IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
WILBER J. MCINTOSH, JR.,
USAF,
Appellant.

USCA Dkt. No. 14-0685/AF

Crim. App. No. 37977

BRIEF IN SUPPORT OF PETITION GRANTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States

Court of Appeals for the Armed Forces Cases

Air Force Court of Criminal Appeals Cases

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

Issue Presented

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO INTRODUCE EVIDENCE WHICH STRONGLY CORROBORATED THE DEFENSE THEORY THAT THE ALLEGATIONS IN THIS CASE WERE FALSE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this matter pursuant to Article 66, UCMJ. *United States v. McIntosh,* ACM No. 37977 (A.F. Ct. Crim. App., 17 January 2014)(unpub. op.). JA at 1. Accordingly, this Court has jurisdiction to review this matter pursuant to Article 67, UCMJ.

Statement of the Case

On 11 March and 12-15 April 2011, Appellant was tried at a general court-martial composed of officer and enlisted members at Joint Base Andrews, Maryland. JA at 23. The charges and specifications he was arraigned, his pleas, and court-martial's findings were as follows:

Chg	Art	Spc	Summary of Offenses	P	F
I	120			NG	G
		1	Did, a/n Alexandria, VA, o/d/o, b/o/a 1 Jan 09 & 20 Apr 10, engage in a sexual act, with BH, a child who had attained the age of 12 years, but had not yet attained the age of 16 years, to wit: inserting his penis into her vagina, by using strength sufficient that she could not avoid or escape sexual contact.	NG	G
		2	Did, a/n CONUS, o/d/o, b/o/a 1 Jan 09 & 20 Apr 10, engage in a lewd act, to wit: touching the genitalia of BH, a child who had not attained the age of 16 years.	NG	G
II	125			NG	NG
		1	Did, a/n CONUS, o/d/o, b/o/a 18 Aug 05 & o/a 23 Oct 08, commit sodomy with BH, a child under the age of 12 years by force & without consent of the said BH.	NG	NG
		2	Did, a/n Virginia, o/d/o, b/o/a 24 Oct 08 & 20 Apr 10, commit sodomy with BH, a child who attained the age of 12 but was under the age of 16, by force & without consent of said BH.	NG	NG
III	134			NG	G
		1	Did, a/n Alexandria, VA, b/o/a 1 Mar 10 & o/a 20 Apr 10, with the intent to commit rape, commit an assault upon BH by wrongfully grabbing her body & forcing her into bed.	NG	G
		2	Did, a/n Alabama, b/o/a 18 Aug 05 & o/a 10 Nov 06, wrongfully communicate to BH a threat to kill her if she ever told anyone that he had sexually assaulted her.	NG	G

JA at. 23, 26-31.

Appellant was sentenced to 25 years of confinement, a dishonorable discharge and a reduction to E-1. JA at 23. On 2

August 2011, the convening authority approved the adjudged sentence. JA at 23.

On 17 January 2014, the AFCCA set aside Charge III and its specifications (Article 134) for failure to charge the terminal element and affirmed the remaining findings and the sentence. JA at 1.

Statement of Facts

Civilian and military defense counsel were in possession of Report of Investigation (ROI) # 3F7-C-120-G1-32899101041628. *See* Declaration of Wilber J. McIntosh, JA at 328-338, 339-350. Two Sexual Assault Nurse Examiner (SANE) examinations of BH were included in the ROI. *Id.* One of the examinations took place in 2007 and one in 2010. *Id.* In both examinations, which bookended almost three (3) years[1] of alleged rape and anal sodomy, BH's genitalia was found to be without injury and her hymen was found to be intact. *Id.* The defense did not offer evidence of either exam at trial.

