13 September 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

MICHAEL L. KNAPP II
Airman First Class (E-4), USAF
Appellant

Crim. App. Dkt. No. 37718
USCA Dkt. No. 13-0512/AF

BRIEF IN SUPPORT OF PETITION GRANTED

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MICHAEL L. KNAPP II	)	Crim. App. Dkt. No. 37718
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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Granted

WHETHER THE MILITARY JUDGE (1) PLAINLY ERRED BY INITIALLY ALLOWING "HUMAN LIE DETECTOR" TESTIMONY, (2) ABUSED HIS DISCRETION BY ALLOWING FURTHER ADMISSION OF "HUMAN LIE DETECTOR" TESTIMONY OVER DEFENSE OBJECTION, AND (3) ERRED BY NOT PROVIDING A CURATIVE INSTRUCTION ON THE "HUMAN LIE DETECTOR" TESTIMONY.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866. This Court has jurisdiction pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On 12 June 2010 a general court-martial of officer and enlisted members convicted Appellant, contrary to his pleas, of aggravated sexual assault upon a substantially incapacitated victim in violation of Article 120, UCMJ, 10 U.S.C. § 920. On 14 June 2010, Appellant was sentenced to a dishonorable discharge,

confinement for 3 years, total forfeitures, reduction to E-1, and a reprimand. J.A. at 9. On 19 August 2010, the convening authority approved the findings and the sentence. *Id*.

On 20 March 2013, the Air Force Court of Criminal Appeals (AFCCA) affirmed. J.A. at 1. The Appellate Records Branch notified the Appellate Defense Division that a copy of the Court's decision was deposited in the United States mail by first-class certified mail to the last address provided by Appellant on 21 March 2013.

On 20 May 2013, Appellant petitioned this Court for review. On 10 June 2013, Appellant filed a Supplement to Petition for Grant of Review. The government waived their right to reply on 12 June 2013. Review of the above-stated issue was granted on 15 August 2013.

Statement of Facts

On 16 December 2009, Appellant, Airman First Class (A1C) ELS (Complainant), and other members of their squadron, went out drinking together. J.A. at 27-31. Over the course of several hours, complainant consumed 3 beers and 2 and 3/4 one-ounce shots of liquor. J.A. at 33, 73. The Complainant was 5 feet 7 inches tall and weighed 116 pounds. J.A. at 34.

Complainant remembered taking her last shot of liquor at another Airman's house and then having a 10-minute conversation. J.A. at 70. Complainant remembered the details of the conversation "very well." *Id*. However, Complainant remembers nothing after that conversation until she woke up the next

morning in her dormitory room with the Appellant lying next to her. J.A. at 36. Complainant has no recollection of any sexual encounter with Appellant. J.A. at 63.

Witnesses establish that Complainant, Appellant, and A1C MS returned to the dormitories on Pope Air Force Base, North Carolina, in the early morning hours of 17 December 2009. While in the car returning to base, Complainant "wasn't completely passed out, but she couldn't walk on her own," and she was able to talk "somewhat." J.A. at 143. She had to be carried to her dormitory room and placed in her bed. *Id*. Upon being placed in her bed, Complainant sat up and vomited. J.A. at 145. When A1C MS left Complainant's room, she was asleep in her bed. J.A. at 148. Appellant agreed to remain behind with Complainant. J.A. at 145.

Appellant testified at trial that after A1C MS left Complainant's room, she began to throw up again. J.A. at 156. Appellant provided Complainant a glass of water and they began to talk. *Id*. Complainant then began to rub Appellant's crotch. *Id*. After foreplay, Complainant removed her own pants. J.A. at 160. Appellant put on a condom and he and Complainant had sexual intercourse for about two minutes. J.A. at 162, 251. Complainant was breathing heavy and moaning. J.A. at 159-60. Appellant ejaculated. J.A. at 216. Appellant then noticed that Complainant's head had fallen back, she had stopped moving and she had stopped moaning. J.A. at 162-63. Appellant testified that upon seeing this he proceeded to tap Complainant on the shoulder and ask whether she was alright and awake. J.A. at 251.

