IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Troy B. NORMAN Sergeant (E-5) U.S. Marine Corps, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. No. 201300152 USCA Dkt. No. 14-0524/MC

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

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Issue Presented

WHETHER THE CONVICTION FOR CHILD ENDANGERMENT BY CULPABLE NEGLIGENCE IS LEGALLY INSUFFICIENT WHEN THE ONLY TESTIMONY OFFERED TO PROVE ITS SERVICE DISCREDITING NATURE WAS ADMITTED IN ERROR.

Statement of Statutory Jurisdiction

The appellant, Sergeant (Sgt) Troy Norman, U.S. Marine Corps, received an approved court-martial sentence that included a punitive discharge. (J.A. at 17.) Accordingly, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed the case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012). (J.A. at 1); United States v. Norman, No. 201300152, 2014 CCA LEXIS 88 (Feb. 20, 2014) (per curiam). Sgt Norman now invokes this Court's jurisdiction under Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation, sitting as a general court-martial, tried Sgt Norman for four specifications of aggravated assault in violation of Article 128, UCMJ, and five specifications of child endangerment by design and/or by culpable negligence in violation of Article 134, UCMJ (2008). 10 U.S.C. §§ 928, 934 (2006) (J.A. at 19-23). The members acquitted Sgt Norman of all charges and

specifications save Specification 4 of Charge II--child endangerment by culpable negligence. (J.A. at 15-16.) The members sentenced Sgt Norman to reduction in rank to pay-grade E-1, confinement for sixty days, and a dishonorable discharge. (J.A. at 17.) On April 19, 2013, the Convening Authority (CA) approved the adjudged sentence and, except for the punitive discharge, ordered it executed. (Id.)

The NMCCA affirmed the findings and sentence of the court-martial on February 20, 2014. (J.A. at 3); Norman, 2014 CCA LEXIS 88, *7. On April 18, 2014, Sgt Norman petitioned this Court for grant of review and concurrently moved this Court for leave to file his Supplement to Petition for Grant of Review Separately. On May 7, 2014, Sgt Norman filed a supplement to his petition. This Court granted review of the issue presented in Sgt Norman's case on September 11, 2014.

Statement of the Facts

T.B.N. is Sgt and Mrs. Lynda Norman's son. (J.A. at 248.) At the time of the allegations in this case, T.B.N. was ten months old. Due to a permanent change of station, the Norman family had moved onboard Marine Corps Air Station (MCAS), Yuma, Arizona, only one month before the tragic accident at issue in this case. (J.A. at 139, 245-46, 249.)

Sgt Norman is a good Marine, a loving father, and a peaceful man. (J.A. at 232-33, 238, 241-43.) On the morning of

August 24, 2011, Mrs. Norman decided to take a nap while Sgt Norman watched T.B.N. (J.A. at 116.) T.B.N. soiled his diaper and Sgt Norman attempted to change it on the carpet. (J.A. at 97, 116, 252 at 27:00.) Unfortunately, it created quite a mess and feces got on T.B.N.'s clothing as well as the carpet. (Id.) So Sgt Norman decided to give T.B.N. a bath. (Id. at 97, 116, 252 at 30:38.)

Sgt Norman had only given T.B.N. a bath once before and that was several months earlier. (J.A. at 100, 117, 252 at 32:15.) At that time, the family was living in a different house in Beaufort, South Carolina. (J.A. at 139, 245-46, 249.) In the month since moving to the new family home in Yuma, Sgt Norman had never used the bathtub in the children's bathroom. (J.A. at 117, 252 at 32:00.)

Sgt Norman turned the water on and placed T.B.N. in the tub facing away from the faucet with the drain open. (J.A. at 97, 116, 137.) He sat on the toilet and checked the water temperature with his hand three times to make sure it was not too hot. (J.A. at 116, 252 at 42:00.) Then, Sgt Norman walked across the bathroom to get some soap from underneath the sink. (J.A. at 97, 116, 252 at 40:00, 45:00.) Sgt Norman heard T.B.N. begin to whimper as he searched for the soap. (J.A. at 117.) By the time he returned to the bathtub, T.B.N. was on his back, visibly in pain, and began screaming. (Id.)

The water was very hot as he lifted T.B.N. from the bathtub. (J.A. at 104, 117.) So hot, in fact, that it caused the skin from T.B.N.'s back and arms to peel. (J.A. at 104, 112-13, 117.) Sgt Norman immediately ran to wake Mrs. Norman and, through his tears, explained what happened. (J.A. at 117.) Sgt Norman then called 911 for help. (J.A. at 112-15, 117.)

