the word "divers" and substituting therefore the words "the first occasion." Of the excepted word: NG. Of the substituted words: G.

Appellant was sentenced to a reduction to the grade of E-1, forfeiture of all pay and allowances, and a dishonorable discharge. JA 34. On 11 September 2009, the convening authority approved the findings and sentence as adjudged. JA 35.

On 9 November 2011, in a divided published opinion, AFCCA affirmed the findings and only so much of the sentence as provided for a dishonorable discharge, forfeiture of $933.00 of pay for two months and a reduction to E-1. *United States v. Datavs*, 70 M.J. 595 (A.F. Ct. Crim. App. 2011) JA 1. On 17 November 2011, a copy of the court's decision was forwarded to Appellant by first-class mail. On 7 December 2011, the Government moved for reconsideration and for reconsideration en banc. On the same day, Appellant joined in the Government's request for reconsideration en banc. On 12 December 2011, the Air Force Court denied the motion for reconsideration. JA 23. On 10 February 2012, Appellant filed a timely petition for grant of review. Also on 10 February 2012, the Judge Advocate General of the Air Force certified the following issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS INCORRECTLY APPLIED THE STANDARD OF LAW UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND HARRINGTON V. RICHTER, 131 S.CT. 770, (2011), WHEN EVALUATING WHETHER TRIAL DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT SEEKING EXPERT ASSISTANCE DURING TRIAL AFTER THE GOVERNMENT'S EXPERT WITNESS TESTIFIED.

On 14 February 2012, this Court granted Appellant's motion to extend the time for filing the supplement to the petition

until 1 March 2012. On 18 April 2012, this Court granted Cross-Appellant's petition for review.

Statement of Facts

At 0200 on a Monday, S.M.F. knocked on Appellant's door, knowing that he was intoxicated and unable to meet her elsewhere. JA 46 and 85. S.M.F. anticipated that she and Appellant would engage in sexual intercourse. JA 85. S.M.F. met Appellant about six weeks prior through her father's softball team. JA 2. S.M.F. and Appellant had previously spent time together and had sexual relations once before. *Id*.

Appellant rented a single room from his landlords, a staff sergeant and her husband. JA 84-85. When S.M.F. knocked on Appellant's door, his landlords answered, having been awakened by their barking dogs. JA 84.

When S.M.F. entered Appellant's room, he was asleep. *Id*. S.M.F. woke up Appellant, and they started kissing. JA 86. She helped Appellant remove her clothing. JA 87. S.M.F. engaged in consensual vaginal sex. JA 88. S.M.F. also admitted to kissing Appellant's penis to please him. JA 91.

On 21 August 2008, S.M.F. filled out a sworn statement, claiming that Appellant had raped her. JA 128. At 2230 the same day, S.M.F. told her mother that she thought she had been raped. JA 127. S.M.F.'s mother took her to the hospital where they met Ms. Twanya Burton, a family friend who conducted the SANE

examination. *Id*. The government did not pursue S.M.F.'s allegations of rape. JA 29.

On 24 April 2009, defense counsel submitted a motion to compel the appointment of a SANE consultant due to their lack of experience and knowledge. JA 39. In their motion, the defense counsel reasoned:

> An expert consultant SANE is a necessity in Defense preparation of this case. No member of the Defense team has received formal or informal training regarding forensic evidence collection from a complainant after an allegation of sexual assault. Defense consultant will be utilized to confirm the accuracy of the findings of Government's SANE. Furthermore, said consultant will assist in identification and development of any favorable evidence that can be derived from the SANE report. Finally, if determined necessary, the consultant may assist as a witness to explain said favorable evidence to the court. Absent the appointment of such an expert, the Defense will be at a disadvantage to discover and explain favorable evidence derived from the SANE report. . . . There is a reasonable probability that not ordering the appointment of such an expert would result in a fundamentally unfair trial. By depriving SrA Datavs the opportunity to effectively challenge the Government's case because his counsel are not experts in the fields of Sexual Assault Examinations, would violate his due process rights.

JA 41-42.

Despite this lack of experience and knowledge, defense counsel withdrew their motion to compel the appointment of a defense SANE consultant. JA 43.