He received no response, so he stopped having sexual intercourse with her. J.A. at 162, 252. A1C SP, whose dorm room shares a wall with Complainant, testified to hearing a male and a female moaning in Complainant's room during the relevant time frame. After about four minutes, A1C SP heard the sounds of sexual intercourse stop and heard the male asking the female whether she was awake. J.A. at 242-52.

After command received an allegation that Complainant had been assaulted, the case was investigated by Special Agent (SA) David Peachey of the Air Force Office of Special Investigations (AFOSI). J.A. at 78. At trial the prosecution called SA Peachey to testify as to his interrogation of the Appellant. J.A. at 77. SA Peachey testified that, in his view, Appellant first asserted that the sexual intercourse was consensual but then later admitted guilt. J.A. at 87.

This purported confession came after nearly five hours of questioning. J.A. at 103. It consisted of the Appellant "nodd[ing] his head and sa[ying] yes" to facts offered by SA Peachey. J.A. at 89. Specifically, Appellant's supposed confession was in response to the following byzantine and compound declaration by SA Peachey: "So three minutes could have been seven minutes; it could have been ten minutes, you don't really know. But the entire time you were having sex with her, the entire time that you were having intercourse, the entire time from the time you put your penis into her, she was unconscious, all the way up to the point that you pulled out. Is that not true?" J.A. at 125. Appellant responded to that volley with,

"Um-hmm." *Id*. Even SA Peachey doubted whether Appellant understood what he had just admitted to, and so felt the need to "clarify" by asking: "Yes, that's not true, or yes that's what happened?" *Id*. Appellant responded, "Yes, that's true; that's what happened." *Id.* Attempting to further clarify which of his compound assertions Appellant was admitting to, SA Peachey then asked, "The entire time you were having sexual intercourse with her she was unconscious?" *Id*. To which, Appellant responded, without adopting the agent's assertion of guilt, "I wasn't paying no attention to it until like a couple of minutes go by and then I was like, wait, and then I tapped her." *Id*.

Senior trial counsel then elicited the following human lie detector type testimony from SA Peachey:

> Q [by senior trial counsel]. Now, you said [Appellant] nodded his head. Did he give other nonverbal clues during the interview?
>
> A [by SA Peachey]. Several.
>
> Q. What were those?
>
> A. Early on in the interview -- we are trained to pick up on nonverbal discrepancies, if you will. Early on in the interview the accused would not make eye contact with me when we were talking about the sexual intercourse portion.
>
> Q. Why is that important to you?
>
> A. That is indicating to me that there is some form of deception going on. Prior to the intercourse, the accused was very detailed, very detail oriented, would look me in the eye, talk to me, and as soon as we got to the intercourse he would look away, look at the wall, look at the floor, not look at myself for Agent Sessler, and then immediately after the sexual intercourse timeframe he would

> kind of come back to us and be, once again, extremely detailed.

J.A. at 90.

Later, during cross-examination by civilian defense counsel, when asked why he did not explore Appellant's assertion, arguably corroborated by A1C SP, that the sexual intercourse was consensual and stopped upon Appellant noticing that Complainant was unconscious, SA Peachey responded:

> A [by SA Peachey]. Like I had stated earlier, sir, I'm trained on picking up nonverbal cues during interviews ...
>
> Q [by Civilian Defense Counsel]. Okay.
>
> A. ... and the accused was giving off several nonverbal cues which made us believe that we needed to dig a little deeper.
>
> Q. And one of the nonverbal cues is he would not look at you when it came to him talking about the sex, correct?
>
> A. Correct.

J.A. at 105.

On re-direct examination by senior trial counsel, SA Peachey testified, defense counsel objected, and the military judge overruled the objection, as follows:

> Q [by senior trial counsel]. Okay. On cross you talked about nonverbal cues and you said that one of them was that the accused would look away. Did you notice in the nonverbal cues about his face?
>
> A [by SA Peachey]. Yes.
>
> Q. What was that?
>
> A. Whenever the accused would speak about the actual incident, while he was looking away the accused would actually get large red sun blotches ...