On the morning of 20 May 2007, BH's mother, Ms. CD, discovered Appellant in BH's bedroom behind a locked door. JA at 227. When Ms. CD entered the bedroom, Appellant was at the end of BH's bed, pulling up his underwear. *Id.* BH was wearing

[1] Given BH's testimony, the alleged rapes began in Summer 2006 and continued through April 2010. The first exam was in 2007, after approximately nine (9) months of alleged rapes. The second exam was in 2010. Thus, while the alleged rapes occurred for almost four (4) years, the exams "bookended" at least three of those years.

a shirt, but not wearing her shorts or her underwear. *Id.* Ms. CD claims to have chased Appellant out of the house with a baseball bat, and then immediately taken BH to the police department. JA at 227-28. Following a number of interviews, Ms. CD accompanied BH to the hospital, where a SANE performed a thorough medical examination of BH at 1700 hours on 20 May 2007. JA 328-338. During the physical examination of BH's genitalia, there was no evidence of trauma detected to either BH's vagina or anus. *Id.* BH's hymen was reported to be intact, and her anus evaluated has having "good tone." *Id.* The examination, which included a "Toluidine Blue Exam,"[2] found no abnormal findings or trauma detected to BH's labia majora, labia minora, posterior fourchette, clitoral hood, fossa novicularis, vaginal orifice, urinary meatus, cervix, or perineus. The SANE examiner's conclusions were that BH's both non-genital findings and genital findings were "without abnormality." JA 328-338. As with any SANE report, the examiner noted that "[t]he lack of abnormal findings does not rule out the occurrence of sexual assault." *Id.*

On 22 April 2010, BH underwent a second SANE examination. JA at 339-350. During the physical examination of BH's genitalia, there was no evidence of trauma detected to either

[2] Toluidine Blue Dye is applied to the external vagina, genitalia and anus. It will adhere to denuded areas of skin where the nucleus of a cell is exposed. See SANE EXAM #2, Comments, JA 339-350.

BH's vagina or anus. *Id.* BH's hymen was reported as an "estrogenized, pink, circular hymen with no injury, bleeding or bruising noted." The SANE further noted "[n]o injury, bleeding or bruising noted in any other genital structures." *Id.* The examination of BH's anus noted that "[a]nal tone reflexive, folds symmetrical, no dilation noted." *Id.* The SANE examination further noted that "[w]ith magnification the above findings are again noted" and that it was a "[n]ormal genital exam." *Id.* The examination found no abnormal findings or trauma detected to BH's labia majora, labia minora, posterior fourchette, clitoral hood, fossa novicularis, vaginal orifice, urinary meatus, or perineum. The SANE conclusions were that BH's genital findings were "normal." *Id.*

Argument

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO INTRODUCE EVIDENCE WHICH STRONGLY CORROBORATED THE DEFENSE THEORY THAT THE ALLEGATIONS MADE BY THE COMPLAINING WITNESS AND HER MOTHER WERE FALSE.

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002)(citations omitted).

Law and Analysis

Service members maintain a fundamental right to effective assistance of counsel. *United States v. Davis*, 60 M.J. 469, 473

(C.A.A.F. 2005) (citations omitted)). When reviewing claims for ineffective assistance of counsel, this Court is bound by the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See, United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). Under *Strickland*, Appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

In order to satisfy the deficiency prong of *Strickland*, Appellant must show his defense counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id.* at 688. This Honorable Court has established a three-part test to determine if a defense counsel's performance was deficient. Specifically, this Court must determine:

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

would have been a different result? *See United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

The Court "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). On the other hand, an unreasonable "tactical" decision will not defeat a claim of ineffective assistance of counsel. *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, *cf. United States v. Valenzuela-Bernal*, 458 U. S. 858, 458 U. S. 866-867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693. As established in *Strickland*, "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." *Strickland*, 466 U.S. at 694, *quoting*, *United States v. Agurs*, 427 U.S. 97, 104, 112-113 (1976).

"The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Strickland,* 466 U.S. at 694.

