IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20100112
Private First Class **PAUL R. JASPER,** United States Army, Appellant	)	USCA Dkt. No. 13-0013/AR

JACOB D. BASHORE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0651
USCAAF# 35281

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
USCAAF# 26450

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate
Division
USCAAF# 31186

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U N I T E D S T A T E S, Appellee	FINAL BRIEF ON BEHALF OF APPELLANT
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	Army Misc. Dkt. No. 20100112
Sergeant (E-5) **PAUL R. JASPER,**[1] United States Army, Appellant	USCA Dkt. No. 13-0013/AR

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

Introduction

BK, the accuser in this case and Sergeant (SGT) Paul R. Jasper's seventeen year-old step-daughter, admitted to her pastor that "she had made it all up at that time to get attention." (JA 22-23, 26, 36). What BK admitted she "made up" is that SGT Jasper sexually assaulted her in 2006-2007 as reflected in Specification 1 of Charge II and Specification 1 of The Additional Charge.

The military judge erred by allowing BK to re-assert the clergy privilege even though she gave her consent to disclose the communications after which her pastor disclosed her admission to fabricating the allegations. The Army Court compounded that error by creating a constitutional "knowing"

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[1] Since filing his petition with this Court, Sergeant Jasper has legally changed his last name to Fraganato. As all documents relating to this case refer to "Jasper," this brief will refer to the appellant as Sergeant Jasper.

factor to effectuate waiver of a privilege under Military Rule of Evidence [Mil. R. Evid.] 510(a). As a result, the members never heard BK's devastating admission, and SGT Jasper stands convicted and incarcerated for offenses BK "made up."

Issues Granted

I

WHETHER THE MILITARY JUDGE ERRED WHEN HE ALLOWED THE ACCUSER TO RECLAIM A REGULATORY PRIVILEGE AFTER PREVIOUSLY WAIVING THAT PRIVILEGE AND DISCLOSING THAT THE ACCUSER ADMITTED FABRICATING SOME OF THE ALLEGATIONS AGAINST APPELLANT.

II

WHETHER THE ARMY COURT ERRED WHEN IT CREATED A CONSTITUTIONAL "KNOWING" ELEMENT TO MILITARY RULE OF EVIDENCE 510(a) REQUIRING A PRIVILEGE HOLDER TO BE INFORMED OF THE REGULATORY PRIVILEGE IN ORDER FOR THE DISCLOSURE TO BE DEEMED VOLUNTARY.

III

WHETHER THE GOVERNMENT'S FAILURE TO ALLEGE THE TERMINAL ELEMENT IN SPECIFICATION 1 OF CHARGE II AND THE SPECIFICATIONS OF THE ADDITIONAL CHARGE RESULTED IN MATERIAL PREJUDICE TO APPELLANT'S SUBSTANTIAL RIGHT TO NOTICE.[2]

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[2] The two additional charges were amended to constitute two specifications under The Additional Charge, violation of the UCMJ, Article 134. (JA 17-18).

IV

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING THE PANEL MEMBERS THAT IN ORDER TO FIND APPELLANT GUILTY OF POSSESSION OF CHILD PORNOGRAPHY IN VIOLATION OF ARTICLE 134, CLAUSE 1 AND 2, THE IMAGES MUST BE OF A CHILD UNDER THE AGE OF EIGHTEEN, INSTEAD OF UNDER THE AGE OF SIXTEEN AS THE UCMJ DEFINES CHILD.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2006) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On February 2-4, 2010, an enlisted panel sitting as a general court-martial tried SGT Paul R. Jasper. Contrary to his pleas, the panel convicted appellant of indecent conduct, indecent acts (two specifications), knowingly possessing child pornography, persuasion and enticement of sexually explicit conduct, knowingly receiving child pornography, and obstruction of justice, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934 (2006). The panel sentenced SGT Jasper to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-three years, and a dishonorable discharge. The military judge credited SGT Jasper with ten days

of confinement against the sentence to confinement. The convening authority approved eighteen years confinement and the remainder of the sentence as adjudged.

On July 13, 2012, the Army Court affirmed the findings and the sentence, and amended the convening authority's action by crediting SGT Jasper with ten days of confinement against the sentence to confinement. (JA 1-7). Sergeant Jasper was notified of the Army Court's decision and petitioned this Court for review on September 11, 2012. On February 5, 2013, this Honorable Court granted appellant's petition for review.

Statement of Facts

Prior to trial, the trial counsel called Pastor Ellyson seeking to discuss his communications with BK, the accuser and SGT Jasper's seventeen year-old step-daughter. (JA 26, 36). Pastor Ellyson related that he needed permission from AJ, BK's mother, and BK prior to disclosing the communications. (JA 36). Pastor Ellyson called his own attorney prior to calling AJ. (JA 36).

Pastor Ellyson called AJ seeking permission to disclose the communications with BK. Pastor Ellyson testified that he did not tell AJ who would hear the information. (JA 34). AJ claimed that Pastor Ellyson said he was going to disclose the communications to a third party—the two trial counsel. (JA 38). Without asking questions for clarification or placing any

limitations on Pastor Ellyson's disclosure, AJ, BK's guardian, gave Pastor Ellyson permission to disclose their communications. (JA 34). BK later left a message with Pastor Ellyson, without any questions or restrictions, informing him he could disclose their communications. (JA 34, 42-43).

Pastor Ellyson then spoke with both trial counsel and defense counsel disclosing the extremely exculpatory 2007 statement of BK that "she had made it all up at that time to get attention." (JA 21-22, 26, 36). After disclosing this fabrication, the assistant trial counsel traveled to AJ and BK's home to inform them of the details of the clergy privilege in Mil. R. Evid. 503. (JA 27, 39-40). Two weeks later, AJ and BK appeared at an Article 39(a), UCMJ, session attempting to reinstate the clergy-penitent privilege to prevent Pastor Ellyson from testifying concerning BK's admission of fabrication and to prevent defense counsel from questioning BK about her admission to Pastor Ellyson that she fabricated the allegations against her step-father—allegations to which he now stands convicted and for which he is now imprisoned.

The military judge summarily denied the defense motion to compel, ruling:

> The court agrees that there's been no waiver of the privilege. They've invoked and the privilege belongs to the penitent -- if that's the proper term -- and, as such, any testimony of what they said to Pastor

> Ellyson in the course of his clergy duties is privileged. Proof has been asserted. Therefore, any testimony that Pastor Ellyson would have would be inadmissible; therefore, the government does not need to produce Pastor Ellyson.

(JA 43-44).

Summary of Argument

The government sought the disclosure of the accuser's communications with her pastor. Upon learning that BK admitted to her pastor she fabricated several of the allegations against the accused, government counsel rushed to BK's home to talk with her about Mil. R. Evid. 503. The military judge subsequently allowed BK to revoke her consent to disclosure, finding that BK did not waive her privileged communications under Mil. R. Evid. 503.