CIVDC: Your Honor, I'm going to object to this. This goes to like a human lie detector. There hasn't been a foundation laid for him to be able to say if he knows if somebody is lying or not.

MJ: Do you have a foundation?

TC: Your Honor, we're not asking if he's lying or not, we're just noticing different responses. Defense asked in voir dire whether you can misread people and it's going to that point.

MJ: Well, let me ask this, Captain, aren't you drawing an inference from these responses? Otherwise, what's the relevance? What's the relevance of the observations you're seeking?

TC: Your Honor, the relevance is it's the response to being asked questions about the sexual intercourse, the actual crime, the content itself, and how the accused responded to that. It'd be no different than what the accused said in response to a question.

MJ: Are you going to ask the witness to draw an inference form those responses?

TC: No.

MJ: Well, I'll overrule the objection at this point.

Q [by senior trial counsel]. Again, with the face what did you notice?

A [by SA Peachey]. The accused would get large red sun blotches, blood coming to the surface of the skin.

Q. Did that happen more than one time or just once?

A. More than once.

J.A. at 112-14.

The military judge did not provide a curative instruction to the members regarding the purported "human lie detector"

testimony introduced via SA Peachey. J.A. at 266-69. The military judge did, however, provide a "false exculpatory statements" instruction wherein the members were advised orally and in writing (J.A. at 262) as follows:

> There has been evidence that after the offense was allegedly committed, the accused may have given a false explanation about the alleged offense. Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused. If an accused voluntarily offers and explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. The drawing of this inference is not required. Whether the statement was made, was voluntary, or was false is for you to decide. You may also properly consider the circumstances under which the statements were given, such as whether they were given under oath, and the environment under which they were given. Whether evidence as to an accused's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

J.A. at 268-69.

Summary of the Argument

The military judge erred in failing to *sua sponte* exclude testimony elicited by senior trial counsel during direct examination of SA Peachey regarding Appellant's nonverbal conduct during interrogation and SA Peachey's conclusions regarding Appellant's truthfulness derived therefrom. The military judge abused his discretion in failing to sustain defense counsel's objection to such testimony when senior trial counsel again elicited it from SA Peachey on redirect examination. The military judge erred once more in failing to *sua sponte* provide the members a cautionary instruction regarding SA Peachey's "human lie detector" testimony. The military judge then exacerbated that error by providing a "false exculpatory statements" instruction wherein he advised the members that they could consider Appellant's conduct and acts done upon being confronted with a criminal charge as consciousness of guilt when determining guilt or innocence.

The Air Force Court of Criminal Appeals erroneously affirmed the conviction below, despite having found error, via a misapplication of law and clearly erroneous findings of fact.

Wherefore, this Court should reverse the decision below and set aside both findings and sentence in this case.

Argument

THE MILITARY JUDGE (1) PLAINLY ERRED BY INITIALLY ALLOWING "HUMAN LIE DETECTOR" TESTIMONY, (2) ABUSED HIS DISCRETION BY ALLOWING FURTHER ADMISSION OF "HUMAN LIE DETECTOR" TESTIMONY OVER DEFENSE OBJECTION, AND (3) ERRED BY NOT PROVIDING A CURATIVE INSTRUCTION ON THE "HUMAN LIE DETECTOR" TESTIMONY.

1. Admitting "human lie detector" testimony was plain and obvious error that materially prejudiced the accused.

Standard of Review

Where an appellant has not preserved an objection to evidence by making a timely objection, that error is forfeited in the absence of plain error. This Court reviews the case *de novo* to determine whether there is plain error. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007).

Law and Analysis

"The plain error standard is met when '(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.'" *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) (citations omitted).