During trial, the government called its SANE expert to testify. JA 169. The government's SANE, Ms. Burton, was the same family friend who conducted the physical examination of S.M.F. JA 160. Defense counsel did not object to Ms. Burton's

testifying as an expert witness. JA 169. Ms. Burton testified that she was licensed in 2002 after receiving 60 hours of classroom training and 100 hours of clinical training. JA 136. She estimated that she had conducted over 500 sexual assault examinations. JA 140. She did not testify that she had ever been previously qualified as an expert witness at trial.

Although defense counsel did not object to recognizing Ms. Burton as an expert during trial, defense counsel did challenge Ms. Burton's qualifications during cross-examination and clemency. JA 185-192. During cross-examination, defense counsel elicited Ms. Burton's bias when she acknowledged that she had known S.M.F's parents for approximately 15 years prior to conducting a sexual assault examination on S.M.F. *Id*. To show her inexperience, defense counsel also crossed Ms. Burton on her Article 32 testimony, where she admitted to having no experience examining individuals who had engaged in consensual sex. JA 190-192.

In their affidavits, trial defense counsel claimed that they strategically forewent a SANE consultant because they wanted to proceed to trial quickly and because they were confident based on the Article 32 testimony and pretrial interviews that Ms. Burton would not offer damaging testimony related to the anal trauma. JA 227 and JA 231. However, as the Air Force Court of Criminal Appeals noted in its decision, the military judge granted the government a two-month continuance on the same day that defense

counsel withdrew their motion to compel. JA 6. In their subsequent affidavits, defense counsel explained that two months was not enough time to obtain a reliable expert consultant. JA 239 and 242.

Besides claiming expediency as a reason for not requesting a SANE consultant, defense counsel also claimed that they did not need an expert consultant because the government SANE was going to limit her testimony to anal injuries, which were not severe in nature. JA 227 and 231. Defense counsel stated during trial that because the government did not intend to introduce vaginal trauma from the SANE report, defense counsel did not believe that they needed a SANE nurse during trial. JA 43-44. However, through affidavit, defense counsel re-characterized the decision to forgo a SANE consultant as a negotiated bargain with the government rather than a lack of need based on a government proffer of evidence. JA 227, 230-31. Defense counsel also believed that they had no need for the assistance of an expert SANE consultant because, based on the Article 32 testimony, the government SANE consultant would not make harmful statements regarding the anal trauma to S.M.F. *Id*.

During the Article 32 investigation, the government SANE testified as follows:

> I found a great deal of vaginal trauma consistent with friction-related injuries. Those injuries normally result from vaginal dryness and blunt force trauma. Vaginal dryness can exist for a variety of reasons including non-consensual sex, unwanted but consensual

> sex, various kinds of stress, health issues, and/or medications.
>
> I also noted redness of and bruising to the cervix, which is indicative of blunt force but is also possibly a result of vigorous consensual activity.
>
> Additionally, I noted anal trauma, including immediate anal dilation, oozing blood, and lacerations of anal tissues. This is consistent with forced anal penetration but these injuries could also have resulted from a first time anal entry, including partial entry of the penis in the anus.
>
> It's medically possible that all of Samantha's injuries resulted from consensual sex, particularly vigorous sex.

JA 133.

In Appellant's clemency request, defense counsel relied heavily upon a post-trial report from Ms. Becky O'Neal, which was procured at Appellant's own expense after trial. JA 244. At the time of the post-trial report, Ms. O'Neal had been a SANE for 17 years and completed approximately 2,000 sexual assault examinations. *Id*. She had also testified on hundreds of occasions where she was qualified as an expert witness in the field of sexual assault examinations. *Id*.

Ms. O'Neal contradicted the government SANE's (Ms. Burton's) in-court testimony on a number of bases. She disagreed with the Ms. Burton's claim that the SANE pictures show S.M.F's anus "dilated" and "open" as result of damage and trauma. JA 169, 172, 181, 244. Ms. O'Neal explained that the anus was closed according to the first picture of the anus from the SANE examination. JA 244. Ms. O'Neal stated that she did not see any

"spontaneous or immediate dilation of the anus . . . ." *Id*. Additionally, Ms. O'Neal stated that Pros. Ex. 3 p. 2 of the SANE examination appeared to be a picture of a "normal anus that is closed." *Id*. This contradicts Ms. Burton's testimony that the anus was damaged in a manner that left it open over 24 hours after the incident. JA 168-69. Ms. O'Neal explained that in order to meet the definition of anal dilation, both the "external and internal anal sphincters" must be dilated. JA 245. The pictures that Ms. Burton testified to do not meet the definition of a dilated anus according to Ms. O'Neal. JA 181.

