8 June 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Cross-Appellee,*	)	ANSWER TO BRIEF ON BEHALF OF CROSS-APPELLANT
v.	)	USCA Dkt. No. 12-5001/AF
Senior Airman (E-4) DANIEL J. DATAVS, USAF, *Cross-Appellant.*	)	Crim. App. Dkt. No. 37537

ANSWER TO BRIEF ON BEHALF OF CROSS-CROSS-APPELLANT

TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 33631

CHRISTOPHER T. SMITH, Lt Col, USAF
Reviewing Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 31485

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 27428

DON M. CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35093

INDEX

TABLE OF AUTHORITIES

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES

MISCELLANEOUS

8 June 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Cross-Appellee,*	)	ANSWER TO BRIEF ON BEHALF OF CROSS-APPELLANT
v.	)	USCA Dkt. No. 12-5001/AF
Senior Airman (E-4) DANIEL J. DATAVS, USAF, *Cross-Appellant.*	)	Crim. App. Dkt. No. 37537

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER CROSS-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

The government accepts Cross-Appellant's Statement of Statutory Jurisdiction.

STATEMENT OF THE CASE

The government accepts Cross-Appellant's Statement of the Case with the following additions.

Cross-Appellant's granted issue expands the scope of review of the issue certified by The Judge Advocate General, to include considering whether trial defense counsel was ineffective for not consulting with an expert before the government's expert testified. Because the government's brief in support of the

certified issue submitted with this Court on 23 February 2012 thoroughly addressed why trial defense counsel provided effective representation by not consulting with an expert SANE after the government's expert testified at trial, this brief only addresses whether trial defense counsel should have consulted with an expert before the government's expert testified.

STATEMENT OF FACTS

1. Facts concerning trial defense counsel's decision to forego consultation with an expert in the field of sexual assault examinations.

Contrary to his pleas, Cross-Appellant was convicted by general court-martial for forcibly sodomizing a woman, S.F., both anally and orally, and for lying to law enforcement officials when being questioned about the allegation. (J.A. at 29-30; 32-33.) On or about 28 July 2008, Cross-Appellant revealed to S.F. during a phone conversation that he had received deployment orders to Turkey, so she traveled to his house around 0200 hours to talk to him about his pending departure. (J.A. at 46-47, 76.) Cross-Appellant's roommates let S.F. into the house, and she went to Cross-Appellant's room where he was sleeping. (J.A. at 47-48.) S.F. woke up Cross-Appellant, they began kissing, and their interaction quickly progressed to consensual vaginal intercourse. (J.A. at 48-50.) Cross-Appellant and S.F. had engaged in consensual vaginal

intercourse approximately one-to-two weeks earlier. (J.A. at 49.)

Cross-Appellant became surprisingly demanding, physically forcing S.F. to perform oral sex on him against her expressed desires. (J.A. at 50-52.) They then engaged in vaginal intercourse again. (J.A. at 52.) This time, however, S.F. testified that she was scared because Cross-Appellant was being so forceful, but she did not complain because she feared it would make him angrier. (J.A. at 52-53.) While engaging in vaginal intercourse the second time, Cross-Appellant slapped S.F. in the back because "she wasn't in the right position" and she experienced physical pain caused by the sexual intercourse. (J.A. at 53.) Next, Cross-Appellant told S.F. that he wanted to have anal sex. (J.A. at 55.) Over S.F.'s repeated verbal objections, Cross-Appellant forcibly anally sodomized her. (J.A. at 55-58.) S.F. testified that the pain of being anally sodomized was something she had never felt before. (J.A. at 57.) Cross-Appellant and S.F engaged in vaginal sex again, followed by S.F. performing oral sex on Cross-Appellant a second time.[1] (J.A. at 59-60.) Afterwards, Cross-Appellant and S.F. talked briefly, and she departed his house. (J.A. at 60-61.)

The next day, S.F. revealed to her mother she had been raped. (J.A. at 63.) S.F.'s mother advised her to go to the

[1] Cross-Appellant was acquitted of the allegation of forcible oral sodomy on the second occasion.

hospital to have a sexual assault examination performed. (J.A. at 64.) At the hospital, a family acquaintance and sexual assault nurse examiner (SANE), T.B., conducted a forensic examination on S.F. (J.A. at 64-65.)