A. Admitting human lie detector testimony was plain and obvious error.

"[I]t is a basic principle of criminal practice that 'human lie detector' evidence is not admissible in a trial." *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003) (citation omitted). This Court has noted several reasons why such evidence is prohibited. *See United States v. Birdsall*, 47 M.J. 404

(C.A.A.F. 1998) (determining truthfulness exceeds the scope of a witness' expertise and such testimony usurps the jury's function to weigh evidence and determine credibility); *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988)(stating such opinion violates character evidence under M.R.E. 608(a) and improperly puts a stamp of truthfulness on a witness' story); *Kasper*, 58 M.J. at 319 (human lie detector testimony prevents the member from having his credibility determined by the jury without "the filter of human lie detector testimony").

This first allegation of error is analogous to *Kasper*. In *Kasper*, on direct examination, without defense objection, trial counsel elicited testimony from an AFOSI agent who asserted the appellant in that case "gave all the physical indicators" of being untruthful regarding illicit drug use. 58 M.J. at 317. This Court ruled "the military judge was responsible for making sure such testimony was not admitted." *Id*. at 319.

Similar to this case, in *Kasper* the military judge failed to *sua sponte* take "prompt action" to ensure that said human lie detector evidence was not admitted when senior trial counsel elicited it on direct examination. *Id*. As soon as SA Peachey testified that Appellant's physiological reactions revealed deception, the error was plain and obvious.

B. Appellant was materially prejudiced by the admission of the human lie detector testimony.

In *Kasper*, this Court further ruled, "[t]he importance of prompt action by the military judge in the present case is underscored by the central role of the human lie detector testimony." *Id.* In reversing the Court of Criminal Appeals, this Court stressed that the improper testimony was not offered on a "peripheral matter or even as a building block of circumstantial evidence," but "on the ultimate issue in the case – whether Appellant was truthful as to the charge[.]" *Id.* Under such circumstances, the error in permitting such evidence to be introduced "materially prejudiced the substantial right of the appellant to have the members decide the ultimate issue ... without ... viewing Appellant's credibility through the filter of human lie detector testimony." *Id.*; *see also Birdsall*, 47 M.J. at 410;[1] *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).[2]

[1] In *Birdsall*, a child abuse medical expert opined as to the credibility of two juvenile alleged sexual abuse victims. Tthis Court opined the expert's "testimony was focused directly on the key issue in this trial, *i.e.*, the boys' credibility" and thus "the prejudice in this case is clear." 47 M.J. at 410. This Court continued, "Since there is prejudicial error, we must reverse this case. This is a hard but necessary case to reverse. It is extremely important that a trial be free from undue influence on a jury's role in determining the ultimate facts in the case. Improper medical testimony on credibility cannot be allowed. The jury must be free from this type of influence if it is to be fair." *Id*. The findings of guilty and the sentence were set aside and the case returned with the possibility of rehearing.

[2] In *Powell*, this Court highlighted the difference between plain error that merely affects substantial rights and that which is "prejudicial." 49 M.J. at 465. Prejudicial plain error, which requires the remedy of reversal, either "seriously affects the fairness, integrity, or public reputation of judicial proceedings" or

Like *Kasper*, this case involves a witness asserting specialized training allowing him to divine that "there was some sort of deception going on" with regard to the Appellant's assertion of innocence; which – especially given the fact that the Appellant took the stand in his own defense and offered that same assertion of innocence to the members - was the central issue in the case. This denied Appellant his right to have the members assess his credibility without being made to look through the filter of a purported AFOSI human lie detector.

The Air Force Court found the error to be harmless beyond a reasonable doubt, relying in part on a misinterpretation of applicable law (discussed in detail in section 4, below), and otherwise relying on the Appellant supposedly admitting to AFOSI that he knew the Complainant was incapacitated at the time he penetrated her. However, a close look at the circumstances of that supposed admission reveals a much murkier picture – one in which the human lie detector lens and its false promise of clarity is particularly dangerous.