Ms. O'Neal also contradicted Ms. Burton's claim that the sphincter remains closed even in a birthing position. JA 244. Ms. O'Neal stated that in Pros. Ex. 3 p. 2 that the outer sphincter was slightly open and that the internal sphincter was closed. *Id*. Ms. O'Neal explained that this was normal because S.M.F. was in the "common position used in child birth to expel the child. So, in the position that [Ms. Burton] had the patient in, pressure was being applied from the abdomen down to the anal area." Id.

Ms. O'Neal disagreed with Ms. Burton's assessment that S.M.F.'s colon is visible in Pros Ex. 3 p. 2. JA 245. Ms. O'Neal asserted in her report that the anus is tightly closed, so it was impossible to see the colon as Ms. Burton described. JA 169, 171, 172, 177. Ms. O'Neal also argued that even if the anus

were open that it would be nearly impossible for an individual to view a person's colon. JA 245.

Ms. O'Neal suspected that an incorrect use of medical terminology explains why Ms. Burton told the panel that the colon was visible in the pictures. *Id*. According to Ms. O'Neal, the colon ends at the rectum. *Id*. The rectum extends for 8-10 inches into the body and then connects to the colon. *Id*. Consequently, Ms. O'Neal explained that Ms. Burton is likely using incorrect medical terminology to describe what she sees in the SANE pictures. JA 173, 175, 180, 245.

Ms. O'Neal also contested Ms Burton's assertion that the pectinate line of the anus is visible in Pros. Ex. 3 p. 6. JA 245. Anatomically, the pectinate line is much lower in the anus than the colon. *Id*. Even with Ms. Burton manually opening the anal cavity, Ms. O'Neal asserted that the pectinate line is not clearly visible in Pros. Ex. 3 p. 6 as Ms. Burton asserted. JA 177, 179-81, 245.

Ms. O'Neal also argued that Ms. Burton exaggerated the active oozing of the anal tissue in Pros. Ex. 3. p. 3. JA 245. Ms. O'Neal explained that because the blue dye used in the visualization of damaged tissue was able to adhere at the seven o'clock position in the anus, that the seven o'clock position was not actively oozing at the time of the examination as Ms. Burton asserted during trial. JA 174, 245. If that region of the anus

had been oozing, the blue dye would not have been able to adhere. JA 245.

Ms. O'Neal also challenged Ms. Burton's use of manual stimulation to determine S.M.F.'s anus' ability to close. JA 189, 245. During cross-examination, defense counsel questioned Ms. Burton presumably about Pros. Ex. 2 p. 6 when she asked if S.M.F's "sphincter had closed by the end of [the] examination." JA 189. Ms. Burton responded that it only closed as the result of manual stimulation. *Id*. Ms. O'Neal, however, challenged Ms. Burton's technique for determining anal function in this manner. JA 245. Ms. O'Neal wrote, "To take one finger and gently touch the anus you can assess the patient's sphincter tone. It is unclear in Ms. Burton's testimony if this is what she is referring to. Possibly if Ms. Burton had to take one hand off the patient's butt cheek to apply the toludine blue dye, some traction was released therefore allowing the anus to close." *Id*.

Ms. O'Neal also provided Appellant with a more favorable expert opinion regarding the injuries observed in the SANE pictures. *Id*. In Ms. O'Neal's expert opinion, the injuries could have occurred during consensual or non-consensual sex. *Id*. She explained that even people experienced with anal sex can injure the anus because its anatomy is unsuited to the insertion of foreign objects. Ms. Burton, however, testified that one usually would not see any lacerations from consensual sodomy, and "[a]gain, because that particular sexual act is for pleasure, not

for pain and when it's done in a controlled environment with again, lubrication, willing party, things of that nature, it doesn't usually have injury with it." JA 182. Ms. Burton also stated that, "Two people who are experienced with anal sex normally don't incur injury." JA 187.

