IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee,

v.

Staff Sergeant (E-5)
RAY A. VAZQUEZ, USAF
Appellant.

USCA Dkt. No. 12-5002/AF
Crim. App. No. 37563

BRIEF ON BEHALF OF APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
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v.	) USCA Dkt. No. 12-5002/AF)
Staff Sergeant (E-5), Ray A. Vazquez, United States Air Force, Appellee	) Crim. App. Dkt. No. 37563)))

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

Certified Issues Presented

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT APPELLEE WAS NOT AFFORDED A FUNDAMENTALLY FAIR TRIAL, AS GUARANTEED BY MILITARY DUE PROCESS AND THE UCMJ, WHEN TWO REPLACEMENT COURT MEMBERS DETAILED AFTER TRIAL ON THE MERITS HAD BEGUN WERE PRESENTED RECORDED EVIDENCE PREVIOUSLY INTRODUCED BEFORE THE MEMBERS OF THE COURT IN COMPLIANCE WITH ARTICLE 29, UCMJ, AND R.C.M. 805(d)(1).

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FAILING TO FIND WAIVER OR BY FAILING TO CONDUCT A PLAIN ERROR ANALYSIS; INSTEAD, THE COURT INCONGRUOUSLY FOUND THE ALLEGED VIOLATION OF APPELLEE'S RIGHT TO MILITARY DUE PROCESS WAS PER SE PREJUDICIAL DESPITE DECLARING THAT THE ERROR WAS NOT STRUCTURAL.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66, Uniform Code of

Military Justice (UCMJ); 10 U.S.C. § 866 (2008). This Honorable Court has jurisdiction to review this case under Article 67(a)(2), UCMJ; however, as noted below, this Court generally adheres "to the prohibition on [issuing] advisory opinions as a prudential matter." *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)(internal citations omitted).

Statement of the Case

On June 1-6 and 8, 2009, Appellee was tried at Misawa Air Base, Japan, before a court-martial composed of officer members. Contrary to his plea, Appellee was convicted of aggravated sexual contact with a child on or about September 19, 2008, in violation of Article 120, UCMJ. The panel sentenced Appellee to a reprimand, reduction to the grade of E-1, total forfeitures, eight years' confinement, and a dishonorable discharge. (R. at Promulgating Order, 774.) On September 30, 2009, the convening authority approved the sentence and, except for the dishonorable discharge, ordered execution of the sentence. (R. at Promulgating Order.)

On March 19, 2012, the Air Force Court held that Appellee

> was not afforded a fundamentally fair trial, as guaranteed by military due process and the UCMJ, when two of the six court members were added to the panel after five of the Government's six witnesses had already testified and thus did not receive a

> substantial portion of the Government's evidence in the same manner as the other four panel members.[1]

United States v. Vazquez, __ M.J. __, ACM 37563, at J.A. 1 (A.F. Ct. Crim. App. 19 March 2012) (*Vazquez* I).[2] The Air Force Court concluded that, as applied in this case, Rule for Courts-Martial (R.C.M.) 805(d)(1) "resulted in a structural error in the trial mechanism such that the 'criminal trial cannot reliably serve its function as a vehicle for determining truth or innocence.'" *Id*. at 14 (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). The Air Force Court held that the violation of Appellee's military due process rights was per se prejudicial and mandated reversal of the conviction. *Id*. The Air Force Court also held that the military erred by failing to sua sponte declare a mistrial. J.A. 13-14. The Air Force Court set aside the findings and sentence and dismissed the charge. *Id*.

On April 18, 2012, Appellant filed a motion for reconsideration en banc with the Air Force Court. On April 27,

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[1] The Air Force Court concluded that, given its ruling on the specified issues, it was unnecessary to consider the assignments of error raised by Appellant. J.A. 3 n.3.

[2] To distinguish between the Air Force Court's original opinion dated March 19, 2012 and its revised opinion dated April 27, 2012, the Government has styled the original opinion as *Vazquez* I and the revised opinion as *Vazquez* II. *See* Government's Brief in Support of Issues Presented (Government's Brief) at 4. Solely for the sake of consistency, Appellee hereby adopts the Government's nomenclature.

2012, the Air Force Court issued an order denying reconsideration en banc, but granting reconsideration before the original panel. Upon reconsideration, the Air Force Court withdrew its original decision and published the amended decision on April 27, 2012. J.A. 15-28. The amended decision deleted the penultimate paragraph of the original opinion and contained a footnote, which states in full:

> In our original 19 March 2012 opinion, we inadvertently left the impression that our decision was based on a Constitutional structural error analysis as discussed in *Arizona v. Fulminante*, 499 U.S. 279 (1991). That was neither our intent nor the basis for our holding. For the reasons discussed above, we conclude the appellant's right to military due process was denied and the military judge erred by not declaring a mistrial. As a result, the appellant's court-martial did not reliably serve its function as a vehicle for determination of guilt or innocence.

J.A. 28 n.15.

The amended decision included the language from the original decision that "[a] violation of the appellant's military due process rights are per se prejudicial and mandate reversal of the appellant's conviction." J.A. 28.

On May 29, 2012, The Judge Advocate General of the United States Air Force filed a certificate of review for consideration by this Honorable Court pursuant to Article 67(a)(2), UCMJ.

Statement of the Facts

Following voir dire, the court-martial panel consisted of five officers, including First Lieutenant (Lt) Conn. (R. at 222, 273.)

AM, the four-year-old alleged victim, testified remotely. J.A. 48. Both the defense counsel and the senior trial counsel (STC) were in the same room as AM throughout her testimony. *Id.* AM seemed to have problems responding to basic questions. When the STC asked AM for her brothers' names, she answered, "I just drank the ice." J.A. 49. When asked "What was your scariest day?", AM replied, "I fall down." J.A. 51. When the STC asked, "What was your saddest day?", AM responded, "Making crafts. I made crafts at school." *Id*. Regarding the alleged incident, the STC asked, "What happened at Uncle Ray's house?" J.A. 53. AM answered, "He's a lion. I saw him and he's a lion." *Id*.

AM was confused by whether statements were the truth or lies. J.A. 50. The STC asked her, "If I were to say you were a boy, is that a truth or lie?" *Id.* AM replied, "It's the truth." *Id.* The STC then told the witness, "It is true that you're girl. If I were to say you were a boy, is that the truth or a lie?" *Id.* AM answered correctly the second time. *Id.*

AM eventually testified, "Uncle Ray told me to lick his body." J.A. 54. There is no record of her demeanor when she made the accusation, but the military judge later remarked that

she made the accusation “in the manner of a child at play.” J.A. 122. Regarding the annotations of the testimony, the judge indicated that the “the typical gestures and other things that we would often make part of the record during the inquiry were a little difficult to do.” J.A. 58.