SA Peachey interrogated Appellant for nearly a quarter of a day and threatened to tell Appellant's commander he was a "complete jerk" that "ran me around the table for hours" (J.A. at 261) until he finally assented to facts fed to him by SA Peachey via a compound, run-on declaration. *See* J.A. at 451. Even this assent is not clear. SA Peachey's compound "question" predictably failed to ascertain whether Appellant was agreeing or

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has "an unfair impact on the jury's deliberations." 49 M.J. at 463-64, 465.

disagreeing at all, and if so, whether he was agreeing to each of the multiple assertions therein. *See id*. Overall, the lengthy interrogation failed to yield a clear admission regarding the critical questions at trial – the Appellant's *mens rea* for the charged offense, and whether his in-court testimony regarding Complainant being awake and consenting when he began sexual intercourse was truthful.

Because these repeated errors concerned the central issues in this case and not a mere collateral matter*, Kasper* necessitates a finding of prejudice. Another fact tending to show prejudice is that the admission of such speculative testimony regarding matters of such importance, especially under the color of expertise derived from some unexplored and ill-defined "training," could cause a reasonable observer to question whether this court-martial reached its decision using reliable evidence. Such an impact satisfies one of the standards for finding prejudice articulated in *Powell*, 49 M.J. at 465 - harm to the reputation of judicial proceedings.

2. The military judge abused his discretion by admitting the "human lie detector" testimony over defense objection.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *Kasper*, 58 M.J. at 318.

Law and Analysis

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

Upon the objection from defense counsel, the military judge apparently assumed "human lie detector" testimony was an issue of foundation. *See* J.A. at 113. Human lie detector evidence is not an issue of expertise, *see Birdsall* 47 M.J. at 410, nor is it an issue of character, *see United States v. Whitney,* 55 M.J. 413, 415 (C.A.A.F. 2001). The prohibition of human lie detector evidence not only applies to experts but also to similar conclusions of truthfulness by nonexperts. *See United States v. Robbins*, 52 M.J. 455, 458 (C.A.A.F. 2000). Instead, simply, "Human lie detector testimony is inadmissible." *Whitney,* 55 M.J. at 415. It is inadmissible in part because it "usurps the jury's exclusive function to weigh the evidence and determine credibility." *Kasper,* 58 M.J. at 315 (quoting *Birdsall*, 47 M.J. at 410).

Despite senior trial counsel's proffered alternative theory for admissibility, there was no relevant reason to elicit testimony regarding Appellant's blushing during his AFOSI interrogation other than to draw the inference that Appellant was being deceitful. *See* J.A. at 113. In fact, at the time the military judge admitted the evidence, such an inference had already been drawn. The government had already had SA Peachey testify that he had received specialized training allowing him to "pick up on nonverbal discrepancies" such that he could determine "that there is some form of deception going on" with regard to Appellant's testimony. J.A. at 90.

The military judge's failure to sustain the defense objection on the basis of lacking foundation, improper character evidence, or simply on the basis that human lie detector testimony is inherently unreliable and therefore inadmissible in and of itself was an abuse of discretion. As described above, the error also acted to prejudice the Appellant because it denied him the right to have his testimony assessed by the member's without having them looking through the false lens of a human lie detector.

3. The military judge did not provide the mandatory curative instruction about the "human lie detector" testimony.

Standard of Review

Instructions curing improper human lie detector testimony are mandatory. *See Kasper*, 58 M.J. at 315. Mandatory instructions are reviewed *de novo*. *See United States v. Miller*, 58 M.J. 266 (C.A.A.F. 2003).

Law and Analysis

The military judge is responsible for ensuring human lie detector testimony is not admitted, and taking prompt action and providing cautionary instructions to the member when it is admitted, regardless of whether there is a defense objection. *Kasper*, 58 M.J. at 319; *Birdsall*, 47 M.J. at 415–16.

Given *Kasper,* the military judge in this case should have recognized that the presentation of testimony "about the truthfulness of witnesses on the ultimate issue" required him to provide the members with a curative instruction. *Id.* He failed to *sua sponte* give such an instruction to caution the members against using the erroneously admitted evidence. He failed to give such an instruction even after the admission of such evidence was objected to by defense.