Ms. O'Neal indicated that she could have also assisted the defense through the discovery process. Because Ms. Burton indicated that she participated in the examination of live models who regularly engage in anal sex, Ms. O'Neal would have requested the records of those models to validate this claim. JA 185 and 246. This is particularly important because Ms. Burton contradicted her Article 32 testimony during trial when she stated that she had trained with live models who had consented to anal sodomy. JA 132, 185. Even if such records did not exist, Ms. O'Neal would have prompted the defense counsel to challenge Ms. Burton regarding what these live models claimed as far as their experiences with consensual anal sodomy. JA 246.

Ms. O'Neal also would have challenged Ms. Burton when she bolstered her SANE experience by claiming that she had observed the anal region of several hundred emergency room patients who had not experienced forcible anal sodomy. *Id*. Ms. O'Neal asserted that asking patients about anal sex is not common practice in the emergency room, so it is unlikely that Ms. Burton actually would have been regularly asking patients this question, as Ms. Burton testified at trial. *Id*.

Had Ms. O'Neal been employed at trial, she also would have requested the literature, research, and conference education that Ms. Burton claimed in support of her observations about the appearance of consensual and non-consensual anal sex. JA 247. Ms. O'Neal asserted in her written report that this particular topic is not well-researched. *Id*.

Besides not requesting a defense SANE consultant to assist during trial, defense counsel made numerous other mistakes during trial. The defense did not challenge for cause or through preemptory challenge two victim advocates on the panel, one of whom had previously been the acting base Sexual Assault Response Coordinator (SARC). JA 320. The military judge asked the defense if they intended to challenge these two panel members, but the defense declined to challenge them. *Id*. The military judge even asked Appellant if he was satisfied with his defense counsel not challenging these two individuals. JA 321.

During trial, the defense became concerned with their decision not to challenge one of these victim advocates when one panel member allegedly stated that she hated the defense attorney. JA 330. However, the military judge did not find the observations to be reliable and refused to question the panel members regarding that incident. JA 332.

The defense also failed to properly use the telephone records for an effective impeachment of S.M.F. JA 325. Defense counsel wanted to demonstrate to the panel through phone records

that S.M.F. had in fact tried to contact Appellant after the incident of sodomy. JA 322; App. Ex. XV p. 6, 15. Once defense counsel realized that she could not lay the proper foundation for the phone records, she stated, "I respectfully withdraw my request to use the phone record itself as a document to show the witness." JA 325.

Instead of admitting the record into evidence, the defense counsel asked if S.M.F. knew that her phone records indicated that she had texted Appellant three times on 15 June 2008.[1] JA 329. S.M.F. stated that she did not know that her records indicated that she had tried to call Appellant and challenged at least one of those entries by asserting that she was in church at the time. *Id*. Because the phone records were not properly before the members or effectively utilized, the panel had no evidence that S.M.F.'s testimony was inaccurate in this regard. JA 325.

SUMMARY OF ARGUMENT

As Judge Roan explained in his dissent below, Appellant was denied his right to effective counsel when his attorneys failed to obtain an expert consultant to assist. As a result, the government SANE provided misinformation and inaccurately bolstered her personal credentials. Appellant's defense counsel were unable to rebut this testimony because they were unaware of its factual shortcomings. Due to the lack of effective cross-

examination, S.M.F.'s testimony received undue credibility from the SANE testimony. Absent the SANE's erroneous testimony, S.M.F.'s testimony would not have resulted in a conviction considering the other consensual acts and surrounding circumstances. Additionally, defense counsel were ineffective by waiving the right to challenge two victim advocates for cause and by failing to correctly impeach the complaining witness with her own cell phone records.

ARGUMENT

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBTAIN AN EXPERT CONSULTANT IN THE FIELD OF SEXUAL ASSAULT EXAMINATIONS, FAILED TO MAKE CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO WERE BASE VICTIM ADVOCATES, AND FAILED TO PROPERLY IMPEACH S.M.F USING HER PERSONAL TELEPHONE RECORDS.

Standard of Review

Whether counsel was in fact ineffective and whether any ineffective assistance was prejudicial are issues reviewed de novo. *United States v. Wiley*, 47 M.J. 158 (C.A.A.F. 1997).