On 13 March 2009, trial defense counsel[2] submitted a "by-name" request to the convening authority seeking the appointment of a SANE, B.O., to consult with the defense in preparation for and during trial. (J.A. at 36-37.) The senior defense counsel worked with B.O. on a previous court-martial and knew that she was a "thoroughly competent SANE." (J.A. at 239.) On 22 April 2009, the convening authority denied the request. (J.A. at 38.) On 24 April 2009, trial defense counsel filed a motion to compel the appointment of a SANE consultant with the military judge. (J.A. at 39-42.) In describing the defense's need for a SANE, trial defense counsel explained:

> An expert consultant SANE would assist the Defense in better understanding of the evidence obtained by the Government's SANE representative. An expert consultant may assist the Defense in court . . . [t]here is a reasonable probability that not ordering the appointment of such an expert would result in a fundamentally unfair trial . . . .

(J.A. at 42-42.)

In preparation for trial, trial defense counsel interviewed the government's SANE on three separate occasions and observed

[2] Cross-Appellant was represented by a senior defense counsel (SDC) and an area defense counsel (ADC).

her detailed testimony during the Article 32 hearing. (J.A. at 226, 230.) The last defense interview of T.B. was extensive and occurred approximately one week prior to trial, lasting three hours. (J.A. at 230.) During the interview, trial defense counsel discussed at length with T.B. her findings based on her vaginal and anal examination of S.F. (J.A. at 226-27.) T.B. consistently offered damaging testimony regarding the injuries S.F. sustained to her vagina.[3] (Id.) While T.B. described the vaginal injuries sustained by S.F. as "some of the worst she had ever seen," she did not describe the anal injuries in the same light. (J.A. at 226-27, 230-31.) As such, trial defense counsel believed it was important to limit testimony from T.B. regarding the nature and extent of S.F.'s vaginal injuries sustained during the vaginal intercourse and solely focus her testimony on the findings of her anal examination. (J.A. at 226-27, 230-31, 239-40, 242.)

On or about 5 May 2009, before the military judge issued a ruling, the defense withdrew its motion to compel the appointment of a SANE in exchange for the prosecution agreeing to restrict T.B.'s testimony only to the medical findings of

[3] One charge and one specification of rape in violation of Article 120, UCMJ, was originally preferred against Cross-Appellant. (J.A. at 29.) This charge encompassed the vaginal intercourse with S.F. (Id.) On 2 March 2009, after the Article 32 hearing, this charge was withdrawn and dismissed during referral.

S.F.'s anal examination.[4] (J.A. at 43-44, 226-27, 230-31, 239-40, 242.) The defense strived to limit T.B.'s testimony to show the injuries could have been caused by an accidental insertion of Cross-Appellant's penis into S.F.'s anus or through consensual sodomy. (J.A. at 184-92.) Because of the nature and extent of S.F.'s vaginal injuries, the defense was concerned the court members would conclude that Cross-Appellant was violent and used force throughout the entire sexual encounter, which would spill over and influence the members' findings regarding the anal sodomy charge and serve as harmful aggravation evidence in sentencing. (J.A. at 226-27, 230-31, 239-40.) Trial defense counsel was comfortable going forward without assistance from a SANE because, by limiting this evidence, T.B.'s testimony was "insufficient, in and of itself, to suggest with any degree of certainty whether the sexual conduct between [Cross-Appellant] and [S.F.] was consensual or not." (J.A. at 240.) Furthermore, trial defense counsel sought to show that "anal trauma, such as noted by [T.B.], could have been caused by a single insertion, or even partial insertion, of a penis regardless of the use of force." (Id.)

During trial, T.B. described the injuries to S.F.'s anus as more severe than she previously had revealed in pre-trial

[4] Trial convened on 5 May 2009, but was continued until 30 June 2009 because the military judge granted the prosecution's request for a continuance due to witness availability issues.

interviews or during the Article 32 hearing. (J.A. at 134-83.) Consistent with the agreement between trial counsel and the defense, T.B. did not testify as to S.F.'s vaginal injuries. (Id.)

2. Facts concerning trial defense counsel's decision not to challenge for cause two panel members who were also base victim advocates.

During voir dire, trial defense counsel asked if anyone had received specialized training concerning victims of sexual abuse. (J.A. at 287.) MSgt Glover and Capt Wood replied affirmatively. (Id.)

Upon further questioning of Capt Wood, she stated that she had been through the victim's advocate program and had been involved in the program for about five months. (J.A. at 305.) Capt Wood confirmed that during her training as a victim advocate, she did not have contact with actual victims of sexual assault. (J.A. at 311.) Capt Wood explained that she had filled in once for the sexual assault response coordinator (SARC), but had never handled an issue involving sexual assault, nor acted as a victim advocate for any individual. (J.A. at 305-06.) When asked why she had volunteered to be a victim's advocate, she stated she "[j]ust wanted to help people out. Nothing in particular though," and denied anything in her background or in her friends' or family's background that motivated her to volunteer as a victim advocate. (J.A. at 307.)

Finally, Capt Wood confirmed that her role as a victim advocate would not influence her evaluation of the victim's testimony. (Id.)