The military judge's cursory ruling contained none of the analysis required by Mil. R. Evid. 510(a). It is clear that AJ and BK told Pastor Ellyson that he could disclose BK's communications to at least one third party, the trial counsel. Only after speaking with the government counsel did AJ and BK attempt to re-assert the clergy-penitent privilege. As the privilege no longer performed a legitimate function, fairness, justice and SGT Jasper's Sixth Amendment rights to confrontation and to present a defense dictate a permanent waiver of the regulatory privilege. Denying SGT Jasper the ability to cross-

examine BK on her admission to fabricating the allegations, and potentially calling Pastor Ellyson to impeach BK, deprived him of a fair trial. As the exclusion of this constitutionally required evidence was not harmless beyond a reasonable doubt, the findings of guilty of all charges and their specifications and the sentence must be set aside.

Argument

I

WHETHER THE MILITARY JUDGE ERRED WHEN HE ALLOWED THE ACCUSER TO RECLAIM A REGULATORY PRIVILEGE AFTER PREVIOUSLY WAIVING THAT PRIVILEGE AND DISCLOSING THAT THE ACCUSER ADMITTED FABRICATING SOME OF THE ALLEGATIONS AGAINST APPELLANT.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). Normally, a military judge's findings of fact receive deference. *Id.* at 36. When a military judge fails to conduct a complete analysis on the record, the military judge receives much less deference. *Cf. United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009)(giving less deference when the military judge failed to put findings of fact and conclusions of law on the record for R.C.M. 611 and Mil. R. Evid. 403 objections). Additionally, when the military judge is required to conduct a balancing test prior to the ruling on

admissibility, failure to conduct that balancing test results in the reviewing court giving no deference to the military judge's ruling. *Cf. United States v. Tanner*, 63 M.J. 445, 449 (C.A.A.F. 2006)(giving no deference to the military judge when he did not conduct the Mil. R. Evid. 403 balancing test on the record) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (same)).

"The focus of our analysis is the ruling of the military judge. When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, 'we typically have pierced through that intermediate level' and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling." *Shelton*, 64 M.J. at 37 (quoting *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996)).

Law

The clergy privilege has three components: (1) the communication must occur either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor or to his assistant in his official capacity; and (3) the communication must be intended to be confidential. Mil. R. Evid. 503; *Shelton*, 64 M.J. at 37. The purpose of the privilege is to allow a person to disclose her sins in complete confidence to her spiritual advisor so that

she may receive consolation and guidance. *Shelton*, 64 M.J. at 33 (citing *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002)).

Under Mil. R. Evid. 510(a), a person waives the clergy privilege when he or she voluntarily discloses or consents to the disclosure of the substance of his or her privileged communication with a third party. *See also United States v. McCollum*, 58 M.J. 323, 339 (C.A.A.F. 2003). Because the clergy privilege acts to exclude evidence, it, like other testimonial privileges, "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980)(internal quotations and citations omitted).

Argument[3]

1. The military judged erred in finding no waiver

Waiver of privileges by voluntary disclosure is governed by Mil. R. Evid. 510. Under Mil. R. Evid. 510(a), a privilege holder "waives the privilege if the person . . . voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it

[3] The argument for Assignments of Error I and II largely overlap. Thus, the argument made for one granted issue inevitably supports the other.

would be inappropriate to allow the claim of privilege." As one federal court stated, "[i]t should be noted at the outset that intent to waive the privilege is not necessary for waiver." *Champion Intern. Corp. v. International Paper Co.*, 486 F. Supp. 1328, 1332 (N.D. Ga. 1980).

In SGT Jasper's case, both the alleged victim, BK, and her mother, AJ, elected to share their communications to Pastor Ellyson with persons outside the privileged communication. (JA 38, 43). Even assuming a privilege existed, both BK and AJ waived any such privilege under Mil. R. Evid. 510(a) by telling Pastor Ellyson that he could disclose their communications to a third party. "'[V]oluntary disclosure, *regardless of knowledge of the existence of the privilege*, deprives a subsequent claim of privilege based on confidentiality of any significance.'" *Champion Intern. Corp.*, 486 F. Supp. at 1332 (quoting McCormick, *Handbook of the Law of Evidence* § 93, at 194 n.14 (Cleary rev. 2d ed. 1972))(emphasis added); *see also* 1 McCormick, *Evidence* § 93 (6th ed. 2006)("Finding waiver in situations in which forfeiture of the privilege was not subjectively intended by the holder is consistent with the view, expressed by some cases and authorities, that the essential function of the privilege is to protect a confidence that, once revealed by any means, leaves the privilege with no legitimate function to perform."). Furthermore, BK testified she consented for her pastor to

disclose her communications, but she wanted to assert any privilege at SGT Jasper's court-martial because she "just thought he was going to talk to [the trial counsel]." (JA 43).

To allow BK to assert any privilege after the fact under these circumstances would be inappropriate for at least two reasons. First, BK's testimony makes clear that she did *not* seek to keep the communications confidential "as a formal act of religion or as a matter of conscience" allowed for under Mil. R. Evid. 503(a), but simply because she only wanted to make the communications available to the prosecution. This willingness to disclose her communications outside the religious context indicates that there is no interest to protect under the clergy-penitent privilege.[4] As McCormick says, "once [a privileged communication is] revealed by any means, [it] leaves the privilege with no legitimate function to perform." 1 McCormick, *Evidence* § 93 (6th ed. 2006); *see also* Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.12.1 (2002)(stating that finding waiver does not chill future privileged communication because anyone who hears of the ruling "can

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[4] "[T]he continuing confidentiality requirement smokes out statements that truly need the privilege's protection from those that do not, so that the privilege is applied as narrowly as possible. As a general proposition, a [person]'s willingness to disclose to others the content of [privileged] communications constitutes good evidence that the privilege was unnecessary to induce the communications . . . ." Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 200 Wis. L. Rev. 31, 55 (2000).

understand that the evidence is being admitted only because the holder chose to surrender the privilege").

Second, BK's recantation of the sexual assault allegations was significant exculpatory evidence that would likely have resulted in SGT Jasper's acquittal—she admitted to fabricating allegations of which he now stands convicted. (JA 21). Preventing SGT Jasper from confronting BK, and potentially calling Pastor Ellyson, denied SGT Jasper his right to confrontation and to present a defense in order to undermine BK's credibility.

The prosecution contacted Pastor Ellyson in an attempt to learn of his conversations with BK and AJ. (JA 26). The prosecution advised Pastor Ellyson that he must get consent from BK and AJ before discussing their communications. (JA 36). Pastor Ellyson received counsel from his own attorney that he needed consent from all parties before discussing the matter. *Id.* Pastor Ellyson contacted AJ, and received her permission to discuss their communications with others outside the privileged communication. (JA 38). BK similarly testified that she provided Pastor Ellyson consent to discuss their communications, and understood he would share these communications with the prosecution. (JA 42-43).