Law

The Sixth Amendment to the United States Constitution guarantees an accused the right to "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The same right is afforded service members in trials by court-

[1] The phone records show that S.M.F. tried to contact Appellant three times on 16 June 2008. App. Ex. XV p. 6, 15.

martial under Article 27(b), UCMJ, 10 U.S.C. §827(b). *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991).

This Court adopted the Supreme Court's test for effectiveness of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). In *United States v. Polk*, this Court adopted a three-pronged test to determine if the presumption of competence has been overcome:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and
>
> (3) If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

32 M.J. 150, 153 (C.M.A. 1991).

In *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990), this Court held that "very little, if any, showing of necessity" is required for the defense to obtain expert assistance when the government has its own expert that will be testifying against the accused. *See also United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006). The obligation to provide competent representation begins in the pretrial stage and continues through the sentencing and post-trial stage of the court-martial. *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994). *See also United States v. Dorsey*, 30 M.J. 1156, 1159 (A.C.M.R. 1990). Although defense counsel are generally granted great deference

for strategic decisions, that same deference is not granted to defense attorneys who fail to engage in reasonable pretrial investigations. *United States v. Hammer*, 60 M.J. 810, 822 (A.F. Ct. Crim. App. 2004); *Wiggins v. Smith*, 539 U.S. 510 (2003); *United States v. Alves*, 53 M.J. 286 (C.A.A.F. 2000). The pretrial investigation should include the use of an expert consultant if defense counsel are not able to gather and present all necessary evidence on their own. *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999).

To prevail on an ineffective assistance of counsel claim, even after establishing that defense counsel's performance fell measurably below what is expected of fallible attorneys, an appellant must also show by a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A "reasonable probability" is defined as a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694). Also, the harm should be established collectively from all of the deficiencies at trial. *Kyles v. Whitley*, 514 U.S. 419 (1995).

Analysis

In his dissent below, Judge Roan observed:

> In my opinion, trial defense counsels' errors were clearly prejudicial. BO's report and a thorough reading of the record of trial show that defense counsel did not adequately question the methods TB used to conduct her exam, confront her with other studies, or refer to pertinent medical literature to question the accuracy of her conclusions. The defense counsels' lack of familiarity with the medical issues involving

> sexual assaults effectively assured that TB's almost uncontroverted testimony was given greater weight by the members.
>
> . . . Had BO testified, the members would have been presented with evidence from two expert witnesses each of whom would have contradicted key pieces of the theory presented by the opposing side. Such a situation "would have presented a classic battle of the experts, [and] the potential damage to the side whose expert is missing can be devastating." *United States v. Clark,* 49 M.J. 98, 101 (C.A.A.F. 1998). . . .
>
> BO's assistance in formulating an effective defense strategy would have been invaluable. She could have provided defense counsel with the means to contest TB's ultimate conclusion that the injuries were consistent with forcible penetration. TB's testimony on this point was particularly damaging to the defense. Because her opinion was not effectively challenged, TB conveyed the message that SF's injuries could only be the result of nonconsensual forcible sodomy. The defense's attempt at cross-examination as the primary means to damage TB's credibility was not a substitute for the affirmative evidence that BO ostensibly could have provided to diminish the impact of TB's testimony.
>
> Moreover, BO's credentials as an expert were far better than TB's. BO had testified as an expert in sexual assault examinations in hundreds of trials. TB's experience on the other hand was far less. In fact, the appellant's case was the first time she had been recognized as an expert by any court. It is very possible, indeed likely, that the members would have given BO's opinions greater weight than TB's simply because her demonstrated expertise in evaluating the central issue of forcible penetration and sexual assaults in general was significantly more compelling.
>
> In sum, trial defense counsels' failure to secure a forensic expert constituted an abrogation of their responsibility that undermined the proper functioning of the adversarial process.

JA 20-21.

As Judge Roan concluded, Appellant's Sixth Amendment right to effective assistance of counsel was violated when his defense

counsel failed to obtain a SANE consultant for the purpose of educating themselves in the science of sexual assault examinations and preparing themselves for the cross-examination of Ms. Burton. JA 18. Additionally, due to the lack of a reasonable pretrial investigation, defense counsel are not afforded any deference regarding their decision to forgo an expert SANE consultant. JA 15.