In the instant case, Appellant's civilian defense counsel, Mr. GM, provided ineffective representation during Appellant's court-martial by failing to introduce evidence from two (2) SANE examinations of BH that found no evidence of sexual assault/activity. GM's decision not to offer this evidence was unreasonable and not supported by valid tactical considerations. Further, GM's ill-chosen decision not to offer this evidence significantly prejudiced Appellant's case given the relative weakness of the government's evidence that Appellant sexually assaulted BH.

1. Truth of the Allegations

There is no question GM and Mr. BC, Appellant's military defense attorney, were in possession of these reports. *See*, McIntosh Declaration, GM Affidavits, BC Affidavit, JA at 351-364. This evidence was never introduced at trial; and it was undeniably exculpatory as it contained medical evidence that the alleged sexual assaults did not occur. Each examination showed no evidence of sexual assault/activity, and the allegations were that shortly before each examination BH was repeatedly and sometimes brutally raped by Appellant.

2. **Deficient Representation**

The defense theory in this case was that CD, Appellant's ex-wife, made up the allegations to secure the custody of their

three boys. The defense had independent, scientific evidence that these allegations were false. Specifically, the defense had two independent SANE examinations of BH conducted in 2007 and 2010. Despite allegations of over four (4) years of violent vaginal and anal rape of a very young child, the two independent SANE reports showed no injuries, no tearing, no scarring, no bruising, and a completely intact hymen. Yet, even though the defense had this evidence that strongly corroborated the defense argument that the allegations were fabricated, the defense did not present any evidence of BH's SANE examinations.

In their court-ordered affidavits, trial defense counsel assert that their failure to offer this evidence was a tactical decision which allowed them to argue that the government failed to produce any medical evidence of sexual assaults and suggest that admitting the evidence would have prevented that argument. *See* Declarations of GM, dated 13 February 2013[3] and Mr. (formerly Captain) BC, dated 26 February 2013, JA at 358-360. A second reason offered by trial defense counsel for their decision to not admit the evidence is that doing so was not in Appellant's interest because of the possibility that the DNA evidence would be admitted. *See* Declaration of BC, dated 26 February 2013, JA at 353-357. Both arguments fail.

[3] GM submitted two affidavits, one dated 13 February 2013 and one dated 22 February 2013. JA at 361-364.

First, GMargues that admitting the evidence would have deprived them of their main argument that the prosecution produced no medical evidence of a sexual assault. This decision was unreasonable. Certainly, a common and effective defense tactic in courts-martial is to highlight possible, seemingly obvious evidence that was not offered by the government.

In the instant case, had there been no SANE examinations accomplished, or if the SANE examinations did show some evidence of trauma but were not offered by the government, then this would have been a sound strategy for the defense to employ. Instead, the situation in the instant case was very different, in that there were two (2) separate examinations performed, neither of which showed any evidence of sexual activity. Therefore, it is nonsensical for GM to claim that it is more persuasive to *argue* that the government did not produce evidence of trauma than it is to definitively *produce* independent evidence that no trauma actually existed. Actual evidence trumps mere argument, absent compelling tactical considerations that were not present in Appellant's case.

It is important to note that this was a case involving an alleged victim with no sexual experience other than the alleged sexual assaults committed by Appellant. The SANE examinations not only showed no evidence of sexual assault/trauma, they showed no evidence of sexual activity *whatsoever*. Aside from

the fact that there was no evidence of ripping, tearing, scarring, stretching, or any other physical manifestations of sexual assault, there was zero evidence that BH had engaged in *any* form of sexual activity in her entire life.

Specifically, both SANE examinations noted that BH's hymen was fully intact and appeared entirely normal. As the SANE examiners could have explained to the member panel, the presence of BH's intact, "estrogenized, pink, circular hymen with no injury, bleeding or bruising" would be a relevant fact for them to consider on the issue of whether BH had been brutally and repeatedly raped over a period of four (4) years between the ages of ten (10) and fourteen (14) by a grown man. Instead, GM's unreasonable tactical decision not to present evidence of the SANE examinations left the members without this extremely relevant, exculpatory piece of information.