There are two places in the record where it was noted that AM was drawing. J.A. 54. It appears that AM was occupied with drawing throughout the examination and not only the two times noted. Specifically, AM said she “was painting all the sparkles on Sponge Bob Squarepants” and noted that a crayon “is all gone,” whereas the STC remarked, “Well how about you keep drawing,” “What are you drawing?”, and “Maybe you used to [sic] much glue.” J.A. 50, 52-53, 55.

Only one drawing produced during the examination was entered into evidence. Pros. Ex. 4. It appears as though more than one drawing was created during the examination. The record states, “[TC hands witness another piece of drawing paper].” J.A. 52.

AM was drawing when she testified that Appellee sexually assaulted her and referenced one of her drawings in relation to her accusation. She said, “This is his –I’m going to make his body. That’s his body. [Witness draws on paper] That’s what happened.” J.A. 54.

Aside from drawing, several other gestures or actions are reflected in the record. AM counted her fingers and drank water. J.A. 49-50. She twice pointed to her groin area. J.A. 54. The first time AM pointed to her groin, she had just claimed to have drawn the body of Appellee. *Id.* The STC asked the witness, "Can you tell me where is his body? Can you show me?" *Id.* AM said that she could. *Id.* The STC asked, "where at?" *Id.* Instead of referring to her drawing of Appellee, AM said "Right here" and pointed to her groin. *Id.* The STC immediately said, "Right there" and then asked, "What part of the body did you lick his body with? Can you show me?" *Id.* Instead of pointing to her tongue or her mouth, AM again said, "right here," and pointed to her groin area. *Id.*

Following AM's testimony, four more witnesses testified for the Government. They were Petty Officer Second Class (PO2) UG, AM's stepfather; Dr. (Capt) Matthew Hollander, the pediatrician who examined AM; Special Agent (SA) Matthew Ferguson, who arranged a pretext phone call between PO2 UG and Appellee and who interrogated Appellee; and Dr. Elissa Benedek, who testified as an expert in forensic child psychology. J.A. 61-144.

SA Ferguson testified that he arranged for a pretext phone call between Appellee and PO2 UG, wherein PO2 UG informed Appellee that A.M. had accused him of molesting her. J.A. 95-98. During his closing argument, the defense counsel noted

that SA Ferguson had been "evasive" during his testimony, and that he did not want to give "very easy" answers. R. 712. The judge himself noted that the tenor of the conversation between defense counsel and SA Ferguson was "argumentative." J.A. 107. There were several points during the testimony when SA Ferguson was non-responsive. J.A. 101-105.

Dr. Benedek testified about the ways to determine whether a child claiming abuse had been coached or had had their answers suggested to them. J.A. 136-138. According to Dr. Benedek, one way to determine if a child has been coached is to see if the child answers questions or demonstrates something before she is asked. J.A. 135. There was no timestamp on the record of trial, and thus no way to know how long it took AM to make the gestures discussed above. J.A. 54. According to Dr. Benedek, other ways to determine whether a child's testimony is truthful include changes in behavior and whether the child's story has increased or decreased in detail J.A. 136-138.

Following Dr. Benedek's testimony, Lt Conn informed the military judge that he recognized Staff Sergeant (SSgt) DG, AM's mother and a Government witness who had not yet testified, after seeing her in the hall during a recess. J.A. 144-145, 147-148. The military judge granted Appellee's challenge for cause of Lt Conn based on implied bias. J.A. 150. With the excusal of Lt Conn, the panel fell below quorum for a general court-martial

prescribed by Article 16(1)(A), UCMJ, and Rule for Courts-Martial (R.C.M.) 505(c)(2)(b). J.A. 152.

The court-martial reconvened two days later. J.A. 154. The convening authority had appointed five new members to the court-martial. *Id*. After voir dire, the panel now consisted of two new members (Capt Soriano and Lt Castaneda), plus the remaining four members of the original panel. J.A. 157.

At an Article 39(a) session, the military judge announced his plan for proceeding with the court-martial pursuant to R.C.M. 805(d). J.A. 160. He intended to permit the Government "a new opportunity to make opening remarks to the new court members" and to give Appellee the opportunity to make an opening statement or to defer until the defense case-in-chief. *Id*. The military judge stated, "The counsel have worked out a procedure, and we will put that on the record, whereby one counsel will read the questions and another counsel will respond as they read those transcripts." *Id*.

The STC and TC read AM's testimony to the two new members. The STC read the direct examination questions and the TC read AM's testimony.[3] J.A. 165-172. The STC and TC read PO2 UG's testimony to the new members. The TC read both the direct and

[3] On cross-examination, the SDC only asked AM if she remembered him but otherwise did not cross-examine her, such that there were no cross-examination questions for the Government counsel to read to the new members. J.A. 56-58.

cross-examination questions, and the STC read PO2 UG's testimony. J.A. 173-190. The STC and TC read Dr. Hollander's testimony to the new members. The TC read both the direct and cross-examination questions, and the STC read Dr. Hollander's testimony. J.A. 191-203. The STC and TC read SA Ferguson's testimony to the new members. The TC read both the direct and cross-examination questions, and the STC read SA Ferguson's testimony. J.A. 204-225. Finally, the STC and TC read Dr. Benedek's testimony to the new members. The STC read the direct examination questions and the TC read Dr. Benedek's testimony. J.A. 225-235.

At the next session of the court-martial, the original members and the new members were present. J.A. 238. The Government's final witness, SSgt DG, AM's mother, testified before all six members. J.A. 238 *et seq*.

Prior to deliberations, the military judge provided the following instruction to the members:

> You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with each side; and how each witness might be affected by the verdict . . . taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. The believability of each witness'

> testimony should be your guide in evaluation testimony and not the number of witnesses called.

J.A. 362.

Additional facts necessary to resolve the certified issues are contained in the arguments below.

Summary of Argument

The certified issues call for an advisory opinion because the outcome of the appeal and the relief granted to Appellee would be the same regardless of this Court's resolution of the certified issues. The Air Force Court resolved this case on two alternative bases: (1) a violation of military due process; and (2) the military judge's failure to sua sponte declare a mistrial. The certified issues address the first basis but not the second. Even if this Court were to reverse the Air Force Court's holding that Appellee's military due process rights were violated, the dismissal of the charge withstands scrutiny. The Government did not exercise its right to appeal that portion of the ruling which found that the military judge erred by failing to sua sponte declare a mistrial. Accordingly, that ruling is now the law of the case. As such, the outcome of Appellee's case would be no different regardless of this Court's resolution of the certified issues. Answering the certified issues would cause this Court to render an advisory opinion. This Court should follow its regular prudential course of declining to

provide such an advisory opinion and instead dismiss the certificate for review. Alternatively, this Court should affirm the decision of the Air Force Court.