Unbeknownst to Sgt Norman, housing personnel had set the water heater to 140 degrees. (J.A. at 128, 131, 133, 145, 249.) The recommended setting for a water heater, particularly in a house with children, is 120 degrees because, at that temperature, the risk of scalding is low. (J.A. at 170.)

An investigation followed. Ultimately, the Government charged Sgt Norman with, among other offenses, endangering T.B.N. by culpable negligence as follows:

> Specification 4: In that Sergeant Troy B. Norman, U.S. Marine Corps, on active duty, on board Marine Corps Air Station Yuma, Arizona, on or about 24 August 2011, had a duty for the care of T. B. Norman, a child under the age of 16 years and did endanger the physical health of said T. B. Norman, by leaving him unattended in a bathtub where hot water was running from the faucet, and that such conduct constituted culpable negligence which resulted in grievous bodily harm, to wit: 2nd degree burns on approximately 35% of his body, which conduct was of a nature to bring discredit upon the armed forces.

(J.A. at 21.) Plainly, this offense only alleged that Sgt Norman's conduct was of a nature to bring discredit upon the armed forces. (Id.)

The military judge instructed the members on the elements of child endangerment by culpable negligence:

> In order to find Sergeant Norman guilty of this offense under Specification 4 you must be convinced by legal and competent evidence, beyond a reasonable doubt:
>
> One, that on or about 24 August 2011, on board Marine Corps Air Station, Yuma, Arizona, the accused had a duty, for the care of T.B.N.;
>
> Two, that T.B.N. was then under the age of 16 years;
>
> Three, that on or about 24 August 2011, on board Marine Corps Air Station, Yuma, Arizona, the accused endangered T.B.N.'s physical health through culpable negligence by leaving him unattended in a bathtub where hot water was running from the faucet;
>
> Four, that the accused's conduct resulted in grievous bodily harm to T.B.N., to wit: Second degree burns on approximately 35 percent of his body;
>
> And five, that under the circumstances the conduct of the accused was of a nature to bring discredit upon the armed forces.

(J.A. at 253); see also MANUAL FOR COURTS MARTIAL, UNITED STATES, pt. IV, ¶ 68a (2008). The military judge did not instruct the members on how they should go about finding the conduct was of a nature to be service discrediting. (J.A. at 255.)

Attempting to satisfy its burden of proof as to the terminal element, the Government offered the testimony of Staff Sergeant (SSgt) Neil C. Moody, U.S. Marine Corps. (J.A. at 213.) Notably, this was SSgt Moody's second appearance at

trial. (J.A. at 80.) The Government recalled him to the stand just before resting its case to establish the terminal element.[1] But SSgt Moody's testimony on that subject soon elicited objections from defense counsel. (J.A. at 215-16.) After discussing SSgt Moody's reasons for joining the Marine Corps, the Government attempted to elicit his lay opinion on whether Sgt Norman's behavior was of a nature to bring discredit upon the Marine Corps. (J.A. at 217.) The military judge overruled the defense objection. (Id.) He found it "appear[ed] to be lay opinion testimony in light of the need to put on some evidence to support a terminal element." (J.A. at 218).

After this ruling, trial counsel asked the ultimate question: "In your opinion, does a Marine who endangers the life of his child bring discredit on the Marine Corps?" (J.A. at 218.) SSgt Moody ultimately answered: "I would think somebody who did that would--anybody who would do that would bring discredit upon themselves, but especially a Marine, because of the high opinion that we are--I feel we are held to by the public, sir." (Id.)

[1] SSgt Moody served as a military policeman. (J.A. at 80.) He responded to the emergency call and arrived at Sgt Norman's house on the day of the accident. (Id.)

On appeal to the lower court, the Government conceded the admission of SSgt Moody's testimony was error. It noted: "While his testimony was based on his personal perception, it was subjective in nature, not helpful to the determination of a fact in issue, and an impermissible comment on a legal conclusion pending before the trier of fact." (J.A. at 55-56.) The lower court, however, only assumed without deciding the admission of the testimony was error. (J.A. at 2); Norman, 2014 CCA LEXIS 88, *6.