During individual voir dire, MSgt Glover testified that she was a victim advocate for the 3rd SOS and had been for about four or five months, but that she had not acted as a victim advocate for any individual. (J.A. at 312-13.) The extent of MSgt Glover's involvement with the SARC program consisted of the training itself. (J.A. at 313.) When asked why she had volunteered to be a victim advocate she stated, she "[j]ust felt like [she] needed to learn more as a Senior NCO in case someone needed [her]." (Id.) MSgt Glover clarified that there was nothing in her prior experiences or in her friends' or family's background that motivated her to volunteer as a victim advocate. (Id.) Finally, MSgt Glover confirmed that she could set aside her training and experience as a victim advocate and decide the case based solely on the evidence presented at trial and the instructions given by the military judge. (J.A. at 315.) In fact, MSgt Glover explained that she believed her training as a victim advocate would "help [her] to be more open-minded because [she knows]--[she's] been trained more to deal with those types of situations." (Id.)

After the defense's last challenge for cause, the military judge highlighted that two sitting victim advocates remained on

the panel. (J.A. at 320.) The military judge inquired, "[t]o the extent that a challenge for cause would be appropriate against Master Sergeant Glover and Capt Wood, Defense Counsel, are you willing to waive that challenge?" (Id.) Trial defense counsel stated they were affirmatively waiving any issue in that regard. (Id.) The military judge then carefully ensured Cross-Appellant was willing to waive the potential challenge:

> MJ: Senior Airman Datavs, have you been listening to the discussion that I've just been having with your counsel?
>
> ACC: Yes, sir.
>
> MJ: And you heard the answers from Master Sergeant Glover and Captain Wood regarding their current status as victim advocates, and for Capt Wood, former status as the Sexual Assault Response Coordinator here at Cannon Air Force Base?
>
> ACC: Yes, sir.
>
> MJ: And you are willing to waive any potential challenge for cause as it relates to those court members. Is that correct?
>
> ACC: Yes, sir.
>
> MJ: And you've discussed that issue with your counsel?
>
> ACC: Yes, sir.

(J.A. at 320-21.)

3. Facts concerning trial defense counsel's decision not to admit telephone records for the purpose of impeaching the victim.

During cross-examination, trial defense counsel asked S.F.

whether she had contacted Cross-Appellant after the sexual assault, to which she replied she had not. (J.A. at 322.) Trial defense counsel then requested permission to mark S.F.'s phone records as an appellate exhibit. (J.A. at 323.) The military judge inquired whether trial defense counsel intended to lay a proper foundation for the document first and called an Article 39(a) hearing outside the presence of the members. (Id.)

During the Article 39(a) hearing, trial defense counsel clarified that she intended to impeach S.F. with one page of the telephone records to show that she, in fact, called Cross-Appellant after the sexual assault. (J.A. at 325.) The military judge concluded that trial defense counsel first needed to lay a foundation for a business record before using the document to impeach S.F. (Id.) Trial defense counsel then withdrew her request to "use the phone record itself as a document to show the witness." (Id.)

SUMMARY OF ARGUMENT

A comprehensive review of the record in this case demonstrates: (1) that trial defense counsel had a reasonable explanation and strategy for not consulting with an expert in sexual assault examinations before the government's expert testified at trial; (2) trial defense counsel's advocacy did not fall measurably below the performance ordinarily expected of

fallible lawyers; and (3) if trial defense counsel were ineffective, there is no reasonable probability there would have been a different result if they had secured expert assistance. Furthermore, trial defense counsel had a reasonable basis for not challenging for cause two panel members who were victim advocates, and Cross-Appellant expressly agreed with that strategy. Moreover, contrary to Cross-Appellant's claim, trial defense counsel did not intend to admit S.F.'s telephone records as substantive evidence. Trial defense counsel provided effective assistance of counsel, and this Court should deny Cross-Appellant's claims for relief and affirm the conviction and sentence.

ARGUMENT

TRIAL DEFENSE COUNSEL PROVIDED EFFECTIVE REPRESENTATION TO CROSS-APPELLANT.

Standard of Review

Claims of ineffective assistance of counsel are reviewed by this Court de novo. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)).

Law and Analysis

The Sixth Amendment guarantees Cross-Appellant the right to effective assistance of counsel. United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness

of counsel, this Court applies the standard set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and begins with the presumption that counsel provided competent representation. Gooch, 69 M.J. at 361 (citing United States v. Cronic, 466 U.S. 648, 658 (1984)) (citations omitted).

This Court "will not second-guess the strategic or tactical decisions made at trial by defense counsel." Mazza, 67 M.J. at 475. Where an Cross-Appellant "attacks the trial strategy or tactics of the defense counsel, the Cross-Appellant must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" Id. (quoting United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006)).