The Air Force Court correctly held that Appellee was not afforded a fundamentally fair trial, as guaranteed by military due process and the UCMJ, when two replacement court members were added to the panel pursuant to Article 29, UCMJ, and R.C.M. 805(d)(1) after five of the Government's six witnesses had already testified and thus did not receive a substantial portion of the Government's evidence in the same manner as the original four panel members. The application of Article 29, UCMJ, and R.C.M. 805(d)(1) deprived Appellee of the right to confrontation, the right to a properly instructed panel, the right for each panel member to evaluate the evidence, and the right to a fair and impartial panel. This Court should conclude that military due process required all panel members sitting as Appellee's court-martial to receive evidence in the same manner.

Finally, the Air Force Court correctly held that the violation of Appellee's military due process rights was per se prejudicial and mandated reversal of the conviction. Because the application of Article 29, UCMJ, and R.C.M. 805(d)(1) denied Appellee his military due process rights, the error was per se prejudicial. If the error was not per se prejudicial, then it was not harmless beyond a reasonable doubt. The Air Force Court

correctly held that Appellee did not waive or forfeit the issue by failing to object at trial. Even assuming Appellee forfeited the issue and this Court engages in a plain-error analysis, the error was not harmless beyond a reasonable doubt.

Argument

I.

THE CERTIFIED ISSUES ASK THIS COURT TO DECIDE QUESTIONS FOR WHICH THE ANSWERS WOULD NOT AFFECT THE DECISION BY THE AIR FORCE COURT, THEREBY CALLING FOR AN ADVISORY OPINION.

A. Answering the certified issues would not alter the outcome of the case.

The Air Force Court's decision rested on two distinct and independent bases: (1) a violation of military due process; and (2) the military judge's erroneous failure to sua sponte declare a mistrial.

The Judge Advocate General of the Air Force certified two issues to this Court, but both issues concern only the first legal basis – the Air Force Court's finding that Appellee's military due process rights were violated, resulting in a fundamentally unfair trial. The Judge Advocate General did not certify to this Court any issue concerning the second legal basis – the Air Force Court's finding that the military judge erroneously failed to sua sponte declare a mistrial where the application of R.C.M. 805(d)(1) resulted in a patently unfair

trial. Because The Judge Advocate General did not certify any issue regarding the second basis for the Air Force Court's decision, this Court's resolution of the certified issues would not alter the outcome of the case or the relief granted by the lower court.

B. The Air Force Court's holding that the military judge erred by failing to sua sponte declare a mistrial is now the law of the case.

The Judge Advocate General of the Air Force could have appealed, but did not appeal, the Air Force Court's ruling that the military judge erred by failing to sua sponte declare a mistrial. Accordingly, the decision of the lower court is now the law of the case. As this Court has explained, "[w]here neither party appeals a ruling of the court below, that ruling will normally be regarded as law of the case and binding upon the parties." *United States v. Erickson*, 65 M.J. 221, 224 n.1 (C.A.A.F. 2007) (citing *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006)). Similarly, "[w]here there is no appeal, this Court will not review the lower court's ruling unless 'the lower court's decision is clearly erroneous and would work a manifest injustice if the parties were bound by it.'" *Id*. (quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (internal quotation marks omitted)). Here, neither party appealed the Air Force Court's ruling that "under the facts of

this case, the military judge had a sua sponte duty to declare a mistrial." J.A. 14.

This Court should apply the law of the case doctrine because the lower court's decision was neither clearly erroneous nor would it work a manifest injustice if the parties are bound to it. First, the clearly erroneous standard has been famously explained as requiring that a purported error "must be 'more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1993) (alteration in original) (quoting *Parts and Electric Motors v. Sterling Electric*, 866 F.2d 228, 233 (7th Cir. 1988)). The Air Force Court's holding that the military judge erroneously failed to sua sponte declare a mistrial in this case is well-supported both factually and legally. As the Air Force Court observed, its reasoning is consistent with the *Manual for Courts-Martial*'s drafters' analysis for R.C.M. 805(d), which refers to "the rare circumstances in which a court-martial is reduced below a quorum after trial on the merits has begun and a mistrial is inappropriate." J.A. 14 n.14 (quoting MANUAL FOR COURTS-MARTIAL [M.C.M.], UNITED STATES, at A21-47 (2008 ed.)). It is only in "rare" circumstances that a mistrial is inappropriate where a panel is reduced below quorum, such that the more usual practice is to declare a mistrial. The Air Force Court's reasoning is

also consistent with the R.C.M. 805 discussion from the 2005 M.C.M. explaining that "[w]hen a court-martial panel has been reduced below a quorum, a mistrial may be appropriate." *Id.* (quoting Rule for Courts-Martial 805 (discussion), M.C.M. (2005 ed.)).

Second, following the law of the case doctrine would not result in any manifest injustice. The Air Force Court did not order that the charge be dismissed with prejudice. Thus, even if this Court were to dismiss the certificate for review, the Government could re-refer the charge. If the Government believes that the interests of justice support retrying Appellee, it can protect those interests under the terms of the lower court's ruling.

C. Answering the certified issues would cause this Court to render an advisory opinion.

If this Court applies the law of the case doctrine, then answering the certified issues would cause this Court to render an advisory opinion. The Air Force Court provided alternative rationales for its ruling, one based on military due process and the other based on R.C.M. 805. The Air Force Court determined that, under both analyses, the conviction and sentence must be set aside. The Judge Advocate General filed a certificate for review challenging only the military due process analysis and not the R.C.M. 805 analysis. That certificate for review seeks

an advisory opinion, since the R.C.M. 805 analysis would result in the findings' reversal regardless of how this Court were to resolve the issues concerning military due process.

D. This Court should follow its normal practice of declining to render an advisory opinion.

As an Article I Court, this Court is not constrained by Article III, § 2's "cases" or "controversies" requirement. *See, e.g., United States v. Russett*, 40 M.J. 184, 185-86 (C.M.A. 1994). Nevertheless, this Court has observed that "Courts established under Article I of the Constitution, such as this Court, generally adhere to the prohibition on advisory opinions as a prudential matter." *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003) (citing *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981.)). In the past, this Court has dismissed or declined to address the merits of certificates for review where the parties would be unaffected by resolution of the certified issues. *See, e.g.*, *United States v. Hartsock*, 15 M.J. 77 (C.M.A. 1982) (summary disposition); *United States v. Bryant*, 12 M.J. 307 (C.M.A. 1981) (summary disposition); *United States v. McAnally*, 10 M.J. 270 (C.M.A. 1981) (per curiam); *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981) (per curiam). This Court should follow that practice here.