It was only two weeks prior to SGT Jasper's court-martial, after defense counsel learned of the exculpatory evidence and

filed a motion to compel production of Pastor Ellyson, that the assistant trial counsel visited AJ, and "discussed about the privileges of him being a pastor," which caused BK and AJ to re-assert a privilege the day prior to trial. (JA 40). Excluding this extremely exculpatory evidence under these circumstances flies in the face of justice.

Military cases addressing the issue of waiver have relied on the plain language of Mil. R. Evid. 510(a) that a "person waives a privilege where he or she 'voluntarily discloses or consents to disclosure of any significant part of the matter or communication under circumstances that it would be inappropriate to allow the claim of privilege.'" *McCollum*, 58 M.J. at 338 (quoting Mil. R. Evid. 510(a)). In determining whether a person has waived a privilege, this Court has not inquired whether the person knew the legal parameters of the particular military rule of evidence, but has "held, in harmony with federal civilian law, that communications made in the presence of third parties, or revealed to third parties, are not privileged." *United States v. McElhaney*, 54 M.J. 120, 131-32 (C.A.A.F. 2000). This Court in *McCollum* noted that "[v]oluntary disclosure applies only where the speaker elects to share a substantial portion of a privileged communication with a party outside of the privileged relationship." 58 M.J. at 338 (citing *McElhaney*, 54 M.J. at 131-32).

In Sergeant Jasper's case, both the alleged victim, BK, and her mother, AJ, gave their pastor express consent to share their discussions with the trial counsel. Regardless of whether or not they understood the precise parameters of Mil. R. Evid. 503, they voluntarily consented to disclosure to a third party. The disclosure was intentional and voluntary. The mere fact that Pastor Ellyson specifically sought consent from both AJ and BK should have indicated to them that they could have said "no."

The government claimed at the Army Court that BK's attempts to assert her privilege rested on the "comforting guarantee of absolute confidentiality . . . [that may be necessary] for people of faith [to] seek penitence or spiritual guidance . . . ." (Gov't Br. at 12). However, BK's testimony contradicts that claim. BK testified that she wanted to assert a privilege at SGT Jasper's court-martial not because of her desire for "absolute confidentiality" in seeking spiritual guidance, but because she "just thought he was going to talk to [the trial counsel]." (JA 43). "There is always also the objective consideration that when [a privilege holder's] conduct touches a certain point of disclosure, *fairness requires that his privilege shall cease whether he intended that result or not.*" *Developments in the Law - Privileged Communications*, 98 Harv. L. Rev. 1629, 1629 n.1 (1985) [hereinafter *Privileged Communications*](citing 8 J. Wigmore, *Evidence in Trials at*

Common Law § 2327, at 636 (J. McNaughton rev. ed. 1961)) (emphasis added).

"Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel*, 445 U.S. at 50 (citation omitted); *see also Shelton*, 64 M.J. at 37 (stating that "the clergy privilege, like all privileges must be strictly construed"). Since evidentiary privileges operate to exclude evidence even at the expense of determining the truth, "they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally *predominant principle of utilizing all rational means for ascertaining truth.*'" *Trammel*, 445 U.S. at 50 (citation omitted)(emphasis added).[5]

In SGT Jasper's case, the military judge excluded the key piece of evidence for ascertaining the truth. The alleged victim admitted that she fabricated the allegations against SGT Jasper in order to get attention. (JA 21). There is no public good in allowing an accuser to disclose to the prosecution that she fabricated her allegations, but then exclude that evidence

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[5] "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

for the accused's use and the fact finders consideration. The military judge erred in ignoring the plain language of Mil. R. Evid. 510(a) in finding that somehow BK did not waive her privilege under Mil. R. Evid. 503 when she voluntarily elected to disclose all of her communications to a third party.

Therefore, the military judge abused his discretion in denying trial defense counsel's motion to compel production of Pastor Ellyson. Both BK and AJ waived any privilege that might have existed under the plain language of Mil. R. Evid. 510(a). The military judge's findings of fact and conclusions of law are simply that BK and AJ's communications to Pastor Ellyson were privileged, that there had been no waiver, and thus, "any testimony that Pastor Ellyson would have would be inadmissible." (JA 43-44). "[D]etermining waiver of a privilege is an 'evaluation [that] demands a fastidious sifting of the facts and a careful weighing of the circumstances.'" *United States v. Custis*, 65 M.J. 366, 371 n.9 (C.A.A.F. 2007) (citation omitted). The military judge did not engage in a "fastidious sifting of the facts" or a "careful weighing of the circumstances," but instead abused his discretion by simply concluding "there's been no waiver of the privilege." (JA 43).

It does not appear in the record that the military judge considered the plain language of Mil. R. Evid. 510(a). The military judge did not explain how he found that BK and AJ did

not waive their privilege when they voluntarily consented to disclose a significant part of their conversation with Pastor Ellyson. It does not appear in the record that the military judge ever considered whether, as required under Mil. R. Evid. 510(a), it would be inappropriate to allow the claim of privilege when the accuser consented to disclosure of her communications to the prosecution, which resulted in the disclosure of a significant part of the communications—she fabricated allegations against the accused. As the military judge conducted an inadequate analysis on the record and did not conduct a Mil. R. Evid. 510(a) balancing test, this Court should give the military judge no deference and find that he abused his discretion in denying SGT Jasper his Sixth Amendment right to confront his accuser, to present a defense, and to undermine BK's credibility. *See Davis v. Alaska*, 415 U.S. 308 (1974).

2. Prejudice—Denial of Right to Confrontation

The test for prejudice when an accused is deprived of his constitutional right to confrontation is whether the error was harmless beyond a reasonable doubt. *Collier*, 67 M.J. at 355. The government must show that there is no "reasonable probability" that the absence of Pastor Ellyson's testimony "contributed to the contested findings of guilty." *Id.* That is, the evidence not heard would be "*unimportant* in relation to everything else the jury considered . . . . [and] *not a factor*

in obtaining that conviction." *United States v. Othuru*, 65 M.J. 375, 377-78 (C.A.A.F. 2007)(emphasis added). This issue is reviewed de novo. *United States v. McAllister*, 64 M.J. 248, 253 (C.A.A.F. 2007).

In analyzing whether the military judge's constitutional error in denying the right to confrontation was harmless beyond a reasonable doubt, this Court has used the following balancing test: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Collier*, 67 M.J. at 356 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). This "inquiry should focus on whether the military judge's ruling 'essentially deprived Appellant of [his] best defense' that 'may have tipped the credibility balance in Appellant's favor." *Id.* (citation omitted).

a. The importance of the witness' testimony in the prosecution's case

BK's testimony was the entire case for the government. There were no other witnesses who could provide direct testimony corroborating her allegations. No direct evidence was admitted, such as DNA or photographs, to corroborate any of her

allegations. While the government argued that certain statements of SGT Jasper showed a consciousness of guilt as to the 2009 offenses, he never confessed.