GM also claims that his decision not to offer evidence of the SANE examinations was based on the likelihood that the SANE examiners would testify to the possibility that the lack of abnormal findings does not rule out the occurrence of sexual assault.[4] Even if the examiners both testified to this possibility, however, the probative value of the evidence outweighs GM's concern. In such a scenario, at best, the

[4] Please note that GM's affidavits are silent on the issue of whether he actually interviewed the SANE examiners who performed the examinations before making his "tactical" decision. As such, it appears that GM's concern about their possible testimony is mere speculation.

government would have been able to solicit testimony that it is *possible* to exhibit normal vaginal and anal findings after a sexual assault.

In cases where the alleged victim describes a single sexual assault, a sexual assault that occurred a significant length of time before the SANE examination, or a sexual assault that was not accomplished by force, SANE testimony regarding the possibility of normal vaginal and anal examination findings *might* outweigh the value of introducing the SANE examiners' testimony. In the instant case, however, the circumstances described by BH created a markedly different evidentiary landscape in which GM made his unreasonable tactical decision.

As noted previously, BH described a consistent pattern of vaginal and anal rape over a period of four (4) years, beginning at the age of ten (10). These alleged rapes were accomplished using significant force, and left BH "screaming" (JA at 95, 159), "crying" (JA at 202), experiencing vaginal "burning" (JA at 79), "hurt[ing]" (JA at 74), "kicking" (JA at 182), and "calling for help" (JA at 75). Thus, this extremely young, sexually inexperienced child was allegedly brutally raped over a period of years by a grown man. One of the SANE examinations took place within hours of one of the alleged sexual assaults. The other SANE examination took place after all sexual assaults had allegedly taken place over the previous four (4) years. In

both examinations, BH exhibited no signs of recent or previous sexual trauma, or even sexual activity. This extremely exculpatory evidence should have been offered by the defense.

While the government could have argued the possibility that such aggressive, long-term, repeated, and physically painful sexual assaults left not a single mark on BH, the panel members should have been able to balance these medical findings against BH's graphically violent allegations, using their "common sense and knowledge of the ways of the world."

Finally, in his affidavit, BC states that the decision not to admit the SANE examinations was to prevent the admission of the DNA evidence. JA at 353-357. This argument is without merit because the DNA evidence was already admitted. JA at 239-243.

Based on the foregoing, there exists no reasonable tactical decision for the defense's failure to admit evidence of BH's SANE examinations. *See generally, Loving v. United States*, 64 M.J.132, 148 (C.A.A.F. 2006) (citing *United States v. Loving*, 41 M.J. 213, 250 (C.A.A.F. 1994)). Trial defense counsel's decision not to admit evidence of the SANE examinations fell below an objective standard of reasonableness and constituted the ineffective assistance of counsel.

3. Prejudice to Appellant

a. Evidence of SANE Examinations was Relevant,

Exculpatory Evidence

As described above, evidence of BH's two (2) separate SANE examinations, and their lack of medical findings of sexual trauma, was relevant and exculpatory evidence. In the 2007 examination, the SANE found that BH exhibited no injury to her genitalia, her hymen, her perineum, or her anus. This is noteworthy given BH's age and description of the alleged sexual assaults. It is unlikely that a 10-year-old girl's hymen, genitalia, and anus would remain entirely uninjured if she were violently raped by a full-grown male. Yet no injury was discovered during an examination that occurred less than 12 hours after an alleged sexual assault.

Further, if BH's testimony is to be believed, this lack of injury existed after approximately nine (9) months of sexual assaults occurring prior to the examination. JA at 68, (where BH testified Appellant had sex with her as early as summer 2006). Finally, in the 2010 examination, the SANE noted that BH had an "estrogenized, pink, circular hymen with no injury, bleeding or bruising noted." JA at 339-350. This examination occurred after four (4) years of allegedly violent, repeated, sexual assaults (2006-2010). Despite this, BH had an intact, uninjured, normal hymen and no injuries to her genitalia, her anus or perineum.