E. Conclusion

For the foregoing reasons, Appellee respectfully requests that this Honorable Court summarily dismiss the certificate for review or, alternatively, affirm the decision of the Air Force Court.

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT APPELLEE WAS NOT AFFORDED A FUNDAMENTALLY FAIR TRIAL, AS GUARANTEED BY MILITARY DUE PROCESS AND THE UCMJ, WHEN TWO REPLACEMENT COURT MEMBERS DETAILED AFTER TRIAL ON THE MERITS HAD BEGUN WERE PRESENTED RECORDED EVIDENCE PREVIOUSLY INTRODUCED BEFORE THE MEMBERS OF THE COURT IN COMPLIANCE WITH ARTICLE 29, UCMJ, AND R.C.M. 805(d)(1).

A. Standard of Review

"The constitutionality of a statute is a question of law we review *de novo*." *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012) (quoting *United States v. Medina*, 69 M.J. 462, 464 (C.A.A.F. 2011)); *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

B. Law and Argument

Appellee was not afforded a fundamentally fair trial, as guaranteed by military due process and the UCMJ. The Government violated his rights by adding two replacement court members to the panel pursuant to Article 29, UCMJ, and R.C.M. 805(d)(1) after five of the Government's six witnesses had already testified. These replacement members thus did not receive a

substantial portion of the Government's evidence in the same manner as the original four panel members. The application of Article 29, UCMJ, and R.C.M. 805(d)(1) deprived Appellee of the right to confrontation, the right to a properly instructed panel, the right for each panel member to evaluate the evidence, and the right to a fair and impartial panel. This Court should conclude that, under the unique facts of this case, military due process required all panel members sitting as Appellee's court-martial to receive evidence in the same manner.

Military due process consists of certain "fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said that he has been fairly convicted." *United States v. Clay*, 1 C.M.R. 74, 77 (C.M.A. 1951).[4] A violation of military due process occurs when

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[4] In *Clay*, the Court of Military Appeals provided a non-exclusive list of rights which constitute military due process. They include:

> rights which parallel those accorded to defendants in civilian courts: To be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated

an accused is denied a fundamental right granted by Congress. *United States v. Berrey*, 28 M.J. 714 (N.M.C.M.R 1989) (quoting *United States v. Jerasi*, 20 M.J. 719, 723 (N.M.C.M.R. 1985), *aff'd* 23 M.J. 162 (C.M.A. 1986)).

Article I, Section 8, Clause 14, of the United States Constitution empowers the Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces[.]" Pursuant to this provision, Congress has established the court-martial as the institution to provide military justice to servicemembers. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004). This Court has held that the Sixth Amendment right to trial by jury "with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial."[5]

> number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.

1 C.M.R. at 7-8.

[5] Appellant incorrectly notes that the Air Force Court's "decision failed to recognize" that the Sixth Amendment right to a jury trial does not apply to servicemembers. Government's Brief at 12, n.4. The Air Force Court did not state that the Sixth Amendment right to a jury trial applies to servicemembers. To be specific, the Air Force Court stated, "If an accused is entitled to have a 'jury' determine his fate, that right must include, at a minimum, having the same jury present for the entire trial." J.A. 24 (quotation marks in original). The use of the quotation marks indicates that the Air Force Court recognized that the literal definition of "jury" does not apply

Id. (citing *United States v. Kemp*, 22 C.M.A. 152, 154 (C.M.A. 1973)). The jurisprudence of the Supreme Court and this Court regarding the application of the Sixth Amendment to an accused, or the lack thereof, has held that a servicemember has no right to have a court-martial be composed of a jury of peers, a representative cross-section of the community, or randomly chosen. *Id*. (citing *Ex Parte Quirin*, 317 U.S. 1, 39-41 (1942); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988)). However, this Court has also held that "the military defendant does have a right to members who are fair and impartial." *Id*. (quoting *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999)). Further, this right "'is the cornerstone of the military justice system.'" *Id*. (quoting *United States v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991)).

This Court has not considered the narrow question of whether an accused has the right to have the same panel receive evidence in the same manner when the panel is reduced below quorum.[6] Appellee urges this Court to hold that military due process guarantees an accused this right and that the

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to courts-martial but that many of the functions and characteristics of a jury also exist on a court-martial panel.

[6] The Air Force Court correctly noted that the release of members in accordance with R.C.M. 505(c)(2)(A) where a quorum is still maintained would not violate military due process. J.A. 24, n.10.

application of Article 29, UCMJ, and R.C.M. 805(d)(1) denied Appellee this right.

1. Statutory and regulatory framework.

In Article 29, UCMJ, Congress has legislated:

> Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below the applicable minimum number of members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than the applicable minimum number of members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

10 U.S.C. § 829(b)(1).[7]

The President has promulgated R.C.M. 805(d)(1), which provides, in relevant part:

> When after presentation of evidence on merits has begun, a new member is detailed under R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

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[7] The 2005, 2008, and 2012 editions of the M.C.M. do not contain the 2001 amendments which struck the language "five members" and inserted the language "the applicable minimum number of members" in two relevant places within subsection (b)(1) of the statute and which added subsection (b)(2) to the statute. Both Appellee and Appellant rely on the statutory language of 10 U.S.C. § 829(b)(1) when referring to Article 29, UCMJ. *See* Government's Brief at 14, n.5.

The Analysis of R.C.M. 805(d) states, "This subsection provides a means to proceed with a case in the rare circumstance in which a court-martial is reduced below a quorum after trial on the merits has begun and a mistrial is inappropriate." M.C.M. at A21-47.

2. Presumption of Constitutional validity.

The Supreme Court has stated that due respect for the decision of a coordinate branch of government requires that courts invalidate congressional enactments only upon a plain showing that Congress exceeded its constitutional bounds. *United States v. Morrison*, 529 U.S. 598, 607 (2000). In *Parker v. Levy*, the Supreme Court stated that a "strong presumptive of validity" exists regarding an Act of Congress. 417 U.S. 733, 756 (1974).