Instead, rather than mitigating the damage done, the military judge explicitly advised the members, via a "false exculpatory statements" instruction, that the law permitted them to consider the "conduct of an accused ... upon being informed that a crime may have been committed or upon being confronted

with a criminal charge ... in light of other evidence in the case[,] in determining the guilt or innocence of the accused." J.A. 269. Thus, the military judge explicitly instructed the members that they could consider the Appellant's psychophysical responses, as testified to by SA Peachey, along with SA Peachey's testimony that such involuntary conduct is an indication of Appellant's deceit. Not only did the military judge tell the members they could consider that unreliable and improper evidence, but he explicitly advised them that they could consider it when determining the ultimate question of guilt.

By failing to *sua sponte* give the members a curative instruction during the government's case-in-chief, immediately upon the hearing of the offensive testimony, the military judge left the Appellant to take the stand in his own defense with a panel of members who had already been told not to believe him by an OSI special agent, who had testified to receiving some sort of "training" rendering him able to discern truth from fiction merely because they blush when talking about sex. The effect of the prosecution's improper offering of evidence and the military judge's error ensured that the members were tainted by SA Peachey's testimony regarding the very issue that Appellant would be most importantly testifying about – that Complainant consented and was awake when he began having intercourse with her. The military judge's failure to exclude human lie detector testimony and to give the members a curative instruction regarding it prior to the Appellant taking the stand was prejudicial error alone; his advice to the members upon findings that they could actually

consider the involuntary conduct and SA Peachey's conclusion that such was evidence of deception when determining guilt was unconscionable. Any one of those errors would yield a fundamentally unfair trial and constitute material prejudice; together, they acted to disparage the military justice system as a whole, further constituting prejudice and warranting relief.

4. The rationale for affirming offered by the Court of Criminal Appeals is unfounded.

Below, the Air Force Court of Criminal Appeals, citing this Court's decision in *Mullins*, 69 M.J. at 117, found the military judge erred in admitting human lie detector testimony without a curative instruction. J.A. at 6. The Air Force Court acknowledged that *Mullins* stands for the proposition that "prejudice results when there is 'undue influence on a jury's role in determining the ultimate facts in a case.'" J.A. at 7. However, the Air Force Court erroneously read *Mullins* to further provide that "no prejudice exists in human lie detector cases if the record contains other corroborating evidence upon with the members could have relied upon in determining guilt." *Id*. There are two problems with this conclusion. First, the Air Force Court's interpretation of this Court's decision in *Mullins* was incorrect. Second, the particular facts of this case do not support a conclusion, *beyond a reasonable doubt*, that without the offensive evidence the members still would have convicted Appellant. Thus, the court below got the legal standard wrong and then went on to apply that wrong standard erroneously.

The appellant in *Mullins* had been convicted, contrary to his pleas, of raping and forcibly sodomizing his two minor daughters and also possessing images of child pornography. *Mullins*, 69 M.J. at 115. At trial in *Mullins*, the government elicited testimony from a forensic child interviewer who stated that the characteristics she observed in the victims were consistent with a child who had been or may have been sexually abused. *Id*. Unlike in the case at bar, the military judge in *Mullins*, *sua sponte*, immediately gave a curative instruction to the members cautioning against human lie detector testimony. *Id*. During subsequent questioning by the government, the expert went on to testify that less than one percent of children who report sexual abuse are lying. *Id.* The military judge then, again *sua sponte*, questioned the expert in front of the members regarding whether she knew of any forensically-reliable way of telling whether the complainant or the accused were being truthful in any given case. *Id*. at 115-16. The expert admitted that she did not know of any such way of discerning truth from lie. *Id*. at 116. In *Mullins*, unlike the present case, the defense did not object to the admission of any of the complained of evidence and even cited a portion of it during its own closing argument. *Id*.