This Court applies a three-part test to determine whether the presumption has been overcome:

> 1. Are Cross-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"?
>
> 3. If defense counsel was ineffective, is there a reasonable probability that, absent the errors," there would have been a different result?

Id. at 362 (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

1. Trial defense counsel provided effective assistance of counsel without consulting an expert in sexual assault examinations ***before*** the government's expert testified.

On 10 February 2012, The Judge Advocate General of the Air Force certified an issue with this Court pursuant to Article 67(a)(2), UCMJ, regarding whether trial defense counsel were ineffective for not seeking to consult with an expert SANE **after** the government's expert testified at trial. The government rests on its brief submitted on 23 February 2012 to show that trial defense counsel performed effectively by not seeking to consult with an expert SANE **after** the government's expert testified at trial. Cross-Appellant's granted issue expands the scope of review of the certified issue by The Judge Advocate General, to include considering whether trial defense counsel was ineffective for not consulting with an expert **before** the government's expert testified. For the following reasons, this Court should find that trial defense counsel provided effective assistance of counsel, deny Cross-Appellant's claims for relief, and affirm the conviction and sentence.

This Court's analysis of counsel's performance is highly deferential and should consider counsel's conduct under the strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. Mazza, 67 M.J. 474-75 (citing Strickland, 466 U.S. at 689 (internal citation omitted)). "[Cross-Appellant] must overcome the presumption

that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

The Strickland standard is a general one, so the range of reasonable applications is substantial. Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Strickland permits counsel to make a reasonable decision that makes particular investigations unnecessary. Id. There are countless ways for counsel to provide effective assistance in any given case; even the best criminal defense attorneys would not defend a particular client in the same way. Id. at 788-89. It is the rare situation whereby "the wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. Id. at 789. Courts maintain a strong presumption that defense counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Id. at 790 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003)).

The Supreme Court's unanimous decision[5] in Richter applying the Strickland standard in the context of whether a defense counsel is required to secure expert assistance in preparation for, and in execution of, his or her defense strategy undoubtedly reaffirmed the deliberately high bar a Cross-Appellant must overcome to establish his counsel's representation was deficient for electing not to seek expert

[5] Justice Kagan took no part in the consideration or decision of the case.

assistance. In Richter, the Supreme Court determined that the defense counsel had wide latitude in developing and executing his defense strategy, which reasonably excluded consultation with a blood expert even though the expert's insight may have been useful. Id. at 788-92. Even if expert blood testimony could have supported Richter's defense, the Court determined it would be reasonable to conclude that a competent attorney might elect not to use such an expert. Id. at 789. The Court reasoned that Richter's defense counsel employed objectively reasonable strategic considerations in presenting the defense's theory of the case and held that counsel's overall performance was not deficient. Id. at 788-91.

a. Trial defense counsel had a reasonable explanation for not consulting with an expert in sexual assault examinations.

Trial defense counsel withdrew their motion for an expert SANE after careful determination that such a course was in Cross-Appellant's best interest. Counsel had a reasonable basis to be concerned that T.B.'s testimony concerning S.F.'s extensive vaginal injuries would spill over to the anal sodomy specification during findings and any potential sentencing proceeding. Trial defense counsel legitimately and logically feared the impact this evidence would have on Cross-Appellant's defense, especially considering that T.B. had previously testified at the Article 32 hearing that some of the instances

of vaginal intercourse were unwanted and caused S.F. a great deal of vaginal trauma. (J.A. at 132-33.) During pretrial interviews, T.B. described the vaginal injuries sustained by S.F. as "some of the worst she had ever seen." (J.A. at 226.) Thus, trial defense counsel recognized that, "if the members were to see the vaginal portion of the SANE report, they might surmise that the tears, lacerations and abrasions noted by [T.B.] corroborated [S.F.'s] unwilling participation in the subsequent vaginal intercourse . . . [b]y securing an agreement from the government to keep the SANE report out of evidence, we effectively eliminated this danger to the defense case." (J.A. at 240.)

The decision to limit T.B.'s testimony was made only after hours of extensive interviews and after observing her testimony at the pretrial investigation. Trial defense counsel conducted significant pretrial preparation before making the tactical decision to proceed without expert assistance. By excluding evidence of vaginal trauma, trial defense counsel reasonably expected that they could establish a viable alternative theory of the case, i.e., that "S.F. was angry and felt jilted by [Cross-Appellant] and the allegation of sodomy was an attempt to seek revenge as Cross-Appellant made no attempt to plan for a long distance relationship in light of his impending deployment to Turkey." (J.A. at 230.) By excluding this evidence, the

defense strived to show through the government's SANE that S.F.'s anal injuries could have been caused by very slight and brief penile penetration, and emphasized that the government's expert could not determine whether S.F.'s anal injuries were caused by consensual or nonconsensual sexual activity. (J.A. at 184-92.) This approach was consistent with the statements made by T.B. during pretrial interviews and her Article 32 testimony. By judging counsel's actions at the time of trial, their decision to proceed without expert assistance was justified by the particular facts of the case and the information derived from T.B. before trial.