Through enactment of the UCMJ in 1950 and subsequent statutory changes, Congress has gradually changed the military justice system to more closely resemble the civilian justice systems. In several important respects, however, the military remains a "specialized society separate from civilian society." *Weiss v. United States*, 510 U.S. 163, 174 (1999) (quoting *Levy*, 471 U.S. at 743 (1974)). While Congress possesses plenary authority over "rights, duties, and responsibilities in the framework of the Military Establishment," Congress still must guarantee the protections of the Due Process Clause of the Fifth

Amendment when legislating military affairs. *Id.* at 176-77 (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)). The tests and limitations of due process may differ because of the military context, such that "courts must give particular deference to the determination of Congress" pursuant to its authority to regulate the land and naval forces. *Id*. at 177 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)). Judicial deference extends to rules regarding the rights of servicemembers because "Congress has the primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . . . [The Supreme Court] ha[s] adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated." *Id*. (quoting *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)). Accordingly, the "appropriate standard" for due process challenges in the military justice system is whether appellant's right to have the evidence against him evaluated by the same panel is "so extraordinarily weighty as to overcome the balance struck by Congress." *Id*. at 177-78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

Appellee does not argue that Article 29, UCMJ, and R.C.M. 805(d)(1) are facially unconstitutional, that is, outright invalid; rather, Appellee asserts that the application of

Article 29, UCMJ, and R.C.M. 805(d)(1) to the circumstances of his court-martial deprived him of military due process.

3. As applied, Article 29, UCMJ, and R.C.M.805(d)(1) deprived Appellee of his Sixth Amendment right to confrontation.

The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend VI. The right to confrontation is meant "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before a trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The right to confrontation is fundamental and applies to courts-martial. *United States v. Anderson*, 51 M.J. 145, 149 (C.A.A.F. 1999); *United States v. Stombagh*, 40 M.J. 208, 212 (C.M.A. 1994).

Among the rights guaranteed by the Confrontation Clause is the right to have the trier of fact assess and evaluate the demeanor and credibility of witnesses.[8] *Berger v. California*,

[8] Case law regarding the Confrontation Clause has generally focused on the accused's right to physical, face-to-face confrontation with the witnesses against him. *See e.g. Crawford v. Washington*, 541 U.S. 36 (2004); *Maryland v. Craig*, 497 U.S. 836 (1990); *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011); *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011); *United States v. Sullivan*, 70 M.J. 110 (C.A.A.F. 2011); *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011); *United States v.*

393 U.S. 314, 315 (1969) (citing *Barber v. Page*, 390 U.S. 719, 721 (1968)). The Confrontation Clause "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making the statement, thus aiding the jury in assessing his credibility." *California v. Green*, 399 U.S. 149, 158 (1970).

The Confrontation Clause "reflects a preference for face-to-face confrontation at trial." *Anderson*, 51 M.J. at 149 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Craig*, 497 U.S. at 849 (internal quotation and citation omitted)). Among the "aspects" of the Confrontation Clause are that the witnesses are under oath, that the defendant has the right to have the finders of fact evaluate the demeanor of the witnesses, and that the right to Confrontation includes the right to cross-examine these witnesses. *Id*. (citing *Green*, 399 U.S. at 158.) While the right to confrontation is fundamental, it is not absolute, and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id*. (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

In *United States v. Clark*, this Court defined "demeanor" evidence as:

Blazier, 69 M.J. 218 (C.A.A.F. 2010); *United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2009).

> evidence that describes or portrays "outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions." In its traditional sense, demeanor merely refers to the nonverbal conduct of a testifying witness or of the accused while on the witness stand or in the courtroom. . . .

69 M.J. 438, 444 (C.A.A.F. 2011) (quoting Black's Law Dictionary 496 (9th ed. 2009)). Demeanor evidence "may also include physical evidence (a photograph) or real evidence, as in the case of physical observations made by a witness testifying, including other exemplars used to identify the accused (e.g., where the suspect was made 'to stand, to assume a stance, to walk, or to make a particular gesture')." *Id*. (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990) (quoting *Schmerber v. California*, 384 U.S. 757, 764-65 (1966)).

Here, the four original members of the panel, or two-thirds of the panel, observed the demeanor of five of the six Government witnesses. AM's testimony was the linchpin of the Government's case against Appellee. As the Air Force Court correctly noted, "This case was essentially a credibility contest between a military member and a 4-year old child. There was no physical evidence to support the allegation and the majority of the Government's evidence was based on AM's testimony or testimony based on AM's hearsay." J.A. 9.

AM had considerable difficulty answering basic questions during her testimony. The most important of these questions

concerned whether she knew the difference between the truth and a lie. Her inability to distinguish between the truth and a lie weighed directly on her credibility. Based on the STC and TC's recitation of the verbatim record of AM's testimony, it is reasonable that the replacement members concluded that STC was simply being helpful to a scared child as she testified. However, it is also reasonable that the replacement members concluded that AM was simply too young to understand the difference between the truth and a lie. Listening to a recitation of AM's testimony, the replacement members were incapable of evaluating AM's demeanor and whether she understood the difference between a truth and a lie.

The entire tenor of the direct examination is also in question. During the rebuttal closing argument, the STC disputed the defense counsel's argument that the Government asked leading questions during the direct examination. (R. at 700, 723.) The very existence of a dispute regarding the nature of AM's direct examination demonstrates the necessity of the replacement members witnessing AM's testimony to observe and evaluate her credibility and demeanor. If she was led to her statements, as the defense counsel suggested, then her credibility would be significantly diminished. Further, AM's gestures, pauses, emotional responses, and facial expressions were lost during the recitation of her testimony.

Without the ability to personally observe AM, the replacement members could only evaluate her credibility based upon a cold reading of the record almost wholly devoid of any information regarding AM's demeanor or her gestures during her testimony. As Dr. Benedek explained, whether a child witness answers or demonstrates things before he or she is asked a question is a critical factor in determining whether that child has been coached. J.A. 135. AM's gesture of pointing to her groin does not seem to have been made before the STC asked a question, but it seems to be a response which is inconsistent with the question asked. Pointing to her groin was not an appropriate response to the question either time that AM made the gesture. That gesture could simply be a learned response to hearing a question about Uncle Ray's body. It was necessary for the replacement members to witness AM's gesture to determine whether it was an appropriate response to the questions or was a learned response.

Finally, it is likely that AM created her artwork throughout her testimony, raising serious questions about her attention span. AM's drawings could be interpreted as many possible things. The military judge noted that AM "generate[d] shapes that arguably look like ovals or could be construed perhaps as something in a phallic shape I suppose." J.A. 59. The record suggests that AM used more than one piece of paper

for her drawings. If so, then she may have appeared absentminded and uninterested, observations which could have affected the evaluation of her credibility. The fact that the continual act of drawing is not included in the record and that any other papers she used are also not in the record means that the replacement members were unable to witness that AM seemed more occupied with drawing than she was with testifying.