The lack of medical findings in both SANE examinations is

relevant and exculpatory evidence that should have been presented to the factfinder. GM's failure to present this evidence significantly prejudiced Appellant's case and undermines the reliability of the result of the proceeding.

b. Weakness of Government's Evidence

At trial, the government's case against Appellant was largely dependent upon the credibility of witness testimony from BH, CD, and VJ. This testimony was repeatedly inconsistent, both with prior statements made by the witnesses themselves and with the testimony of other witnesses. Further, this witness testimony was at times simply unbelievable in the witness descriptions of the alleged sexual assaults, BH's reactions, CD's reactions, and VJ's reaction.

At times BH described screaming, kicking, and physically trying to get away from Appellant, yet there was no corroborating evidence presented that anyone ever heard these violent encounters, or that there was ever any visible bruising or otherwise on either Appellant or BH. Additionally, taking the testimony of VJ at face value she describes an incredibly violent attack by Appellant on BH, where VJ simply sat by and watched. There was, apparently, no attempt by Appellant to disguise this violent behavior or act in any way to conceal it, which is inconsistent with his prior actions when he was allegedly "caught." VJ made no attempt to run away, get help or

do anything to prevent the attack or protect herself from attack by Appellant.

Given the extremely aggressive nature of the attacks as described by BH and VJ, one would expect some physical evidence of it, and yet there were none. If nothing else, this simply demonstrates the weaknesses of the witnesses' testimony. At times, the testimony seemed incredible, inconsistent and even physically impossible. Knowledge that there was no physical or medical evidence of any sexual assault, let alone even sexual activity, would have undoubtedly played a major role in the members' deliberations.

The only other evidence offered by the government to corroborate BH's allegations was Mr. Fischer's testimony regarding DNA test results. JA at 239-243. The swabs used for testing were samples from BH's vagina/cervix, a vaginal smear, a thigh/external genitalia swab, a thigh/external genitalia smear. JA at 239-240. Additionally, the underwear BH allegedly wore on the night that a sexual assault occurred was tested. JA at 103-104, 240.

According to Mr. Fischer, the only foreign DNA (i.e., not BH's) found in any of the samples was located on the inside crotch of BH's underwear. JA at 240-241, 244. Foreign DNA was not found in BH's cervix, in her vagina, on her external genitalia, or on her thighs. JA at 240-242, 244. If Appellant

had touched or sexually assaulted BH as alleged, some semen or DNA likely would have been found in her vagina/cervix or, at a minimum, on her external genitalia. Instead, the only place any DNA was found was in BH's underwear, which she was not even wearing when CD entered the room. Further, the DNA evidence that was found in BH's underwear could not be confirmed as semen, and instead could have been transferred to the underwear. JA at 241, 244. As such, even the DNA evidence did not support the allegation that Appellant sexually assaulted BH or touched BH's genitalia.

Therefore, given the relative weakness of the government's case, evidence that two (2) independent medical examinations of BH found no indications of sexual trauma (or even sexual activity) would have been relevant and persuasive information for the members to consider. It is difficult to reconcile the four (4) years of repeated, violent rapes and anal sodomy described by BH with medical evidence that shows zero evidence of any sexual activity at all. As such, this was not a case where the government's case was otherwise so strong that trial defense counsel's error would not have had an impact on the findings. At a minimum, evidence regarding the medical findings of the SANE examinations could have created a reasonable doubt in the members' minds when weighed against BH's allegations of extreme and repeated violent sexual assaults. GM's failure to

introduce this evidence undermines confidence in the outcome of Appellant's court-martial.