Under those limited circumstances, this Court found there was no material prejudice, specifically ruling that, when evaluating a human lie detector case for plain error, "we look at the erroneous testimony in context to determine if the witness's opinions amount to prejudicial error.... Context includes such

factors as the immediate instruction, the standard instruction, the military judge's question, and the strength of the government's case—to determine whether there was prejudice." *Id*. at 117 (citation omitted).

In reaching its determination that there was no prejudice in the errors committed in this case, the Air Force Court completely disregarded three out of four of the contextual factors this Court put forth in *Mullins*. The court below incorrectly relied entirely on the proposition that the strength of the government's case was sufficient to overcome the plain and obvious error. In solely relying on that proposition, they failed to account for the military judge's failure in this case to satisfy his *Kasper* obligation to *sua sponte* give an immediate curative instruction to the members - a duty which the trial judge in *Mullins* fulfilled. The Air Force Court also failed to account for the military judge's failure in this case to *sua sponte* give a curative instruction during substantive findings instructions – again, a duty which the trial judge in *Mullins* fulfilled. Indeed, instead of properly advising the members against using illicit evidence, the judge in this case gave a "false official statement instruction" which exacerbated rather than mitigated the prejudicial effect of the impermissible evidence on member deliberations. Further, the Air Force Court did not consider the fact that, unlike in *Mullins*, the military judge here did not ask the witness any questions in order to elicit testimony clarifying the limits of their supposed human lie detector expertise. The

judge in this case simply allowed SA Peachey to testify that he had received training empowering him with the ability to tell the difference between a man who blushes merely because he is speaking with a stranger about having sexual intercourse and one who is blushing because he is a liar. The Air Force Court's interpretation of *Mullins*, cutting its "context test" down to merely only one controlling factor – the supposed strength of the government's case – was legal error.

Further, even if *Mullins* had prescribed only that one factor to be considered when testing prejudice in human lie detector cases, which it did not, the government's case here was not so strong as to banish all reasonable doubt. In this case, the Appellant testified at trial that the Complainant was awake and consented when he began having sexual intercourse with her. J.A. at 162. He further testified that she lost consciousness sometime thereafter and that he ceased intercourse when he noticed her condition. J.A. at 163. Appellant testified that upon stopping, he tried to rouse Complainant and asked her whether she was alright. *Id*. A corroborating witness testified to having heard Appellant and Complainant having sexual intercourse through the wall he shared with Complainant, and then hearing Appellant asking Complainant whether she was okay after several minutes had passed. J.A. at 242-52. If there had been no repeated testimony from an AFOSI agent asserting that he had received some ill-defined specialized training allowing him to determine that Appellant's story was a fabrication, then the members may have retained some doubt. This is especially true

given the fact the complaining witness could not remember anything that had happened. J.A. at 63.

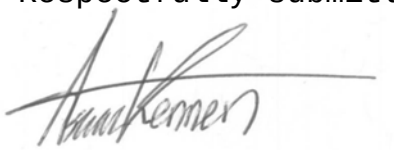
The court below over-valued the alleged confession in this case, which is the government's only piece of evidence contradicting the Appellant's exculpatory explanation and independent witness corroboration. The "confession" was occasioned by the Appellant being held for an excessively long time by agents who threatened to tell his commander he was being an obstructionist when he repeatedly asserted innocence. J.A. at 261. The "confession" manifested itself as a luke-warm, near-guttural, vocalization of assent from the Appellant in response to an agent's compound declaration followed by a reverse-oriented question – "is that not true?" J.A. at 125.

The court below erred in misinterpreting the "context test" of *Mullins* to contain only one factor, and then, given the weaknesses of the "confession" evidence, proceeded to unjustifiably find the government's case stronger than it reasonably could be construed to be.

Conclusion

For the foregong reasons, this Court should reverse the decision of the Air Force Court of Criminal Appeals and set aside the findings and sentence.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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

X	This brief contains 5,320 words.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 13 September 2013.

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