The application of Article 29, UCMJ, and R.C.M. 805(d)(1) resulted in the replacement members receiving an incomplete picture of AM's crucial testimony. The replacement members did not observe AM's inability to distinguish truth from reality, the diverging accounts during closing arguments regarding the tenor of AM's testimony, her apparent preoccupation with drawing, and her pointing to her groin at incongruent points during her testimony. The replacement members were unable to observe the length of time it took for AM to answer the TC's questions and whether she looked at the camera during her testimony or looked elsewhere. They were unable to observe AM's outward appearance or behavior, her facial expressions, her tone of voice, and the hesitation or readiness to answer the TC's questions. In short, the replacement members were unable to observe AM's nonverbal conduct.

AM was the critical witness against Appellee and the replacement members did not have the opportunity to observe AM's

demeanor which may have affected their assessment and evaluation of her credibility. As previously discussed, Appellee does not argue that Article 29, UCMJ, and R.C.M. 805(d)(1) are facially unconstitutional because there is a panoply of situations in which demeanor evidence may be less crucial than it was here or in which hearsay exceptions do not require confrontation of a witness.[9] Here, however, the Government alleged that Appellee sexually abused AM. The Government's case rested on the testimony of a four-year-old child. The trial counsel read AM's testimony to the replacement members. The nature of the mechanism provided by Article 29, UCMJ, and R.C.M. 805(d)(1) meant that the replacement members did not have an adequate opportunity to assess AM's credibility. The replacement members sat in judgment of Appellee and decided his fate without receiving crucial evidence in the same manner as the original

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[9] The Air Force Court explicitly stated:

> Our decision does not stand for the proposition that failure to observe each witness testify automatically violates due process. To do so would render all hearsay exemptions, or other forms of out-of-court testimony, to include depositions, essentially invalid, a result we obviously do not reach. Rather, we find a due process violation in the appellant's case in part because two-thirds of the panel received decisive evidence in a completely different way than did the remaining third.

J.A. 25.

members. Accordingly, the application of Article 29, UCMJ, and R.C.M. 805(d0(1) deprived Appellee of his right to confrontation because the replacement members did not observe AM's demeanor.

Just as the replacement members were unable to observe AM's demeanor, they did not personally observe PO2 UG's testimony. During closing arguments, the STC argued that PO2 UG was "careful" with his word choice and the way he approached questions. The replacement members did not observe PO2 UG's testimony and could not know what the STC meant by "careful." "Careful" may have meant that PO2 UG was thoughtful and deliberate with his answers or that he was evasive and hesitant. "Careful" may have meant that PO2 UG's continuing close friendship with Appellee was incongruent with the allegation. When considering PO2 UG's continuing friendship with Appellee and the STC's characterization of PO2 UG's testimony as "careful," it is possible that PO2 UG did not believe that his friend molested his stepdaughter. The replacement members, who did not see the manner in which PO2 UG chose his words, were unable to conclude that PO2 UG was "careful" during his testimony because he did not want to falsely implicate his close friend. The application of Article 29, UCMJ, and R.C.M. 805(d)(1) resulted in the replacement members receiving an incomplete picture of PO2 UG's testimony.

Likewise, Special Agent Ferguson's testimony included several adversarial exchanges with defense counsel during cross-examination. J.A. 107. The replacement members were unable to observe and evaluate whether SA Ferguson's tone was disrespectful, thus affecting his credibility. The application of Article 29, UCMJ, and R.C.M. 805(d)(1) resulted in the replacement members receiving an incomplete picture of SA Ferguson's testimony.

The Government argues that Appellee's right to confrontation was satisfied by the application of Article 29, UCMJ, and R.C.M. 805(d)(1) because the witnesses testified under oath, appeared before Appellee, and were subjected to cross-examination.[10] Government's Brief at 30. The Government argues, "The only feature of cross-examination the replacement members were not afforded was the ability to observe the witnesses' demeanor. Appellee was unrestrained in testing the credibility of the witnesses, and the replacement members were able to conduct a thorough credibility assessment through the recorded testimony." *Id*. at 31. First, the Government fails to understand that the right to confrontation is not limited to the right to cross-examine witnesses. Both the Supreme Court and

[10] The Government correctly notes that AM testified via remote means pursuant to Mil. R. Evid. 611(d). (Government's Brief at 30 n.8.)

this Court recognize that the right to confrontation includes the right for the trier of fact to evaluate the witnesses' demeanor. Second, the Government attempts to minimize the importance of this aspect of the right to confrontation. Because the trier of fact has the right to evaluate the witnesses' demeanor under the Confrontation Clause, that right is also a constitutional right. There are no greater or lesser constitutional rights. Third, the Government argues, "The verbatim transcript of the witnesses' testimony substantially satisfied confrontation concerns." *Id*. The Government simply fails to recognize that listening to the trial counsel dryly read a verbatim transcript to panel members deprives members of the right to observe and evaluate that witness' demeanor and credibility.

While it may be necessary in appropriate cases for an accused's right to confrontation to bow to accommodate other legitimate interests in the criminal trial process, Appellee's is not an "appropriate case." AM's testimony, including all her nonverbal conduct, was the linchpin of the Government's case against Appellee. Two-thirds of the panel received critical evidence, that of AM's testimony, by listening to trial counsel read a verbatim transcript. The verbatim transcript did not include AM's nonverbal conduct. Accordingly, Appellee was denied the right to have the panel observe and evaluate the

testimony of five of the six Government witnesses, including the testimony of the most important witness against Appellee.

The Government relies on *United States v. Camacho*, 58 M.J. 624 (N.M. Ct. Crim. App. 2003) and *United States v. McGeeney*, 41 M.J. 544 (N.M. Ct. Crim. App. 1994), *aff'd on other grounds*, 44 M.J. 418 (C.A.A.F. 1996), to support its argument. This reliance is misplaced.

In *Camacho*, a panel member was excused after the conclusion of both cases-in-chief and the defense had concluded its surrebuttal case. *Camacho*, 58 M.J. at 631-32. The panel fell below quorum. *Id*. Two new members were detailed and all prior witness testimony and opening statements were read to the new members. *Id*. The military judge granted a defense request to recall two witnesses "in supplementation" of their previous testimony. *Id*. at 632. The accused did not object to adhering to R.C.M. 805(d)(1) nor did he move for a mistrial. *Id*. at 632-33. On appeal, the accused argued that R.C.M. 805(d)(1) was unconstitutional because it violated his right to a fair trial, substantive due process, and equal protection. *Id*. at 632. The Navy-Marine Corps Court of Criminal Appeals (Navy-Marine Court) affirmed the accused's conviction but did not address the constitutional issue, instead finding that the accused's failure to object at trial constituted a "de facto" waiver of the Confrontation Clause violation. *Id*. at 633. The Navy-Marine

Court found that the accused suffered no prejudice because the military judge had granted the defense request to recall two witnesses so the panel members could evaluate their respective demeanor.