BK's credibility was thus the critical issue throughout the trial. In his opening statement, defense counsel mentioned at least three times that BK's credibility, reliability, and motives were the central issue of the case. (JA 58, 60, 61). The government acknowledged the importance of credibility in their closing argument—"you're going to have to weigh the credibility of all the witnesses in this case. The only witnesses that testified about those events are BK," her sister, and her mother. (JA 263). Government counsel then repeatedly bolstered BK's credibility when he stated that BK provided "very convincing testimony" (JA 261), BK "can't make that kind of detail up" (JA 266), and "you can't make that up" (JA 270). Then, most egregiously, at the end of his argument, government counsel asserted that BK could not be lying—"you're going to hear all the motives that [BK] might have to lie about what she's saying. Well, if that's true, there's one heck of a conspiracy going on. If she's lying about this stuff, I guess [everyone] is somehow in on it." (JA 276). Government counsel did not mention that BK admitted to lying about some of the alleged incidents to her pastor.

If the military judge had properly permitted defense counsel to cross-examine BK about her statements to Pastor Ellyson, one of two things would occur. First, BK would admit that she lied about the allegations at issue in Specification 1 of Charge II and Specification 1 of The Additional Charge; or second, Pastor Ellyson would have testified that BK admitted to him in counseling that she lied about the allegations. Either way, a reasonable panel would have learned of the admission of fabrication and "*might have* received a significantly different impression" of BK's credibility when learning that she admitted *to her religious counselor* that she fabricated several of the allegations against her step-father. *Collier*, 67 M.J. at 352 (emphasis added). Pastor Ellyson's testimony would have caused the panel to call into question BK's credibility not only as to the allegations pertaining to 2006-2007, but would cause the panel to doubt BK's credibility as to the additional allegations of abuse in 2009.

b. Whether the testimony was cumulative

No other testimony was available or admitted regarding BK's admission to fabricating the allegations against SGT Jasper.

c. The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points

There was little evidence admitted to corroborate the allegations of sexual abuse in 2006, 2007, or 2009. BK

testified that SGT Jasper asked her to sit on his lap three separate times from 2006-2007 in which he allegedly sexually assaulted her in nearly identical fashion. (JA 129-42). Some of these allegations were only made during judicial proceedings. BK did not mention them during the initial forensic interview. (JA 168, 175-76). These three alleged incidents are the incidents BK admitted to Pastor Ellyson she fabricated.

One incident allegedly occurred when BK was called home from a swimming pool. Only the pool incident was corroborated in any way, but that corroboration was merely limited to opportunity. BK's sister, TJ, testified that BK was called away from the swimming pool to do her chores. (JA 115-19). TJ said that although BK was not crying, she "seemed like she was upset" when she returned fifteen minutes later, and TJ presumed BK was upset because BK got in trouble. (JA 118). This testimony was contradicted by BK's testimony. She claimed she was gone much longer than fifteen minutes,[6] and she returned crying. (JA 137-43).

BK made no further allegations until the summer of 2009[7] when she alleged that, out of nowhere, SGT Jasper, through a

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[6] BK claimed to have traveled both ways on her bicycle, done the dishes, vacuumed the house, was fondled for twenty minutes, and then was taken to a bedroom where SGT Jasper attempted oral sodomy on her. (JA 137-43).

[7] BK's testimony was contradicted in that she claimed she never sat on SGT Jasper's lap other than these incidents, but TJ says

barrage of text messages while she was at school, demanded that BK take nude photographs of herself. (JA 147-49, 171). These alleged text messages, with only a vague threat regarding "if [she] ever wanted to do anything again" and no in-person or verbal communication, allegedly led to BK taking nude photographs of herself and sending them to SGT Jasper. (JA 148-49). The next day, SGT Jasper allegedly committed an indecent act with BK by touching her as he took his own photographs. Even though the alleged crime was reported the following day, BK's phone did not contain the voluminous number of text messages and the photographs. (JA 151, 201-02).

AJ looked through SGT Jasper's phone, and she did not find anything unusual in his text messages. (JA 66). The only testimony corroborating these allegations involves the nude photographs that AJ claims she saw on SGT Jasper's phone. (JA 66-67). This testimony only corroborated pictures allegedly taken by SGT Jasper, not the ones received by him as alleged in Specification 4 of Charge II, because AJ said the photographs were not self-portraits. (JA 67). Further, forensic analysts were unable to retrieve any such photographs or text messages from SGT Jasper's phone (JA 193, 197), and CID failed to collect

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she did. (*Compare* JA 178-79, *with* JA 204-05). In addition, both TJ and the tattoo artist say that BK acted "excited" and "like a typical teenager" when getting a tattoo just hours after the alleged 2009 sexual incident. (JA 206, 210).

BK's SIM (memory) card and second phone prior to her alleged dropping it in the toilet. (JA 98-99, 180-81, 187-88). BK offered no explanation as to why she did not save and present to the police the text messages and photographs allegedly made on her phone. As a result, no direct corroborating evidence was presented as to Charge I, Specifications 1 and 4 of Charge II, and Specification 2 of The Additional Charge, and only the testimony of BK's mother corroborated Specifications 2 and 3 of Charge II and tangentially Specification 1 of The Additional Charge.

d. The extent of cross-examination otherwise permitted

Other than preventing defense counsel from eliciting from BK or Pastor Ellyson that BK admitted fabricating the three incidents in 2006 and 2007, the military judge permitted open cross-examination.

e. The overall strength of the prosecution's case

The prosecution's case was incredibly weak without a credible BK. The prosecution portrayed BK as an outstanding teenager who excelled as a cheerleader and commander of her high school's junior ROTC program. (JA 112, 127). However, her relationship with her step-father was always tumultuous, as he was a strict parent who she sometimes "hated" (JA 93, 100-03, 123, 179), and BK was not happy about SGT Jasper's orders transferring him to Mississippi (JA 98-99, 125).

The excluded admission of fabrication was made after BK's ruse allowed her to separate from her step-father by moving with her mother and sister to Ohio. The government insinuated that BK's 2006-2007 allegations must be truthful because the family moved to Ohio soon after those allegations, only returning because TJ was sad and AJ could not find work. (JA 83, 86, 90-92, 119-20, 146-47). Allowing full cross-examination of BK regarding her admission of fabrication was crucial to the defense because it undermined BK's allegations of sexual abuse in not only 2006-2007 but also in 2009, and it rebutted the inference that the move to Ohio was the direct result of genuine abuse. Absent the admission to Pastor Ellyson, the panel was left with nothing but to accept that a mother would not uproot her family unless she believed the allegations to be true. Disclosure of the fabrication provides substantial doubt as to SGT Jasper's guilt for the alleged offenses, and it accurately explains why AJ moved her family back to Alabama to be with SGT Jasper.

3. Prejudice—Denial of a Right to Put on a Defense

Similar to denying the opportunity to fully cross-examine the accuser, when the military judge's error is of a constitutional dimension "by depriving an accused of his right to present a defense, the test for prejudice on appellate review is whether the appellate court is able to declare a belief that

it was harmless beyond a reasonable doubt." *McAllister*, 64 M.J. at 250-51 (internal quotations and citations omitted). The government must show that the there is no "'reasonable probability'" that the absence of Pastor Ellyson's testimony "'contributed to the contested findings of guilty.'" *Id.* at 252-53 (citation omitted); *see also Collier*, 67 M.J. at 355.