In this case, it was not reasonable for the defense counsel to forgo the appointment of an expert consultant where they admitted to having no training in "forensic evidence collection from a complainant after an allegation of sexual assault" and even acknowledged that Appellant's due process rights would likely be violated absent such an appointment. JA 41-42. The defense counsel fell far below the performance of a fallible attorney when they proceeded with a trial that was largely based on scientific evidence with which they were unfamiliar.

Although defense counsel attempt to claim strategic reasons to support their decision to withdraw their motion to compel the appointment of an expert consultant, these reasons lack any actual basis and are contradicted by the record of trial. Defense counsel claim that they needed to proceed to trial quickly to avoid exposing inculpatory evidence and to take advantage of poor prosecutorial preparation; however, the government was granted a two month delay over defense objection, negating this claim entirely. JA 6.

Defense counsel also claim in their affidavits that they negotiated away the appointment of a SANE consultant in order to keep out the evidence of vaginal trauma; however, based on the record of trial, the government made the decision not to introduce evidence of vaginal trauma in a forcible anal sodomy case completely independent of defense counsels' decision to withdraw their motion to compel. JA 43-44.

Lastly, defense counsel claimed that they did not need to request the appointment of an expert consultant because the testimony from the government SANE was going to be harmless. This assertion is not supported by the Article 32 investigation. Summarized Article 32 Testimony of Ms. Burton, dated 4 Feb 09. Even if trial defense counsels' claim that pretrial statements were harmless had merit, they still should have sought a recess to attempt to obtain expert advice after Ms. Burton's in-court testimony, realizing that her testimony had caused significant damage to their case and that they were unprepared to cross-examine her based on a lack of knowledge and experience. Affidavit from Maj Owen, dated 12 November 2010 and Affidavit from Capt Elizabeth L. Patrolia, dated 15 Nov 10. As Judge Roan observed in dissent below, "Even accepting for the sake of argument that trial defense counsels' decision to withdraw their motion to compel was plausibly reasonable, their failure to renew the request for an expert once TB's testimony substantially changed from what they expected was indefensible." JA 17.

Not only did Appellant's trial defense attorneys fall measurably below the performance of fallible attorneys, but Ms. O'Neal's post-trial report demonstrates a reasonable probability that Appellant would have been found not guilty had his attorneys employed expert assistance. Ms. Burton stated throughout her testimony that S.M.F.'s anus was open and dilated due to the damage to her anus. JA 169. Defense counsel was unable to rebut this expert opinion due to lack of knowledge and expertise. JA 189.

If Ms. O'Neal had been assisting defense counsel at the time of trial, she would have informed the attorneys that S.M.F.'s anus did not meet the medical definition of dilation or being open. JA 244. Ms. O'Neal would have explained that the slight opening of the anus was likely due to S.M.F.'s anatomical position during the SANE exam. *Id*. Ms. O'Neal would also have informed the defense that touching a finger to the anus is not an approved medical technique for assessing the anus's ability to close. *Id*.

Ms. O'Neal could have assisted defense counsel in refuting numerous other aspects of Ms. Burton's testimony. Ms. O'Neal could have informed defense counsel that Ms. Burton was using incorrect medical terminology when she was referring to S.M.F.'s colon. JA 245. The defense counsel were, however, unable to refute that S.M.F.'s colon was visible from the SANE pictures because they were not familiar with the medical terminology and

would not know how to identify the different anatomical parts of S.M.F.'s anal cavity. JA 41-42. Defense counsel did not know that the colon is located 8-10 inches inside the anal cavity. JA 245.

Ms. O'Neal would also have informed the defense that Ms. Burton's assertions concerning oozing at the seven o'clock position were inaccurate because the dye adhered in that location. *Id*. Ms. O'Neal would have informed the defense counsel that the literature and research that Ms. Burton cited regarding consensual sodomy likely does not exist. JA 247. Ms. O'Neal could also have informed the defense that Ms. Burton is likely inaccurately bolstering her credibility by claiming that her emergency room experience has educated her on what consensual anal sodomy looks like. JA 246. Ms. O'Neal could have assisted the defense counsel by informing them what discovery documents to request. JA 246-247.