Camacho is distinguishable from the instant case. First, Camacho was convicted of drug-related offenses. The witnesses in *Camacho* were all adults and none of them were the victims of the accused's offenses. Here, Appellee was convicted of aggravated sexual contact with a child who was the critical witness against him. In *Camacho*, the military judge granted a defense request to recall two witnesses and the new panel members were afforded the opportunity to observe and evaluate the demeanor and credibility of those witnesses. Here, AM was ultimately declared unavailable. (R. at 556.) Thus, though Appellee did not request to recall any witnesses, even if he sought to recall AM, she was unavailable and the replacement members would not have had the opportunity to observe and evaluate her demeanor and credibility. Accordingly, *Camacho* is inapposite to the instant case.

McGeeney is also distinguishable from the instant case. In *McGeeney*, the military judge granted a challenge for cause after the Government's third witness testified. 41 M.J. at 551. The excusal reduced the panel below quorum. *Id*. After new members were detailed to the court-martial, the opening statements and

witnesses' testimony were read to the new members. *Id*. The accused objected to the procedure as a violation of his right to confront the witnesses against him and as an impermissible reinforcement of the Government witnesses' testimony. *Id*. The military judge denied the accused's request for a mistrial. *Id*.

One of the witnesses had testified before the original panel that the person who wrote and uttered the check in her store had a "brownish" hair color similar to hers and was slightly taller than she was. *Id*. The military judge required the Government to recall the witness for a "viewing" so that the new members could evaluate her hair color and height. *Id*. The Navy-Marine Court concluded that this procedure resolved the issue regarding that particular witness. *Id*. The Navy-Marine Court found:

> Only three witnesses had testified, and in order to respond to the defense's concern about their testimony being reinforced before the members, the military judge had the testimony read only to the new members, and not the full panel. Additionally, he required one of the witnesses to return to the courtroom so that the new members could view her height and hair color because she had compared these aspects of her person to those of the person who passed the check. In following the language of the UCMJ and Rule 805 strictly, we cannot find an abuse of discretion by the military judge.

Id. at 551-52.

The Navy-Marine Court stated that "only" three Government witnesses had testified. Though the Navy-Marine Court did not

state the total number of Government witnesses, it is clear that the majority of witnesses had not yet testified when the panel fell below quorum. Here, 83.3 percent of the Government's witnesses, or an overwhelming majority, testified before the panel fell below quorum and two replacement members were added. Whereas the case against *McGeeney* had apparently only begun, the Government's case against Appellee was nearly finished. Further, the military judge in *McGeeney* recalled a witness for a viewing so that the new members could observe and evaluate her height and hair color. Here, no witnesses were recalled, but even if Appellee had requested to recall AM, she was unavailable to testify. Most significantly, AM drew several pictures during her testimony. The original panel members observed and evaluated her demeanor as she drew her pictures and described her drawings. The replacement members did not have this opportunity. Accordingly, *McGeeney* is inapposite to this case.

4. The application of Article 29, UCMJ, and R.C.M. 805(d)(1) prevented the replacement members from complying with the military judge's instructions regarding credibility of a witness.

The credibility of witness testimony is to be determined by a properly instructed jury. *Hoffa v. United States*, 385 U.S. 293, 311 (1966); *United States v. Moss*, 63 M.J. 233, 239 (C.A.A.F. 2006); *United States v. Collier*, 1 M.J. 358, 366 (C.M.A. 1976). In *Moss*, this Court held, "It is the members'

role to determine whether a prosecutrix's testimony is credible or biased. The weight and credibility of the Government's main witnesses are matters for the members to decide alone." 63 M.J. at 239 (citing *United States v. Bins*, 43 M.J. 79, 85 (C.A.A.F. 1995)).

Here, the military judge instructed the panel to "consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, prejudices and character for truthfulness." J.A. 362. Where the application of Article 29, UCMJ, and R.C.M. 805(d)(1) deprived the replacement members of the opportunity to observe five of the six Government witnesses, those members simply could not consider the factors listed by the military judge. In this case, which had no physical evidence and was essentially a credibility contest between AM, a four-year-old child, and Appellee, the replacement members could not evaluate AM's credibility. Accordingly, the replacement members could not follow the military judge's instructions.

C. Conclusion

For the foregoing reasons, Appellee respectfully requests that this Honorable Court affirm the decision of the Air Force Court.

III.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FAILING TO FIND WAIVER OR BY FAILING TO CONDUCT A PLAIN ERROR ANALYSIS; INSTEAD, THE COURT INCONGRUOUSLY FOUND THE ALLEGED VIOLATION OF APPELLEE'S RIGHT TO MILITARY DUE PROCESS WAS PER SE PREJUDICIAL DESPITE DECLARING THAT THE ERROR WAS NOT STRUCTURAL.

A. Standard of Review

Whether Appellee's military due process rights were violated is an issue of law reviewed de novo. *See generally United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011); *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011); *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999); *United States v. Cooper*, 51 M.J. 247 (C.A.A.F. 1999); *United States v. Mitchell*, 13 M.J. 131 (C.M.A. 1994).

B. Law and Argument

1. The error was not structural.

Structural errors are "those constitutional errors so 'affect[ing] the framework within which the trial proceed[s], that the trial 'cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F. 2011) (quoting *United States v. Wiechmann*, 67 M.J. 456, 463 (C.A.A.F. 2009)(citation and quotation marks omitted)); *Rose v. Clark*, 478 U.S. 570, 577-78 (1986), overruled on other grounds by *Brecht v. Abrahamson*, 507

U.S. 619, 637(1993). An error is structural "only when 'the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Id*. (quoting *Rivera v. Illinois*, 556 U.S. 148 (2009) (citation and quotation marks omitted (alteration in original)). Structural errors exist in a limited class of cases. *Id*. (citing *Neder v. United States*, 527 U.S. 1, 8 (1999) (citation omitted)). This Court has a "strong presumption" against structural error. *Id*.

The Supreme Court has recognized two tests for structural error: 1) when the court is faced with the difficulty of assessing the error, such as a violation of the public trial guarantee or the denial of counsel of choice; and 2) when harmlessness is irrelevant, such as the denial of the right to self-representation. *Brooks*, 66 M.J. at 224 (citations and quotations omitted).

The Government incorrectly argues that the Air Force Court declared the violation of Appellee's military due process rights facially unconstitutional and a structural error. (Government's Brief at 26, 36-37.) The Air Force Court stated:

> In our original 19 March 2012 opinion, we inadvertently left the impression that our decision was based on a Constitutional structural error analysis as discussed in *Arizona v. Fulminante*, 499 U.S. 279 (1991). That was neither our intent nor the basis for our holding. For the reasons discussed above, we conclude that appellant's right to military

> due process was denied and the military judge erred by not declaring a mistrial. As a result, the appellant's court-martial did not reliably serve its function as a vehicle for determination of guilt or innocence.