In this case, the military judge's denial of Pastor Ellyson as a witness denied appellant his Sixth Amendment right to put forth a defense. "'Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'" *McAllister*, 64 M.J. at 249 (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

The test for a constitutional violation of the right to present a defense is similar to the test discussed above. In *United States v. Roberson*, this Court stated, "'We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" 65 M.J. 43, 47-48 (C.A.A.F. 2007)(citation omitted).

The weakness of the government's case as described previously is equally applicable to the first prong enunciated in *Roberson*. The other three prongs are all interrelated.

BK's statement to Pastor Ellyson was critical to the defense. It went to the very heart of the allegations of which SGT Jasper was convicted. There were no other effective means to attack BK's credibility on this issue as the defense counsel's attempts to portray a motive to lie rang hollow without tangible proof that BK was a liar. Allowing cross-examination of BK regarding her recantation, or Pastor Ellyson's testimony if she denied recanting, destroys BK's credibility in a case where her credibility was paramount. As the government exhorted the members, "If she's lying about this stuff, I guess [everyone] is somehow in on it." (JA 276).

BK's admission was the type of evidence defense team's dream of. It established that many of the allegations were untrue, and devastated the credibility of the accuser as to the other allegations. BK provided the only testimony that supported nearly every element of every offense. As the government admitted in closing, her credibility was not "unimportant" and it was "a factor" for the panel in finding guilt for every specification. *Othuru*, 65 M.J. at 377-78.

Secondly, and perhaps most importantly, in this case the hearer of the recantation is critical. This recantation was not

made to a spurned ex-lover or disgruntled friend. This testimony would come from the one person that an accuser would speak most honestly to—her spiritual advisor. There would be no way for BK to explain away the recantation while maintaining the credibility that the trial counsel argued she possessed in his closing. Either she lied to her pastor who was helping her communicate with God or she lied to the members. Either way, she cannot be believed.

Conclusion

It is the government's burden to prove that the military judge's error was harmless beyond a reasonable doubt as to each specification. Even so, SGT Jasper has demonstrated how BK's credibility was crucial to his conviction, and the exclusion of this testimony "might have" contributed to his conviction of all specifications. In finding the communications to Pastor Ellyson were privileged, the military judge erred by denying SGT Jasper his best defense—his Sixth Amendment right to present a defense, to "have compulsory process for obtaining witnesses in his favor," and to his right to cross-examination. This error was not harmless beyond a reasonable doubt, and, as a result, this Court should set aside and dismiss all findings of guilt and set aside the sentence.

II

WHETHER THE ARMY COURT ERRED WHEN IT CREATED A CONSTITUTIONAL "KNOWING" ELEMENT TO MILITARY RULE OF EVIDENCE 510(a) REQUIRING A PRIVILEGE HOLDER TO BE INFORMED OF THE REGULATORY PRIVILEGE IN ORDER FOR THE DISCLOSURE TO BE DEEMED VOLUNTARY.

The Army Court established, for the first time in any military or federal court, a sweeping new rule allowing an accuser to revoke her waiver of a privileged communication after a substantial portion of the communication is disclosed because she was not fully advised of the legal implications of her waiver. The Army Court hatched this sweeping new rule with no legal analysis or explanation of how the facts of this case allowed the court to bypass the presumption of upholding the waiver and the directive by this Court and the Supreme Court to strictly construe privileges as they may deny the public justice. This holding in effect gives a non-accused holder of a regulatory privilege a constitutional right to notice that trumps the accused's constitutional right to confrontation and right to present a defense.[8]

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[8] At the Army Court, the government's primary argument was that no waiver occurred because BK did not know her rights as required by *Johnson v. Zerbst*. (*See* Gov't Br. at 12). While the Army Court does not cite *Johnson v. Zerbst* (discussing waiver of constitutional rights), the *Jasper* holding in effect inserts a constitutional knowing requirement to waive regulatory privileges. 304 U.S. 458 (1938).

Without explanation or support, the Army Court created a constitutional standard for a knowing and intelligent waiver of a *regulatory* privilege held by the accuser, which deprived the accused of his firmly established constitutional rights to confrontation and to present a defense.[9]

The Army Court cites no law to support the notion that a holder of a privilege created by the President must receive advice on par with a constitutional right held by an accused in order to "knowing[ly]" and voluntarily consent to waiver of the privilege. (JA 4). In so ruling, the Army Court ignored three key principles of law relating to privileges and waiver.

a. Once a substantial portion of the communication is voluntarily disclosed, the presumption dictates waiver, more aptly called forfeiture.

It is well established that once a privilege is disclosed at the behest of the holder, it usually cannot be restored. *See United States v. Shelton*, 59 M.J. 727, 732 n.10 (Army Ct. Crim. App. 2004)(citations omitted), *rev'd on other grounds*, 64 M.J. 32 (C.A.A.F. 2006); *see* Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.12.6 (2002)("[T]he prevailing view

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[9] In addition, the Army Court cites to Mil. R. Evid. 511(a), with no further analysis, even though it does not apply to this case nor did the government argue it applied either at trial or on appeal. (JA 4). Military Rule of Evidence 511 only applies to those "situation[s] in which there is no voluntary disclosure of privileged information; rather, the privileged material is improperly coerced . . . or is obtained under circumstances in which the holder has no opportunity to claim the privilege." 2 Stephen A. Saltzburg et al., *Military Rules of Evidence* § 511.02[1] (7th ed. 2011).

today is that once made, a waiver is irrevocable . . . ."). In its opinion, the Army Court failed to demonstrate what justifies the extraordinary restoration of such a privilege after the significant disclosure demonstrating SGT Jasper's innocence. In addition, the Army Court failed to rectify a holding that is in clear contravention to its position in *Shelton*. *Id.* at 732 n.10. The Army Court misapplied even its own legal precedent.

Military cases addressing the issue of waiver of privilege have relied on the plain language of Mil. R. Evid. 510(a) that a "person waives a privilege where he or she '*voluntarily* discloses or consents to disclosure of *any significant part* of the matter or communication under circumstances that it would be inappropriate to allow the claim of privilege.'" *McCollum*, 58 M.J. at 338 (quoting Mil. R. Evid. 510(a))(emphasis added). This term "waiver" is "more appropriately considered 'forfeiture.'" 2 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* § 501.02[5][k][i] (10th ed. 2011).

> Judge Posner has stated that many of the waiver doctrines—such as the doctrine finding a waiver of the privilege in some circumstances when the party has mistakenly disclosed the privileged information—are not "waiver in the standard sense in which the word is used in the law: the deliberate relinquishment of a right." Rather, ... "[w]aiver" in this broad sense includes the concept of forfeiture and follows from any conduct by the client that would make it unfair for the client thereafter to assert the privilege.