Cross-Appellant impermissibly attempts to reconstruct trial defense counsel's decisions through the distortion of hindsight. "[An appellate court's] analysis of counsel's performance is highly deferential; it is not to assess counsel's actions through the distortion of hindsight; rather [it is] to consider counsel's actions in light of the circumstances of the trial . . . ." Mazza, 67 M.J. at 474 (citing Strickland, 466 U.S. at 689); *see also* Perez, 64 M.J. at 243; United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000). Under the Strickland standard for evaluating ineffective assistance of counsel claims, every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

perspective at the time. Bell v. Cone, 535 U.S. 685, 698 (2002) (citing Strickland, 466 U.S. at 689). Cross-Appellant's skewed view of counsel's performance is derived from his reliance on a post-trial report offered by B.O.[6] as part of his petition for clemency. (J.A. at 244-47.) B.O. was hired by Cross-Appellant's family after the court-martial had adjourned to criticize T.B.'s testimony by reviewing the record of trial. (Id.) The post-trial report essentially constitutes an unchallenged opinion, which was not sworn to or affirmed, nor subject to cross-examination. (Id.) Such post-trial retrospection is strictly proscribed by Strickland. The focus is on events at trial, not afterward. Hindsight is especially dangerous when bolstered by a report that did not exist at the time of trial.

B.O.'s substantive post-trial findings do little to change Cross-Appellant's case. B.O.'s findings primarily highlighted minor points, which would not have impacted the weight of T.B.'s testimony. For example, B.O.'s report essentially disputes minor medical findings[7] and the particular use of medical terms,[8]

[6] The same expert SANE originally requested by trial defense counsel.

[7] B.O. repeatedly disputes spontaneous or immediate dilation of S.F.'s anus, (notes corresponding to pages 318, 319, 322, 327); B.O. contends that S.F.'s sphincter could open slightly given her physical position of the examination, (notes corresponding to pages 319, 322, 331); B.O. does not observe "active oozing" at 7 o'clock, (notes corresponding to page 326); B.O. is suspicious of the number of bottoms T.B. has examined in her career, (notes corresponding to page 336); and B.O. contests the difference in assessing rectal tone compared to anal dilation, (notes corresponding to page 338). (J.A. at 244-47.)

and requests to review certain literature T.B. relied upon before expressing an opinion as to certain aspects of T.B.'s testimony.[9] (Id.) This report does not undermine T.B.'s testimony. In fact, even though the report criticized certain aspects of T.B.'s testimony, three key consistencies exist between their opinions: (1) there was injury to S.F.'s anus; (2) some force was necessary to perform anal sex; and (3) S.F.'s injuries could have occurred from either consensual or non-consensual anal sex. The end result is that B.O. and T.B. reached the same medical conclusion regarding consent -- S.F.'s injuries could have been caused by consensual or nonconsensual sexual activity. There was simply no need for trial defense counsel to seek expert assistance to ultimately achieve the same conclusion. As recognized in Richter, "[a]n attorney need not pursue an investigation that would be fruitless . . . ." 131 S.Ct. at 790.

b. Trial defense counsel's advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers.

When not relying on hindsight or post-trial reports and instead relying on the facts as developed at trial, it is clear

[8] B.O. disputes T.B.'s use of the term "colon," (notes corresponding to page 325). (Id.)

[9] B.O. requests to review the "records of the live models that [T.B.] states she has seen," (notes corresponding to page 334); and B.O. requests to review the literature T.B. relies upon to describe what is normal or abnormal with regard to consensual or non-consensual anal sex, (notes corresponding to page 345). (Id.)

that trial defense counsel effectively executed their strategy because: (1) T.B. did not testify as to the vaginal trauma; and (2) trial defense counsel effectively cross-examined T.B. and successfully presented their theory of the case at every step of litigation. The defense confronted S.F. with thorough and effective cross-examination questions to expose several inconsistencies in her previous statements compared to her in-court testimony. (J.A. at 276-336.) Trial defense counsel highlighted these inconsistencies during closing argument to undermine the credibility of S.F.'s allegations. (J.A. at 200-224.)