J.A. 28 n.15.

The violation of Appellee's military due process rights was not a structural error, that is, facially unconstitutional. Rather, the Air Force Court held that Article 29, UCMJ, and R.C.M. 805(d)(1), *as applied*, violated Appellee's military due process rights. The Air Force Court found "a due process violation in the appellant's case in part because two-thirds of the panel received decisive evidence in a completely different way than did the remaining third." J.A. 25 n. 11. The Air Force Court readily acknowledged that broadly declaring that every panel member must observe each witness testify would "render all hearsay exemptions, or other forms of out-of-court testimony, to include depositions, essentially invalid, a result we obviously do not reach." *Id*. Therefore, the error was in the application of Article 29, UCMJ, and R.C.M. 805(d)(1) and was not structural, as argued by the Government. Appellee does not assert that the error was structural.

2. <u>If the denial of military due process is not per se prejudicial, the error materially prejudiced Appellee's substantial rights.</u>

The failure to afford an accused military due process "demands a finding that the denial was per se prejudicial to the

substantial rights of the accused. No search for prejudice is ever undertaken . . . [because] denial of a congressionally created right is, under military due process, always materially prejudicial – as a matter of law." *United States v. Jerasi*, 20 M.J. 719, 723 (N.M.C.M.R. 1985); *see also Clay*, 1 C.M.R. at 77-78. Thus, the application of Article 29, UCMJ, and R.C.M. 805(d)(1), which resulted in the denial of Appellee's military due process rights, is per se prejudicial, such that this Court should summarily affirm the decision of the Air Force Court.

Should this Court find that the denial of Appellee's military due process rights is not per se prejudicial, the error materially prejudiced his substantial rights. *See*, *e.g.*, *Wiechmann*, 67 M.J. at 462-63; *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011); *Brooks*, 66 M.J. at 224. Where an error is of constitutional dimension, this Court will assess whether the error was harmless beyond a reasonable doubt. *Wiechmann*, 67 M.J. at 463; *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The error, a violation of Appellee's military due process rights, was not harmless beyond a reasonable doubt. Appellee's military due process rights were violated when two members were added to the panel after five of the six Government witnesses testified, including the four-year-old alleged victim, and did not receive a substantial portion of the Government's evidence

against him in the same manner as the other four panel members. The replacement members were simply unable to observe and evaluate the credibility and demeanor of AM, the Government's most critical witness. The replacement members did not witness the same testimony as the original four members. Appellee was essentially judged by three different panels, the four original members who physically witnessed AM's testimony and her nonverbal conduct while drawing pictures, the two replacement members who only heard a dry recitation of the recorded testimony, and the combined panel who observed only one Government witness together. It is difficult, if not impossible, to assess the effect of the demarcation of the members on the deliberations for both the finding and the sentence. The two replacement members lacked the ability to fully evaluate the testimony of five of the six Government witnesses and to challenge those witnesses. The nature of the mechanism in Article 29, UCMJ, and R.C.M. 805(d)(1) precluded any possibility of the replacement members asking questions of the first five witnesses. Even if Appellee had requested to recall the Government's witnesses, AM had been declared unavailable and was not subject to recall. Thus, the replacement members were left only with the voices of the trial counsel reading AM's testimony back to them in a vacuum. The error in applying Article 29, UCMJ, and R.C.M. 805(d)(1) to the

circumstances in Appellee's court-martial was not harmless beyond a reasonable doubt. Accordingly, this Court should summarily affirm the decision of the Air Force Court.

3. Appellee did not waive his right to contest the violation of his military due process rights.

There is a presumption against the waiver of constitutional rights. *United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2010) (quoting *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)). "For a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege." *Id*.

Waiver and forfeiture of a right are distinct concepts:

> Waiver is different from forfeitures. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

Harcrow, 66 M.J. at 156 (internal citations and quotations omitted).

Appellee's failure to object to the application of Article 29, UMCJ, and R.C.M. 805(d)(1) did not constitute a waiver of the error. Appellee asserts that the particular right at issue, that of military due process, is not waivable and the presumption against waiver of constitutional rights supports

this position. The Government incorrectly argues that the defense team's trial tactics and strategy indicated waiver. (Government's Brief at 39-40.) The onus of understanding complicated constitutional rights and the import of those rights cannot fall on an accused. Further, a defense counsel's "failure to object at trial does not waive a denial of a fair trial or a violation of due process of law." *United States v. Groce*, 3 M.J. 369, 371 (C.M.A. 1977) (quoting *United States v. Stringer*, 16 C.M.R. 68, 72 (C.M.A. 1954)). Where the error seriously affects the fairness of the proceedings, then some remedy is required. *See Stringer*, 16 C.M.R. at 72; *United States v. Bishop*, 21 M.J. 541 (A.F.C.M.R. 1985). Accordingly, Appellee's failure to object to the application of Article 29, UCMJ, and R.C.M. 805(d)(1) did not constitute waiver.

Similarly, Appellee's failure to object at trial did not constitute forfeiture of the issue. If, however, this Court finds that Appellee forfeited the issue, the application of Article 29, UCMJ, and R.C.M. 805(d)(1) constituted plain error. Failure to object at trial forfeits appellate review of the issue absent plain error. *United States v. Eslinger*, 70 M.J. 193, 197-98 (C.A.A.F. 2011). Plain error exists when (1) there was an error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused. *Sweeney*, 70 M.J. at 304; *Harcrow*, 66 M.J. at 158. Where the

error is constitutional, the prejudice prong is fulfilled where the Government cannot show that the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdale*, 475 U.S. 673, 684 (1986); *Sweeney*, 70 M.J. at 304 (citing *Harcrow*, 66 M.J. at 158)).

Here, the application of Article 29, UCMJ, and R.C.M. 805(d)(1) resulted in plain and obvious error when two members were added to the panel after five of the six Government witnesses testified, including the four-year-old alleged victim, and did not receive a substantial portion of the Government's evidence against him in the same manner as the other four panel members. As discussed above, the error was not harmless beyond a reasonable doubt.

C. Conclusion

For the foregoing reasons, Appellee respectfully requests that this Honorable Court affirm the decision of the Air Force Court.

Conclusion

Wherefore, appellant respectfully requests that this Honorable Court dismiss the certificate for review or summarily affirm the decision of the Air Force Court.

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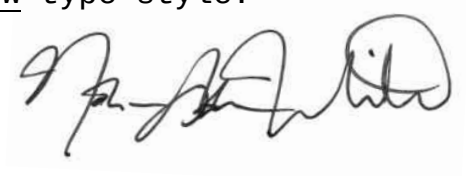

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