Id. (citations omitted).

As such, in determining whether a person waived a privilege, this Court has not inquired whether the person knew the legal parameters of the particular military rule of evidence or required that she be advised of those parameters.[10] Rather, this Court has "held, in harmony with federal civilian law, that communications made in the presence of third parties, or revealed to third parties, are not privileged." *McElhaney*, 54 M.J. at 131-32; *see also Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 668 (9th Cir. 2003)("[T]he general rule [is] that once confidential communications are disclosed to a third party the privilege is forever lost."). This Court in *McCollum* noted that all that is required for a voluntary disclosure is that "*the speaker elects* to share a substantial portion of a privileged communication *with a party outside of the privileged relationship.*" 58 M.J. at 338 (citing *McElhaney*, 54 M.J. at 131-32)(emphasis added). Here, both AJ and BK elected to share their privileged communications when given the chance to say "yes" or "no."

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[10] In the few cases in which this Court discusses Mil. R. Evid. 510(a) and waiver, none discussed a "knowing" aspect to voluntary disclosure. *See United States v. Durbin*, 68 M.J. 271 (C.A.A.F. 2010); *Custis*, 65 M.J. at 371-72; *McCollum*, 58 M.J. at 338-39; *McElhaney*, 54 M.J. at 131-32; *United States v. Smith*, 33 M.J. 114, 118-19 (C.M.A. 1991).

As discussed in Assignment of Error I, "'voluntary disclosure, *regardless of knowledge of the existence of the privilege*,[11] deprives a subsequent claim of privilege based on confidentiality of any significance.'" *Champion Intern. Corp.*, 486 F. Supp. at 1332 (citation omitted)(emphasis added); *see also* 1 McCormick, *Evidence* § 93 (6th ed. 2006)(stating that waiver applies even when not subjectively intended by the holder because the policy rational for maintaining the privilege no longer exists); Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.12.4, at 913 (2002)("If the [non-party] holder proceeds to answer the question and discloses the contents of a confidential communication, there is a waiver. There can be a waiver even if neither the judge nor counsel advise the holder of the existence of the privilege."), *quoted in State v. Okubo*, 53 P.3d 1204, 1209 (Haw. Ct. App. 2002) (holding that the spousal privilege "is not a constitutional right requiring an in-court colloquy or express waiver"). In addition, "when [a privilege holder's] conduct touches a certain point of disclosure, fairness requires that his privilege shall

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[11] A party may waive a privilege by disclosing privileged information to a third party who is not bound by the privilege, or by otherwise showing disregard for the privilege by making the information public. *See generally* Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence: Practice Under the Rules* § 5.28, at 530-33 (2d ed. 1999); *see also McElhaney*, 53 M.J. at 130-32.

cease whether he intended that result or not." *Privileged Communications*, 98 Harv. L. Rev. at 1629 n.1 (citation omitted).

In 2004, citing Saltzburg's treatise on the Military Rules of Evidence, the Army Court adopted this view of permanent disclosure even when the holder is unaware of the implications of disclosure. *Shelton*, 59 M.J. at 732 n.10. Professor Saltzburg, agreeing with McCormick, Wigmore and Imwinkelried,[12] posits that once a "privilege is removed[, it] usually cannot be restored." 2 Stephen A. Saltzburg et al., *Military Rules of Evidence* § 510.02 (7th ed. 2011)[hereinafter *MRE*]. His interpretation undermines the very basis of the Army Court's opinion in *Jasper*:

> Although the standard for a voluntary waiver is an intentional relinquishment of a known right, the Rule implicitly recognizes that, once confidentiality is destroyed, a holder's attempts to claim the privilege *will not restore it. The waiver here will stand even if the disclosure was made without the holder realizing the impact of the disclosure.* Because the holder has destroyed the privacy or security afforded by the privilege by disclosure, repair cannot be made.

Id. (emphasis added). The Army Court maintained this view in *Shelton*, yet *Jasper* failed to acknowledge this previous position

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[12] *Accord* 3 *Weinstein's Federal Evidence* § 511.04[1]-[2] ("The holder of a privilege can waive the privilege by voluntarily disclosing the privileged information. . . . Most authorities . . . . hold that one who voluntarily discloses privileged information outside the scope of the privilege thereby waives the privilege entirely.").

or justify a departure from that position—a position that is universally held in both military and federal courts. *Shelton*, 59 M.J. at 732 n.10 (quoting Saltzburg's prior edition of this same treatise).

In this case, the government affirmatively sought the information and the pastor spoke to both the government counsel and his own counsel before contacting BK and AJ. Upon speaking with them, both BK and AJ expressly gave their unequivocal consent to disclose the entirety of their communications made in 2007 to third parties. If there were circumstances of the disclosure that BK and AJ wanted to prevent prior to the visit to their home by the assistant trial counsel, due care required BK and AJ to seek more information as to the consequences of their decision prior to their unequivocal consent for Pastor Ellyson to disclose the substance of their communications.

Once BK and AJ elected to share their communications and the disclosure was made, the privilege had no legitimate function left to perform. As the disclosure went directly to the credibility of the complaining witness as she admitted to fabricating allegations against SGT Jasper, fairness dictates that the members hear of this fabrication before determining guilt.

As the military judge and the Army Court did not conduct any analysis regarding the presumption of waiver of the

privilege, both courts failed to conduct the "fastidious sifting of the facts" as required by *Custis*, 65 M.J. at 371 n.9, and an appropriateness balancing test as required by Mil. R. Evid. 510(a). Both courts failed to provide legal justification for taking the extraordinary step of reinstating the privilege and depriving the members of the knowledge that the sole accuser admitted she fabricated some of the allegations.

b. The Army Court revised the waiver standard in Mil. R. Evid. 510 in a manner the President did not intend.

Ironically, the Army Court cited *Custis* in holding that Mil. R. Evid. 510 possesses a "knowing" requirement even though Mil. R. Evid. 510 never uses the word "knowing." (JA 4)(citing *Custis*, 65 M.J. at 371). *Custis* specifically prohibits Courts of Criminal Appeals from creating exceptions to the expressly delineated privilege provisions and their exceptions. 65 M.J. at 370-71. In addition, in *Custis*' summary of the Mil. R. Evid. 510(a) waiver provision, this Court did not cite a "knowing" aspect to waiver;[13] all that is required is that the holder voluntarily "'elects to share a substantial portion of a privileged communication with a party outside of the privileged relationship.'" *Id.* at 371 (citation omitted). Here, the Army Court altered the plain language of Mil. R. Evid. 510 by adding a constitutional "knowing" requirement.

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[13] *See supra* note 10.