Despite Cross-Appellant's claims, the record demonstrates the defense was prepared to cross-examine T.B., was familiar with the subject matter, and knew the precise points they intended to extract from her to establish their theory of the case. "In many instances cross-examination will be sufficient to expose defects in an expert's presentation." Richter, 131 S.Ct. at 791. In fact, the defense's cross-examination exposed highly probative points to prove S.F.'s injuries could have resulted from consensual sex, such as: (1) that much of the information T.B. relied upon did not account for key medical factors, such as whether or not the subjects of her prior examinations were experienced with anal sex and whether those subjects prepared their bodies for anal sex beforehand, (J.A. at

184-87); (2) that it was physically possible the injuries to S.F.'s anus could have occurred by "first-time anal entry," (J.A. at 187); (3) that it was medically possible that the damage to S.F.'s anus could have been caused by a single insertion of Cross-Appellant's penis, (J.A. at 188); (4) that it was medically possible, but unlikely the injuries to S.F.'s injuries could have been caused by a partial insertion, (Id.); (5) and that she could not conclusively determine whether the injuries were caused by consensual or nonconsensual sexual activity. (Id.) Notably, the defense was able to expose this evidence through an adverse expert witness, inherently bolstering the credibility of the evidence because it was extracted from the opposing party.

Furthermore, trial defense counsel's questioning of Detective Pitcock helped to portray Cross-Appellant as a cooperative subject, revealed that Cross-Appellant and S.F. had engaged in consensual sexual intercourse on two occasions prior to the incident in question, and highlighted admissions by Cross-Appellant indicating the anal intercourse was very brief. (J.A. at 193-94.) During the defense's case, Cross-Appellant's roommate was called to explain that S.F. was very flirtatious with Cross-Appellant, seemed upset when she arrived the night in question, and despite resting approximately forty-feet from Cross-Appellant's room, he did not hear anything through the

thin walls to indicate S.F. was being sexually assaulted that night. (J.A. at 195-99.)

All of the evidence elicited by the defense demonstrates that counsel represented Cross-Appellant with vigor and conducted skillful cross-examinations. Trial defense counsel effectively elicited key concessions from the government's expert and was able to draw attention to weaknesses in her conclusions and get her to admit the medical examination could not determine whether the injuries to S.F.'s anus resulted from consensual or nonconsensual sex. Furthermore, Appellant was acquitted of the forcible oral sodomy charge and walked away a free man the day the court-martial adjourned. Based on this evidence, it is clear that trial defense counsel provided effective representation without consulting an expert SANE in preparation for trial.

c. No reasonable probability exists that there would have been a different result if trial defense counsel had expert assistance in sexual assault examinations.

Cross-Appellant cannot demonstrate he was prejudiced by trial defense counsel's decision not to seek expert assistance in preparation for trial. Even if this Court finds that trial defense counsel should have sought expert assistance, no reasonable probability exists that the result of trial would

have been different.[10] The outcome of this case rested on the believability of S.F., Detective Pitcock, and Cross-Appellant's written statement to law enforcement. (J.A. at 248-53.) Furthermore, T.B.'s testimony is primarily relevant to the specification for forcible anal sodomy. Cross-Appellant was convicted of false official statement and forcible oral sodomy independent of T.B.'s medical testimony. The fact that Cross-Appellant achieved an acquittal on the forcible oral sodomy charge and was not sentenced to a single day of confinement after being convicted of a serious sex offense demonstrates his defense counsel provided competent and capable advocacy. (J.A. at 32-34.)

Most notably, however, is that an expert SANE for the defense would not have enabled Cross-Appellant to undermine T.B.'s testimony. The defense successfully elicited from T.B. that the medical examination could not confirm whether the injuries to S.F.'s anus were caused by consensual or nonconsensual sex. (J.A. at 184-92.) Even if B.O. was appointed to assist the defense, she would not have been able to offer a definitive opinion on the issue of consent, just as T.B. could not offer such a definitive opinion. Essentially, the

[10] As demonstrated in this brief, trial defense counsel were not deficient in light of the Supreme Court's rulings in Richter and Strickland. Even so, AFCCA unnecessarily graded the quality of trial defense counsels' performance when it had determined that any error would not have prejudiced Appellant. AFCCA should have simply analyzed this issue under the prejudice-prong of Strickland. United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008).

best that any SANE, testifying as an expert witness, could offer is that S.F.'s injuries were consistent with both consensual and nonconsensual sex. Whether anal intercourse occurred was not a matter in controversy. This information came directly from S.F. and Cross-Appellant. Whether the anal intercourse was consensual was in controversy, and neither T.B. or B.O. could provide conclusive evidence that S.F.'s injuries resulted from nonconsensual sexual activity. Given the fact that it is undisputed that some amount of force was necessary to engage in anal sex and that S.F.'s injuries could have resulted from either consensual or nonconsensual anal intercourse, this Court should not find a reasonable probability exists that an expert SANE for the defense would have lead to a different result.