SSgt Moody's testimony constitutes the only independent evidence offered by the government to prove the terminal element. For example, the Government did not offer any evidence that this tragic accident actually drew the public's attention. Nor did the Government offer the opinion of a reasonable member of the public that this type of behavior would lower the armed forces in his or her esteem. Worse, the Government did not even attempt to showcase which facts--already admitted into evidence--satisfied the service discrediting element of the offense. (J.A. at 256-64; 285-87.) It simply stayed silent on this critical issue of proof during its closing argument. And the military judge issued no instruction to guide the members through its inquiry.

Accordingly, the issue before this Court is whether a reasonable fact-finder could have found the facts of this tragic

accident to be of a nature to bring discredit on the armed forces.

Summary of Argument

United States v. Phillips did not relieve the Government of its burden to prove the terminal element of an Article 134 offense. To secure a conviction, the Constitution requires the Government to offer independent evidence to prove every element of a criminal offense beyond a reasonable doubt. Clause 2 of the terminal element is no exception to this well-settled rule. Here, the Government offered no competent evidence upon which the members could have concluded Sgt Norman's role in the tragic accident that burned his child was service discrediting in nature. In fact, the only evidence it offered has since been conceded as improper--the lay opinion testimony of Staff Sergeant Moody. The conviction is legally insufficient for two reasons. First, there is no other evidence establishing the service discrediting nature of this conduct. Second, there are no facts admitted into evidence from which a reasonable fact-finder could find proof of that terminal element. This Court should, therefore, set aside the conviction.

Argument

THE CONVICTION FOR CHILD ENDANGERMENT BY CULPABLE NEGLIGENCE IS LEGALLY INSUFFICIENT WHERE THE GOVERNMENT PRESENTED NO ADMISSIBLE EVIDENCE OF ITS SERVICE DISCREDITING NATURE.

Standard of Review

This Court reviews legal sufficiency of the findings of a court-martial *de novo*. Art. 66(c), UCMJ; United States v. Phillips, 70 M.J. 161, 166 (C.A.A.F. 2011) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Law

When deciding whether the evidence is legally sufficient to sustain a conviction, the test is "whether, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Phillips, 70 M.J. at 166. To prove a violation of Clause 2 of Article 134, the Government must: 1) prove that the accused committed a certain act; and 2) "introduce sufficient evidence" that the accused's conduct was "of a nature to bring discredit upon the armed forces." Id.; Art. 134, UCMJ, 10 U.S.C. § 934. To be service discrediting, conduct must either "have 'a tendency to bring the service into disrepute or . . . [have a] tend[ency] to lower it in the public esteem.'" United States v. Caldwell, 72 M.J. 137, 141 (C.A.A.F. 2013) (quoting MCM, pt. IV, ¶ 60.c(3) (2008)).

Discussion

In this case, the Government did not offer any admissible evidence that Sgt Norman's behavior was of a nature to bring discredit on the armed forces. And, the facts and circumstances of this case indicate Sgt Norman acted without intent or knowledge of the danger to T.B.N. Therefore, the Government failed to prove the terminal element and the conviction is legally insufficient.

a. United States v. Phillips did not obviate the Government's duty to independently prove the terminal element.

In United States v. Phillips, this Court reaffirmed that in order to meet the terminal element, the Government must offer independent evidence sufficient for the fact-finder to determine the behavior was of a nature to bring discredit on the armed forces. Id. at 164 (citing Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); In re Winship, 397 U.S. 358, 361-64 (1970); United States v. Neal, 68 M.J. 289, 298 (C.A.A.F. 2010)); see also Phillips, 70 M.J. at 167 (Ryan J., dissenting). This is not to say evidence cannot be used to support more than one element. Rather, it recognizes that the terminal element cannot be proven merely by the charged act itself. See United States v. Humphries, 71 M.J. 209, 212 (C.A.A.F. 2012) (the terminal element must be "separately charged and proven, regardless of

context") (citing United States v. Ballan, 71 M.J. 28, 33 (C.A.A.F. 2012)).

The point of contention in the present case centers on one sentence in the majority opinion of Phillips: "Furthermore, proof of the *conduct itself* may be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, *under all the circumstances*, it was of a nature to bring discredit upon the armed forces." Phillips, 70 M.J. at 163 (emphasis added).