Military Rule of Evidence 510(a) requires only a "voluntary disclos[ure] or consent[] to disclosure" in order to effectuate disclosure. Nowhere in Mil. R. Evid. 510 did the President dictate a "knowing" requirement as to the exact limitations of the privilege that are on par with a knowing relinquishment of a constitutional right held by an accused.[14] "The doctrine of waiver of evidentiary privileges shares little more than its name with traditional concepts of waiver in contract or constitutional law." *Privileged Communications*, 98 Harv. L. Rev. at 1630 n.1. In contrast to the waiver standard in *Johnson v. Zerbst*, 304 U.S. 458 (1938)(discussing waiver as applied to constitutional rights), "the holder of an evidentiary privilege can waive that privilege *without ever being aware* that he had it." *Id.* (emphasis added).

The Army Court ignored *Custis*' primary holding in adding not only a more stringent standard to the Manual's privilege, but one of apparently constitutional proportions for a non-accused holder of a privilege that trumps the accused's Sixth Amendment rights. The opinion cites no authority for this remarkable expansion of the privilege.

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[14] "'[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Custis*, 65 M.J. at 370 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))(alteration in original).

c. Privileges must be strictly construed

Privileges are disfavored because, as this case demonstrates, they sometimes exclude very important evidence in the search for truth and justice. *See* 2 Saltzburg, *supra MRE*, § 501.02[1]. The Supreme Court has mandated subordinate courts engage in analysis that justifies the deprivation of this justice. That analysis is wholly lacking by the Army Court.

As the Supreme Court stated in *Trammel* and *Nixon*, excluding testimony because of a privilege denies the trier of fact evidence to determine the truth. 445 U.S. at 50; 418 U.S. at 710. Since evidentiary privileges operate to exclude evidence, even at the expense of determining the truth, "they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally *predominant principle of utilizing all rational means for ascertaining truth.*'" *Trammel*, 445 U.S. at 50 (citation omitted)(emphasis added). This Court adopted these same principles for the military's clergy-penitent privilege. *Shelton*, 64 M.J. at 37 (stating that "the clergy privilege, like all privileges must be strictly construed"). Yet the Army Court ignored this directive and conducted no analysis as to why waiver should not apply. As Mil. R. Evid. 510(a) dictates, waiver must be found except

"under such circumstances that it would be inappropriate to allow the claim of privilege."

d. Conclusion

Sergeant Jasper's constitutional right to present a defense should not have been thwarted because no one explained to BK and AJ the complete ramifications of BK's waiver. The request implied the right and ability to say "no." If either was confused in any way, she should have asked further questions. The Army Court cited no case that allows for the proverbial "cat to be put back in the bag" because the non-accused privilege holder failed to seek clarification of her rights. Both BK and AJ allowed their complete communications with Pastor Ellyson to be disclosed.

Military Rule of Evidence 503 was promulgated by the President and is, therefore, regulatory. The regulatory policy interest in protecting the confidentiality of communications to members of the clergy cannot require yielding an appellant's constitutional right to present a defense, especially when the substance of the communications has already been disclosed. To the contrary, the clergy privilege must yield to appellant's Sixth Amendment rights. Instituting a "knowing" requirement into Mil. R. Evid. 510(a) is without basis in law in both military and federal courts. The Army Court's attempt to do so in order to save the conviction in SGT Jasper's case is error.

Conclusion

Wherefore, SGT Jasper requests that this Court set aside and dismiss all findings of guilt and set aside the sentence.

III

WHETHER THE GOVERNMENT'S FAILURE TO ALLEGE THE TERMINAL ELEMENT IN SPECIFICATION 1 OF CHARGE II AND THE SPECIFICATIONS OF THE ADDITIONAL CHARGE RESULTED IN MATERIAL PREJUDICE TO APPELLANT'S SUBSTANTIAL RIGHT TO NOTICE.

Additional Statement of Facts

The government charged SGT Jasper with six Article 134, UCMJ, specifications. In Specification 1 of Charge II (indecent acts) and Specifications 1 and 2 of The Additional Charge[15] (indecent acts and obstruction of justice), the government did not provide notice on the charge sheets as to its theory of criminality. (JA 8, 11).

The government did not mention the terminal element during its' opening statement or closing argument. (JA 49-57, 258-78, 287-90). The only mention in the record of trial of the terminal element for any of the six specifications was one question to AJ immediately after she answered a question where she claimed that SGT Jasper admitted taking pictures of BK

[15] The original Additional Charges I and II were combined into The Additional Charge, Specifications 1 and 2, after the military judge identified the government's error in charging indecent acts pre-October 2007 as an Article 120, UCMJ, offense when it should have been an Article 134, UCMJ, offense. (*See* JA 17-18).

because he said it was "a mistake." (JA 96)(the pictures were the subject of the three Article 134, UCMJ, specifications that did contain the terminal element). The trial counsel next asked, "And what do you think about a Soldier in the United States Army doing these things with his stepdaughter?" (JA 96). After the defense counsel objected, the trial counsel stated that service discrediting is an element, but he did not specify as to which charge and specification the question was directed. (JA 409-10). Sustaining the defense objection, the military judge ruled that "the members can infer that element." (JA 97).

Law

In *United States v. Humphries*, this Court held that failure to allege the terminal element on the charge sheet is plain and obvious error. 71 M.J. 209, 214 (C.A.A.F. 2012). However, an appellant's constitutional right to notice may be satisfied if the government's actions at trial adequately demonstrate the government's theory of criminality. *Id.* at 215-16. Otherwise, this Court will determine if the appellant suffered material prejudice due to the lack of notice. *Id.* at 215. This Court reviews this constitutional error under a harmless beyond a reasonable doubt standard. *Id.*

Argument

In this case, the error is plain and obvious as the terminal element was not pled for three of the Article 134,

UCMJ, specifications. This resulted in material prejudice to SGT Jasper because no one knew which theory of criminality the government was attempting to prove, and the government did not put on any evidence relating to either terminal element for these three specifications.

The government did attempt to ask AJ one question regarding what she thought about an Army soldier taking inappropriate pictures of his step-daughter. (JA 96). However, this vague question and statement failed to specify which specification the "service discrediting" question was directed. Without specifying which specification(s) the question was meant to address, SGT Jasper was not on notice as to the government's theory of criminality for three of the six Article 134, UCMJ, specifications. When this Court puts the question in context to the witness' statements immediately preceding the "service discrediting" question, it is apparent that the trial counsel was seeking to prove the terminal element for the three specifications involving pictures of BK—Specifications 2-4 of Charge II.

As the government failed to put SGT Jasper on notice as to its theory of criminality for Specification 1 of Charge II and the specifications of The Additional Charge, SGT Jasper suffered a material prejudice to his constitutional right to notice. Without that notice, SGT Jasper was unable to adequately defend

against the specifications because he did not know if the government's theory of criminality was based on clause 1, clause 2, or both clauses of the terminal element of Article 134, UCMJ. Thus, the constitutional error was not harmless beyond a reasonable doubt.

Wherefore, SGT Jasper requests that this Court set aside and dismiss the findings of guilt to Specification 1 of Charge II and the specifications of The Additional Charge, and set aside the sentence.