Therefore, this Court should find that trial defense counsel provided effective representation and deny Cross-Appellant's claims for relief and affirm the conviction and sentence.

2. Trial defense counsel had a reasonable basis for not challenging for cause two panel members that were victim advocates.

The record demonstrates no cause existed for trial defense counsel to challenge the two members that were victim advocates. While both had received training as victim advocates, neither had acted in that capacity or had contact with victims of sexual assault. Moreover, both members confirmed they could fairly

consider the evidence and follow the military judge's instructions. Although Cross-Appellant has a right to a court-martial free from substantial doubt as to legality, fairness, and impartiality, the proceeding is not fundamentally unfair solely because members have received training on a particular subject. R.C.M. 912(f)(1)(N). Probative questioning during voir dire sufficiently exposed the members' limited involvement with the victim advocate program, which enabled trial defense counsel and Cross-Appellant to conclude that the members were sincere and were able to sit as part of a fair and impartial panel. *See* United States v. Napolotano, 53 M.J. 162 (C.A.A.F. 2000).

No evidence was introduced to cause trial defense counsel to believe the questioned members possessed actual or implied bias. The questioned court members had received training in a particular field; however, receiving training or holding a particular position is not per se disqualifying. United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996). The record is clear the court members in this case were not victims of the same or similar crime, *see* United States v. Smart, 21 M.J. 15 (C.M.A. 1985), did not have a close relationship with or provide professional assistance to a victim of a traumatic crime similar to the offenses in this case, United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007); Daulton, *supra*, nor did they demonstrate an

inelastic predisposition toward a particular punishment for sexual assault offenses. United States v. Martinez, 67 M.J. 59 (C.A.A.F. 2008). Thus, no legitimate basis existed for trial defense counsel to challenge the questioned members.

Furthermore, trial defense counsel had a legitimate tactical rationale for keeping Capt Wood and MSgt Glover on the panel. Trial defense counsel identified aspects of their background that convinced them these members would introduce helpful perspectives during deliberations. Specifically, Capt Wood was perceived as a strong-willed, rough-and-tumble personality that would not believe testimony by S.F. -- arguably another strong-willed and athletic female -- that she was unable to fight back. MSgt Glover had two sons, ages 15 and 19, and this presented the possibility that she would empathize with Cross-Appellant. Finally, the defense team considered that if they challenged both individuals, they may "bust" the panel, causing further delay without any guarantee that new members would have been females or possess characteristics or experiences favorable to Cross-Appellant's case.

After the defense confirmed that they had no further challenges for cause, the military judge specifically asked counsel and Cross-Appellant whether they were willing to waive any challenge of Capt Wood and MSgt Glover. (J.A. at 320.) Trial defense counsel stated they did not desire to challenge

either Capt Wood or MSgt Glover. As further protection of Cross-Appellant's rights, the military judge specifically inquired with Cross-Appellant whether he understood the consequence of not challenging these members. (J.A. at 320-21.) Cross-Appellant expressly waived any challenge for cause against Capt Wood and MSgt Glover and specifically confirmed he discussed this decision with his counsel. Capt E.P.'s Declaration also explained how she and Maj J.O. discussed with Cross-Appellant whether to seek removal of the two members, but they decided that keeping both on the panel may be advantageous. (J.A. at 232-33). "Where the defense, armed with full knowledge of its right to make objection or challenge, deliberately and consciously declines to do so and expressly waives that right, [this Court] has consistently declined to support a rule of law which would permit the defense to induce the error and then take advantage of it on appeal." United States v. Catt, 1 M.J. 41, 47 (C.M.A. 1975) (citing United States v. Airhart, 48 C.M.R. 685 (C.M.A. 1974)). Given the overwhelming evidence demonstrating that trial defense counsel and Cross-Appellant knew the right to challenge the questioned members existed and they deliberately declined to exercise that right, this Court should not permit Cross-Appellant to retreat from his unsuccessful trial strategy and take advantage of a situation of his own making.

Cross-Appellant also purports that MSgt Glover was

overheard stating that she "hated" the defense counsel and that this confirms that she should have been challenged for cause. The record, however, does not support Cross-Appellant's assertions. While describing this incident to the military judge, trial defense counsel speculated:

> Master Sergeant then turned her head slightly either towards counsel -- trial counsel table or the Sexual Assault Response Coordinator, who is sitting in the gallery, in the courtroom, and mouthed something in the line of, 'I hate her' or 'hate her.'

(J.A. at 331.)