Reading Phillips to say that proof of the act itself is sufficient would be an unconstitutional presumptive conclusion. Id. at 163-64. There must be something more. The appropriate interpretation of Phillips is that evidence of the circumstances surrounding the act itself may, in some limited cases, meet the terminal element. Id. at 161, 166 (limiting its holding to "this case," thus creating an exception by which the circumstances of an offense may be enough in certain, limited cases); see also United States v. Guerrero, 33 M.J. 295, 298 (C.M.A. 1991) (noting that cross-dressing does not *per se* violate Article 134, but rather, "it is the (1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the cross-dressing, all together, which form the basis for determining if the conduct is to the prejudice of good order and discipline . . . or was of a nature to bring discredit upon the

armed forces.”). Any other interpretation of Phillips would overturn decades of well-accepted and constitutionally sound precedent, and ignore the plain language of this Court’s opinion.

In Phillips, not only did the accused possess child pornography as he was charged, but he also searched for that child pornography from a military installation, was caught in the act of downloading the child pornography, and some of his victims were identified minors. Phillips, 70 M.J. at 166. That additional evidence showed an active duty service member was preying on members of the civilian population from an armed forces barracks room. Id. These circumstances, if known, would tend to bring discredit on the armed forces.

An appellate court cannot affirm a conviction based on a theory of liability not presented to the members. Phillips, 70 M.J. at 167 (Ryan, J., dissenting) (citing United States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008)). But the lower court here did just that. The Government presented no evidence and no argument other than the inadmissible opinion of SSgt Moody as to why Sgt Norman’s allegedly culpably negligent behavior was service discrediting. Nevertheless the lower court incorrectly concluded that the extent of T.B.N.’s injuries and his subsequent actions could have established this element. (J.A.

at 2); Norman, 2014 CCA LEXIS 88, *6. This was error since neither theory was presented to the members.

Additionally, even if these theories had been presented to he members, neither constituted "sufficient evidence" to prove the terminal element beyond a reasonable doubt.

First, the Government had to prove the extent of T.B.N.'s injuries to prove an element of the specification--grievous bodily harm. (J.A. at 253.) Phillips explained that an element of an offense cannot be established by conclusive presumption. Phillips, 70 M.J. 164-65. This is because "such presumptions conflict with the presumption of innocence and invade the province of the trier of fact." Id. (citing Sandstrom v. Montana, 442 U.S. 510, 523 (1979)); see also United States v. Vaughn, 58 M.J. 29, 36 (C.A.A.F. 2003) (declining to find child neglect to be *per se* service discrediting because of the wide-range of behaviors it could encompass). Yet the lower court did just that by finding that by proving one element--grievous bodily harm--the Government also proved the terminal element. The lower court also failed to acknowledge that these injuries were the result of a tragic accident requiring neither knowledge nor intent. The results of this tragic accident do not establish the terminal element.

The lower court's reasoning in this case would infuse the terminal elements with super powers, and permit them to be

presumed even absent independent evidence as required by Phillips and the Constitution. Such an interpretation would return military jurisprudence to a United States v. Foster-like construct, in which the terminal elements operated outside of normal rules. See Phillips, 70 M.J. 168 (Ryan, J. dissenting) (citing United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994); see also United States v. Miller, 67 M.J. 385, 389 (C.A.A.F. 2009) (overturning United States v. Foster, finding the terminal elements were not *per se* included in every enumerated offense and that those elements must be pleaded). This reading is unconstitutional and directly contrary to this Court's well-established precedent, including Phillips. 70 M.J. at 164-65 (reaffirming that no crime can be "per se" service discrediting because conclusive presumptions are unconstitutional).

Next, the lower court erred by finding Sgt Norman's conduct to be service discrediting in nature because the Government claimed Sgt Norman may have tried to mislead investigators after the conduct at issue. (J.A. at 2); Norman, 2014 CCA LEXIS 88, *6. This assertion is logically flawed. The nature of Sgt Norman's cannot be changed by his subsequent actions. Further, any alleged false statements would be the basis for an entirely separate crime of false official statement--and the evidence for such a charge is very weak and was hotly contested. (J.A. at 252, 2:06:00 (Sgt Norman states that he could be wrong about the

handle being at the nine o'clock position); 2:57:15 (Sgt Norman stating emphatically that he never claimed the water burned T.B.N. by "splashing").[2]

Even aside from the other weaknesses in these two theories of liability, this Court cannot affirm Sgt Norman's conviction based on T.B.N.'s grievous bodily injury, or Sgt Norman's subsequent behavior. That is because none of these theories were presented to the members. Medina, 66 M.J. at 27 (finding "an appellate court may not affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt"). This Court should reverse the lower court's decision and set aside Sgt Norman's conviction.

b. The intentional sexual victimization of children from a military installation is distinct from this tragic accident born of inexperience.