IV

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING THE PANEL MEMBERS THAT IN ORDER TO FIND APPELLANT GUILTY OF POSSESSION OF CHILD PORNOGRAPHY IN VIOLATION OF ARTICLE 134, CLAUSE 1 AND 2, THE IMAGES MUST BE OF A CHILD UNDER THE AGE OF EIGHTEEN, INSTEAD OF UNDER THE AGE OF SIXTEEN AS THE UCMJ DEFINES CHILD.

Additional Statement of Facts

The government charged SGT Jasper with possessing and receiving child pornography, in violation of Article 134, UCMJ, under clauses 1, 2, and 3 in Specifications 2 and 4 of Charge II. (JA 8, 10). In Specification 3 of Charge II, the government charged SGT Jasper for persuading, inducing, enticing and coercing BK into making the child pornography as alleged in Specifications 2 and 4 of Charge II. (JA 10). The government amended Specifications 2, 3, and 4 of Charge II removing all

references to the statutory language of 18 U.S.C. §§ 2251, 2252A in order to proceed under a clause 1 and 2 theory at trial. (JA 33, 46-48). In instructing the panel members on findings, the military judge stated that the words "child" and "minor" for the offense in Specifications 2 and 4 of Charge II meant "any person under the age of 18 years." (JA 244, 249). The military judge did not define "child" as he used the term in the instructions for Specification 3 of Charge II.[16] (JA 247). The defense counsel objected to the instruction defining child as a person under the age of eighteen years. (JA 226-34).

Standard of Review

"'The question of whether a jury was properly instructed [is] a question of law, and thus, review is *de novo*.'" *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)(quoting *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)). When constitutional issues are implicated in an instructional error, then appellant's claim is ordinarily tested "under the standard of harmless beyond a reasonable doubt." *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). "The inquiry for determining whether constitutional error is harmless beyond a

[16] The military judge attempted to make this specification akin to an indecent act under Article 120. (JA 228-34). This Court should analyze this specification just like Specifications 2 and 4 of Charge II because if it does not, Specification 3 should have been dismissed because it was preempted by Article 120, UCMJ.

reasonable doubt is 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *Id.* (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)). Instructional errors are constitutional errors, and to overcome the harmlessness standard, the government must show that the improperly instructed element was uncontested at trial and that the evidence for the element was overwhelming. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008)(citing *Neder v. United States*, 527 U.S. 1, 17 (1999); *Chapman v. California*, 386 U.S. 18 (1967)).

Law and Argument

In *United States v. Barberi*, this Court acknowledged that charging child pornography possession under clause 1 or 2 of Article 134, UCMJ, without reference to the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §§ 2252A-2260 (2006), creates "a completely different set of elements required for conviction." 71 M.J. 127, 131 (C.A.A.F. 2012). However, as neither party objected to the instructions chosen by the military judge, the military judge was free to use the definitions included in the CPPA. *Id.* at 129-30. In this case, SGT Jasper objected to the definition of "child" as proposed by the military judge, and it was error for the military judge to use a definition not found within the UCMJ when the UCMJ explicitly defines the term "child."

1. Improperly Instructed Element

The military judge improperly instructed the panel in SGT Jasper's case as to the proper definition of "child" in the offense as charged. As amended by the government, the specifications for possession, enticing to produce, and receiving child pornography were offenses solely under clause 1 and 2 of Article 134, UCMJ. (JA 8, 10, 46-48). Therefore, federal statutes on child pornography did not apply, including federal statutory definitions applicable to those offenses, and the UCMJ was the only proper place to look for the definition of a "child."

The military judge's instruction had no basis in law. Federal law did not apply because the offenses were charged as purely military offenses. Thus, the military judge should have looked to the UCMJ to define the meaning of "child." Nowhere in the UCMJ is "child" defined as anyone older than a person under the age of sixteen. *See, e.g.*, Article 120(t)(9), UCMJ ("The term 'child' means any person who has not attained the age of 16 years."); Article 125b(3), UCMJ (element to be proven is that child is under the age of sixteen); Article 128b(3)(c), UCMJ ("assault consummated by a battery upon a child under 16 years of age"); Article 134, UCMJ (child is under the age of sixteen for child endangerment); Article 134, UCMJ (2000) (indecent acts with a child only if the person is under sixteen years of age).

There is one sole definition of a "child" under the UCMJ, and the military judge misapplied the law as to that definition. *Cf. United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007)("We have long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused.")(citation omitted).

The military judge's instruction also violated the concept of notice. *See generally Humphries*, 71 M.J. 209. When the military judge arraigned SGT Jasper, the charge sheet simply alleged offenses involving a "child." Sergeant Jasper used the UCMJ to define "child," and the government argued that the military judge should define the term as in a federal statute no longer referenced in the charges. As a result, since the UCMJ defines "child" in multiple places, SGT Jasper was not put on notice by the government that he was to defend himself against a crime as defined by a statute wholly outside the UCMJ. Thus, the military judge abused his discretion in overruling the defense objection and defining the term "child" as a person under the age of eighteen years-old.

2. Harmlessness Standard

To prove that the military judge's error was harmless beyond a reasonable doubt, the government must show that: (1) the element of child under sixteen versus child under eighteen was uncontested, and (2) that the evidence of images of children

under sixteen was overwhelming. *Upham*, 66 M.J. at 86. There was no evidence that the images were of a child under sixteen years-old. The alleged images were of BK, appellant's step-daughter, who turned seventeen on August 17, 2009. (JA 127). Sergeant Jasper was convicted of Specifications 2-4 of Charge II for possessing, enticing to produce, and receiving the images during the time period of August 20-22, 2009, three to five days after BK turned seventeen years-old. (JA 8, 10). BK testified that the nude pictures of her, at issue in Specifications 2-4 of Charge II, were taken on and after August 19, 2009. (JA 147-51). Therefore, the alleged images, if they existed, were of a seventeen year-old girl, not of a child under the age of sixteen years.

The element requiring proof that any child in the alleged pornography on appellant's cell phone was under the age of sixteen was wrongfully instructed upon by the military judge as only requiring proof that the images were of children under eighteen. The government cannot meet its burden of harmless beyond a reasonable doubt, or even under the less onerous burden of harmless, where any images, even if they existed, were of a person over the age of sixteen.

WHEREFORE, SGT Jasper requests that this Court set aside and dismiss the findings of guilt to Specifications 2, 3, and 4 of Charge II and set aside the sentence.

Conclusion

Accordingly, SGT Jasper requests that this Honorable Court set aside and dismiss all specifications and set aside the sentence.

JACOB D. BASHORE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703)693-0651
USCAAF# 35281

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
USCAAF# 26450

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF# 31186

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because this brief contains 10,682 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 Courier New, using 12-point type with no more than ten and ½ characters per inch.

Jacob D. Bashore
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0651
USCAAF # 35281

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Jasper, Crim. App. Dkt. No. 20100112, Dkt. No. 13-0013/AR, was delivered to the Court and Government Appellate Division on March 7, 2013.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736