Most importantly, however, Ms. O'Neal would have provided the defense with a much more favorable expert opinion regarding the effect of consensual anal sodomy. JA 246. Ms. Burton's testimony was very damaging in this regard, and she left little room for the belief that S.M.F. could have engaged in consensual sodomy considering the extensive damage to her anus. JA 181, 182, 187, and 188. By contrast, Ms. O'Neal would have testified that

> [A]ny of these injuries could occur in consensual or non-consensual anal sex. I would also define force as

> the use of physical power against some type of resistance. Therefore, I believe it would take some form of force to have anal sex, whether consensual or non-consensual. Force is going to be needed to get a penis into an anus in any situation. In my expert opinion, even two people who are experienced in anal sex could incur injury due to the sensitivity of the anus and the fact that it is not meant to be entered.

JA 246. However, the defense was not able to provide a more beneficial and more experienced expert opinion during trial or even effectively cross-examine Ms. Burton's damaging expert opinion.

Ms. Burton's testimony served to bolster S.M.F.'s claim of forcible anal and oral sodomy because she created a picture of extreme violence during the encounter even though S.M.F. admitted that much of the sexual interaction had been consensual before and after the sodomy. JA 85. Because Ms. Burton presented unchallenged and professionally credible testimony supporting S.M.F.'s claim, the shortcomings in S.M.F.'s testimony became insignificant to the members. Absent Ms. Burton's bolstering testimony, the panel members would have focused more on S.M.F.'s decision to initiate the sexual encounter at 0200 when Appellant was asleep and partially intoxicated. *Id*. The members would have focused on the fact that two adults and two dogs were also present in the house. JA 84. The members also would have focused on any motive that S.M.F. might have had to lie to her mother when she claimed "rape" in order to receive medical treatment. JA 127. Instead, Ms. Burton, a family friend of S.M.F., bolstered S.M.F.'s claim of forcible anal and oral sodomy

testifying that the injuries were consistent with S.M.F.'s claims.

Not only was Appellant deprived of effective assistance of counsel when his counsel failed to request a SANE consultant, but he was also deprived of effective assistance of counsel through numerous other actions on his attorneys' part throughout trial. His defense attorneys failed to ensure Appellant would be tried by a fair and impartial panel when they did not challenge for cause two base victim advocates, one of whom had been the acting base Sexual Assault Response Coordinator (SARC). JA 320. Any reasonable defense attorney would challenge these types of panel members, and the military judge would have likely granted such a challenge in this case. *Id*. In any event, the defense counsel could have ensured that at least one was removed by using the defense's peremptory challenge for that purpose. The unfavorable disposition of one of the panel members became clear when allegedly she told another panel member during the trial that she "hated" the defense attorney. JA 330.

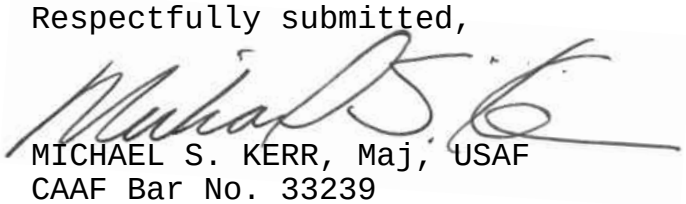
As is common practice in sexual assault cases, defense counsel sought to impeach S.M.F.'s credibility; however, defense counsel failed to meet reasonable standards of trial preparation when she was unable to use telephone records in an effective manner to impeach S.M.F. regarding her attemps to contact Appellant after the SANE examination. JA 327. Because defense counsel was not adequately prepared, she withdrew her request to

admit the telephone records and was unable to prove to the panel members that S.M.F.'s testimony was not credible. JA 325.

The Government may attempt to argue that even if this Court found ineffective assistance of counsel that this Court should still affirm the findings regarding the forcible oral sodomy and the false official statement due to the military judge's spillover instruction. However, the military judge also instructed the members that if "evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant." As a result, the military judge allowed the members to use Ms. Burton's erroneous testimony to support the element of force. Based on Ms. Burton's testimony, the members would have envisioned a violent and hostile situation where S.M.F. would have been forced into oral sex and where Appellant's statement to law enforcement would not have been true based on the force necessary to cause the anal injuries described by Ms. Burton.

WHEREFORE, Appellant respectfully asks this Court dismiss Charge I, Charge II, and their specifications.

Respectfully submitted,



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