c. Trial Counsel's Closing Argument

At trial, the lack of any evidence of medical findings consistent with sexual assault was a consistent issue in trial and defense counsel's closing arguments. During GM's closing argument, he repeatedly noted that the government had not presented any medical evidence that a sexual assault had occurred. JA at 278-279, 286-287, 304-305. During her rebuttal argument, trial counsel responded to GM's argument as follows:

> Where is the trauma, where is the medical evidence, where is the DNA in her vagina? These are the questions and, as you know, this little girl submitted to a sex assault kit. She went and she saw a nurse and the nurse took swabs, and the nurse took her underwear, and the nurse opened her up and looked at her. And when this kit went forward to the science lab, and when the report went forward to law enforcement, this case continued. *This wasn't a case where the medical evidence didn't exist, or the DNA didn't exist, in order for substantiation of this little girl's version of horrific events. This is a case where all of that existed and that's why we're here.*

JA at 320-321 (emphasis added).

Trial counsel's rebuttal argument to the members regarding medical evidence was prejudicial for a number of reasons. First, trial counsel argued to the members that medical evidence of trauma did exist. As previously discussed, the "sex assault kit" and the "nurse [who] opened [BH] up" discovered no abnormal

findings that would be consistent with sexual assault. Thus, trial counsel not only knowingly argued facts not in evidence, she knowingly argued facts not in existence. As a result of trial counsel's disingenuous statements, the members were left with the implication that medical evidence of sexual trauma existed.

Second, trial counsel argued that the review of these (non-existent) medical findings justified law enforcement's "substantiation" of BH's account, and "that's why we're here." Thus, trial counsel's misleading argument left the members with the implication that medical evidence of trauma not only existed, but that the evidence was sufficiently reliable to justify a law enforcement investigation and Appellant's ultimate prosecution. This argument clearly had a prejudicial impact on the members, in that they specifically requested the production of the AFOSI Report of Investigation in the midst of their deliberations. Had GM presented actual evidence regarding the medical examinations performed upon BH, trial counsel would have been precluded from making such a prejudicial rebuttal argument.

For the foregoing reasons, the prejudice to the Appellant is plain and obvious. There exists a reasonable probability that had this evidence been introduced, the jurors could have reached a different conclusion. Without this evidence, combined with trial counsel's improper argument, the members were left

with the impression that medical confirmation of the alleged assaults occurred, when in fact no such evidence existed. There exists a real probability that had this evidence been introduced, the result of Appellant's court-martial would have been different.

In what can only be called troubling, the AFCCA failed to address this issue despite hearing oral argument on it. *McIntosh*, ACM 37977, slip op. at 19. Instead, the closest the Court came to discussing the question was to generally hold that "there are reasonable explanations for the counsel's advice and their level of advocacy on the appellant's behalf was commiserate [sic] with that expected of defense counsel."[5] *Id.* Only this conclusory statement was provided and no further analysis was made on the instant issue. AFCCA did not even note the improper argument by trial counsel, or the impression the members were left with as a result of that argument when concluding there existed no ineffective assistance or prejudice to the Appellant.

It is important to note that this lack of analysis was raised to the AFCCA in Appellant's motion for reconsideration *en banc*. In the motion, Appellant highlighted that "[a]bsent further analysis, trial defense counsel and any appellate court

[5] This statement was used to cover eight (8) different claims of ineffective assistance of counsel. Seven of the eight were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

reviewing this case will not know this Court's reasoning." That motion was denied.

Conclusion

Trial defense counsel possessed exculpatory medical evidence and failed to introduce them at trial. The "tactical" decision to not introduce this evidence was not reasonable, as the exculpatory nature of the evidence far outweighed any possible harm that could come from introducing it. Finally, there is a reasonable probability that the outcome would have been different, given that without this information the evidence was limited, incredible at times, and the members were left with the impression that medical evidence of these alleged assaults did exist.

WHEREFORE, Appellant requests this Honorable Court set aside the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 17 February 2015.

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