Trial counsel, who observed the incident, replied that the movements of her mouth could have been misinterpreted, and she could have easily been stating "hot in here," instead of "hate her." (J.A. at 331-32.) Ultimately, the military judge determined there was a lack of information to justify inquiry into court member communications. (J.A. at 332.) The record does not reflect that MSgt Glover's comment was directed at defense counsel or what was actually said. Such rank speculation provided no basis for a challenge for cause and certainly no basis for the blatant Monday-morning quarterbacking Cross-Appellant wishes to engage in now on appeal.

Therefore, trial defense counsel provided effective representation. Cross-Appellant's claims for relief should be denied, and this Court should affirm Cross-Appellant's

conviction and sentence.

3. Trial defense counsel did not intend to admit S.F.'s telephone records as substantive evidence.

Finally, Cross-Appellant claims his trial defense counsel were ineffective for allegedly failing to properly impeach S.F. using her personal telephone records. (App. Br. at 24-25.) This allegation is without merit because trial defense counsel intended to confront S.F. with her phone records in an effort to get her to admit that she had called Cross-Appellant after the sexual assault; however, counsel did not intend to admit the telephone records as substantive evidence because they contained information that could lead the prosecutors to harmful evidence against Cross-Appellant.[11] (J.A. at 228, 233.)

During pretrial investigation, Cross-Appellant provided trial defense counsel with a list of character references. (J.A. at 231.) One of these witnesses was S.F.'s former boyfriend who was the initial disclosure witness. (Id.) The defense interviewed S.F.'s former boyfriend and confirmed she initially provided details of the sexual assault consistent with her claims to law enforcement and her subsequent testimony

[11] As additional evidence that trial defense counsel did not intend to introduce S.F.'s telephone records as substantive evidence to be considered by the court members, counsel specifically asked the military judge for permission to mark the phone records as an "appellate exhibit," rather than a "defense exhibit." (J.A. at 323.) This is a critical distinction. Admitted defense exhibits are provided to the members as substantive evidence for use during their deliberations; however, appellate exhibits are not provided to the members and are only included in the record of trial for appellate review purposes.

during legal proceedings. (Id.) This witness could testify as to S.F.'s prior consistent statements and bolster her credibility once the defense attacked the veracity of her allegation. S.F.'s phone records confirmed that she called her former boyfriend after the sexual assault and listed his actual phone number. (Id.) Trial defense counsel feared the government would eventually locate and interview S.F.'s former boyfriend and discover that his testimony buttressed S.F.'s credibility and her description of the oral and anal sodomy. This was a reasonable fear considering the defense's entire trial strategy was aimed at undermining S.F.'s credibility. Ineffectiveness should not result when a counsel foregoes potentially favorable information if the decision to do so was a strategic or tactical one to limit unfavorable information. Gooch, 69 M.J. at 362-63.

As described in their declarations, the defense intended to confront S.F. regarding the telephone logs, but they never intended to have the documents admitted because it would expose Cross-Appellant to unnecessary risk of harm to his case. It is the rare situation whereby "the wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. Richter, 131 S.Ct. at 789.

Furthermore, Cross-Appellant has cited no legal authority, nor provided any legal basis, demonstrating that trial defense

counsel's decision not to introduce such an insignificant piece of evidence as an appellate exhibit constituted ineffective representation. In fact, the merits of Cross-Appellant's claim can be appropriately assessed by considering the minimal effort dedicated to this allegation -- namely, Cross-Appellant devoted two sentences to this claim within his entire 25-page brief. (App. Br. at 24-25.) As such, Cross-Appellant has failed to make even the slightest showing why his counsel's decision not to introduce the phone records deprived him of a fair trial. It is Cross-Appellant's burden, and he had failed to meet it.

Even if this Court were to find that failure to try to admit the phone records constituted error, it is not enough to show that counsel's errors had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693. Cross-Appellant must demonstrate that the error was so serious that a reasonable probability exists that the result of the proceeding would have been different. Id. Here, Cross-Appellant has failed to satisfy his weighty burden.

As such, trial defense counsel provided effective assistance of counsel. Therefore, this Court should deny Cross-Appellant's request for relief and affirm the conviction and sentence.

CONCLUSION

WHEREFORE, Cross-Appellant's trial defense counsel provided effective assistance of counsel. Accordingly, the United States respectfully requests this Honorable Court deny Cross-Appellant's claims for relief and affirm the conviction and sentence.

TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4806
Court Bar No. 33631

CHRISTOPHER T. SMITH, Lt Col, USAF
Reviewing Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4805
Court Bar No. 31485

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 27428

FOR DON M. CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4815
Court Bar No. 35093

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 June 2012 via electronic filing.

TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 33631

COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

☐ This brief contains 7,466 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☐ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with 10 characters per inch using Courier New.

/s/
TYSON D. KINDNESS, Capt, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division
Date: 8 June 2012