The lower court, like the trial counsel in closing arguments, failed to explain what makes this particular, unintentional conduct of a nature to be service-discrediting.

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[2] It should also be noted that the Government did not present evidence of significant public knowledge of Sgt Norman's actions and that neither the Government, nor the lower court suggested that extent of the public knowledge of Sgt Norman's behavior was service discrediting. See Phillips, 70 M.J. at at 166:

> the degree to which others became aware of the accused's conduct may bear upon whether the conduct is service discrediting, but the statute does not establish a requirement that the accused's conduct must in *every case* be in some respect public knowledge.

(J.A. at 256-64, 285-87); see Humphries, 71 M.J. at 216 (overturning a conviction for adultery and noting that the Government "made no attempt to tie any of its evidence or witnesses . . . to the Article 134, UCMJ, charge"); see also Phillips, 70 M.J. at 167 (Ryan, J. dissenting) (citation omitted). It did not, because it cannot.

In Phillips, the Government charged the appellant with a violation of Article 134, UCMJ for possession of child pornography. 70 M.J. at 164. But it did not offer the traditional evidence that the conduct was of a nature to bring discredit--an opinion from a civilian witness, or proof of actual discredit. Id. This Court found the Government was not required to offer such evidence "in this case" because the facts and circumstances surrounding the crime was sufficient evidence of the terminal element. Id. at 166. "[P]roof of the conduct itself *may* be sufficient for a rational trier of fact to conclude that, under all the circumstances, it was of a nature to bring discredit upon the armed forces." Id. at 163 (emphasis added). The logical implication of the majority's use of "may" in that crucial portion of its holding is that proof of circumstances surrounding the conduct will not usually meet the Government's burden. Id. at 163. There has to be something more.

The Government must provide members independent evidence on which to decide whether an act is service discrediting. The quantum of evidence necessary to meet the standard may be significantly less in some types of cases due simply to the nature of the acts. For instance, suppose the Government proves that the accused intentionally sexually exploited an identified civilian victim by actively searching for child pornography while in the barracks. A reasonable finder of fact could certainly find that the conduct was a of a nature to bring discredit on the armed forces for the reasons discussed above. But in other offenses, particularly offenses where the scienter required is not an intentional act, the quantum of evidence required is significantly higher. This is because the potential for discredit to the armed forces is much lower. In those cases, one of two things will probably be required: 1) actual impact on the reputation of the armed forces; or 2) testimony that such behavior would lessen the witness' opinion of the armed forces.

Here, the quantum of evidence required to prove the terminal element is very high. This tragic accident occurred within the confines of the Norman's private on-base home. Again, Sgt Norman had only bathed T.B.N., his only biological child, once before, and that was several months prior to June 2011. (J.A. at 100, 117, 252 at 32:15.) The Norman family had

moved into the Yuma residence just a few weeks prior to the incident and Sgt Norman had never used the bathtub where this tragic accident occurred. (J.A. at 117, 252 at 32:00.) Unbeknownst to Sgt Norman, housing personnel or the previous tenant set the water heater to heat the water to 140 degrees. (J.A. at 128, 131, 133, 249.) His reaction to the accident, moreover, is consistent with the expected behavior of any parent or Marine: he immediately extracted his son from the hazard, he told his wife, Mrs. Norman what happened through his tears, and then he called the paramedics with a shaky voice. (J.A. at 112-15, 117.) All the while, Sgt Norman wore his heart on his sleeve, agonizing over what had just happened.

The Government tried and failed in this case to prove that Sgt Norman's behavior was child endangerment by design and assault. (J.A. at 15-16.) What's more, the Government offered no evidence that Sgt Norman was actually aware of the risk of burning T.B.N. from unreasonably hot water or of any other specific risk inherent in his behavior. In fact, the members acquitted Sgt Norman of the same conduct "by design," which required such proof.[3] (J.A. at 16.) Culpable negligence does not, in fact, require Sgt Norman's actual knowledge of any of

[3] "'Design' means on purpose, intentionally, or according to plan and requires specific intent to endanger the child." (J.A. at 254); see also MCM, pt. IV 68.a(c)(2) (2008).

these potential dangers. Instead, culpable negligence requires a culpable absence of due care.[4]

But the crime at issue in Phillips, possession of child pornography, requires knowledge and intent, see MCM, pt. IV, ¶ 68b (2012), which, in the hierarchy of mental states, sits atop culpable negligence. See Kenneth W. Simons, Rethinking Mental States, 72 B.U. L. Rev. 463, 465 (1992).

This scenario resembles the alleged offensive conduct in United States v. Caldwell, where this Court found the guilty plea for self-injury under article 134, to be legally insufficient. 72 M.J. 137 (C.A.A.F. 2013). This Court found the plea to a bona fide suicide attempt insufficient to "establish a reasonably direct and palpable injury to good order and discipline," and insufficient to prove the conduct was of a nature to bring discredit on the armed forces. Id. at 141. The facts were that Caldwell was alone in his barracks room when he was discovered and treated by his Gunnery Sergeant. Id. at 137.

[4] The MCM states:

> . . . It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts. . .

A large part of this Court's reasoning relied on Caldwell's state of mind. The opinion repeatedly notes that this was a bona fide suicide attempt and that there was no claim of shirking duties. Id. at 138, 140, 141, 142. This Court concluded the private nature of Caldwell's actions combined with the total lack of evidence on the terminal element failed to establish the offense beyond a reasonable doubt. Id.

In United States v. Guerrero, a chief petty officer took a junior sailor to his home where they drank alcohol. 33 M.J. 295, 295 (C.M.A. 1991). Then, Guerrero changed into women's attire. Id. Guerrero also repeatedly cross-dressed in his apartment while leaving his curtains open, making another service-member and his wife uncomfortable because they had a clear view into his apartment. Id. at 296-97. Further, a retired master chief, the manager of the apartment complex, also witnessed Guerrero's behavior. Id. This Court found the behavior to be prejudicial to good order and discipline and of a nature to bring discredit on the armed forces due to the open nature of Guerrero's behavior, its connection to other servicemembers, and his apparent motive for cross-dressing--to engage in then-illegal homosexual acts. Id. at 298.

Based on the reasoning in Caldwell and Guerrero, Sgt Norman's intentions and knowledge are dispositive on the terminal element in this case. The Government offered no

evidence that Sgt Norman knew the risks associated with his behavior or that he intentionally exposed his son to those risks. Further, Sgt Norman's conduct was confined to his home. Sgt Norman's part in this tragic accident is not conduct of a nature to discredit the armed forces.

c. The military judge did not adequately instruct the members of their duty to personally determine the nature of Sgt Norman's actions.

In Phillips, this Court noted that the military judge must adequately instruct the members of their duty to determine the nature of the conduct at issue in cases involving Article 134 Clause 2 violations. Id. at 166 ("In a panel case, the military judge must instruct the members how to evaluate *that evidence*.") (emphasis added) (citing Art. 51(c), UCMJ, 10 U.S.C. § 851(c) (2006); Neder v. United States, 527 U.S. 1, 9 (1999)). This duty is unlike any other asked of a military panel. Instead of simply making a factual determination, the members panel is now tasked with speculating on the potential consequences of the publication of an accused's behavior. See, e.g., (J.A. at 4); United States v. Hart, No. 201300295, 2014 CCA LEXIS 593, *21-22 (N-M. Ct. Crim. App. Aug. 19, 2014) (recognizing the unique implications of a "service discrediting" determination).

A military judge alone heard the Phillips case, so this Court did not analyze the requirements of such instructions in depth. 70 M.J. at 166. The present case, however, involved a

members panel and required the military judge to provide additional instructions. Id. at 166.

The military judge defined "service discrediting conduct" as "conduct which tends to harm the reputation of the service or lower it in pubic esteem." (J.A. at 255.) But he did not instruct the members panel on how it should execute its duty to make this unique determination. Due to this lack of specific instructions, this Court cannot be convinced the members did not improperly rely on Sgt Moody's inappropriate testimony.

Conclusion

Specification 4 of Charge II is legally insufficient. Because the Government failed to establish the service-discrediting element, this Court should set aside the sole finding of guilty.

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 10, 2014.

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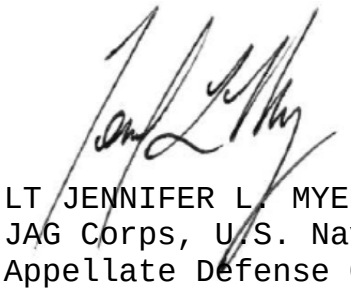

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