

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Pedro M. BESS
Hospitalman
Second Class (E-5)
U.S. Navy,

Appellant

APPELLANT'S BRIEF

USCA Dkt. No. 15-0372/NA

Crim. App. Dkt. No. 201300311

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

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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE ADMISSION OF ADDITIONAL EVIDENCE DURING DELIBERATIONS BUT ALSO DENIED APPELLANT THE OPPORTUNITY TO ATTACK THE ACCURACY OF THAT EVIDENCE BEFORE THE FACTFINDER.

Statement of Statutory Jurisdiction

Appellant's approved general court-martial sentence included a dishonorable discharge. Accordingly, his case fell within the Article 66(b)(1), Uniform Code of Military Justice (UCMJ), jurisdiction of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA).¹ Appellant now invokes this Court's jurisdiction under Article 67, UCMJ.²

Statement of the Case

A general court-martial consisting of officer and enlisted members convicted Hospitalman Second Class (HM2) Pedro M. Bess, U.S. Navy, contrary to his pleas, of two specifications of attempting to commit indecent acts, and four specifications of committing indecent acts in violation of Articles 80 and 120, UCMJ.³ The members sentenced HM2 Bess to reduction to pay-grade E-1, confinement for two years, and a dishonorable discharge.⁴

¹ 10 U.S.C. § 866(b)(1) (2006).

² 10 U.S.C. § 867 (2006).

³ 10 U.S.C. §§ 880, 920 (2006).

⁴ JA at 0825.

The Convening Authority approved the adjudged sentence and, except for the dishonorable discharge, ordered it executed.⁵

On October 28, 2014, the lower court affirmed the findings and sentence.⁶ This Court granted review on May 26, 2015.

Statement of Facts

1. Petty Officer Bess arrives at Dam Neck in 2010.

In October 2010, HM2 Bess checked into the Naval Branch Health Clinic in Dam Neck, Virginia.⁷ HM2 Bess, a twenty-six-year-old black man, had been on active duty for ten years.⁸ He was named Sailor of the Year in Okinawa, served with Marine infantry units, deployed to Iraq in support of Operation Iraqi Freedom, and earned a Combat Action Ribbon.⁹

As an x-ray technician, HM2 Bess was assigned to split time between the clinics in Dam Neck and nearby Oceana. He worked alongside several other individuals who were later involved in the court-martial. One of those was HM3 Philogene, a twenty three year-old x-ray technician, who was also black. HM3 Philogene had been counseled several times for, among other things, locking the exam room doors while conducting exams,¹⁰

⁵ Convening Authority's Action, General Court-Martial Order No. 14-13, JA 0023-0029.

⁶ *United States v. Bess*, No. 201300311, 2014 CCA LEXIS 803 (N-M. Ct. Crim. App. Oct. 28, 2014) (unpublished op.), JA 0001-0009.

⁷ JA at 0655.

⁸ JA at 0650.

⁹ Defense Ex. G, JA at 0887.

¹⁰ JA at 0366-67, 0610.

using his cellular phone during patient exams,¹¹ handling patients in a rough manner,¹² and using other technician's x-ray markers (devices technicians place on x-rays meant to indicate which technician took the x-ray).¹³

2. Two complaints about Petty Officer Bess.

On March 17, 2011, a fifteen-year-old girl, O.L.S., accompanied her father, a Navy Commander, to Oceana for chest x-rays.¹⁴ According to O.L.S., HM2 Bess forced her to completely disrobe during the exam.¹⁵ O.L.S. claimed she reported this immediately to her father while still at the clinic, but he did nothing.¹⁶ Upon arriving home, O.L.S. told her mother, who visited the clinic the next morning to complain to HM2 Bess's supervisor, HM1 Oliver.¹⁷ HM2 Bess called Mrs. S. that evening and explained what actually happened during the exam.¹⁸ Though Mrs. S. was still upset, she took no further action.¹⁹ HM2 Bess was acquitted of all the specifications related to O.L.S.²⁰

¹¹ JA at 365-66.

¹² JA at 365.

¹³ JA at 0344, 614. HM2 Bess had distinctive, personalized x-ray markers, depicting his initials and a skull and crossbones. See Pros. Ex. 15, JA at 874-75, showing HM2 Bess's markers on LCpl J.E.'s x-rays.

¹⁴ JA at 135-38.

¹⁵ JA at 142-46.

¹⁶ JA at 147.

¹⁷ JA at 204, 587.

¹⁸ JA at 588.

¹⁹ JA at 207.

²⁰ JA at 0094-951476-77; Report of Results of Trial, Mar. 8, 2013, JA at 0019-0022.

Two months later, another patient made a complaint. On the afternoon of May 17, 2011, Lance Corporal (LCpl) A.A. visited the Oceana clinic to pick up her x-rays from her exam earlier that morning. HM2 Bess mistakenly believed LCpl A.A. needed more x-rays and he took her into an exam room. HM2 Bess told LCpl A.A. that some of the x-rays required her to be undressed and he offered her a female standby, which she declined.²¹

LCpl A.A. told HM2 Bess that HM3 Philogene performed her x-rays in the morning and HM2 Bess left the exam room. Before he returned, HM2 Bess learned she did not require any additional x-rays. He told her, "I almost got you naked for no reason."²²

LCpl A.A. took offense to his joke and briefly left the clinic to call her Staff Non-Commissioned Officer, who recommended she bring her concerns to a supervisor.²³ LCpl A.A. returned to the clinic to get her x-rays and spoke with HM1 Oliver.²⁴ In response, HM1 Oliver gathered all the clinic's technicians, including HM2 Bess and HM3 Philogene. She emphasized the need to be more "sympathetic" to patients and use the word "undressed" instead of "naked."²⁵

²¹ JA at 0402-03.

²² JA at 0589-90, 0602-05.

²³ JA at 0404.

²⁴ JA at 0408, 0589-90, 0602-05.

²⁵ JA at 0589-90, 0602-05. Another civilian employee was at the meeting and testified that the complaint concerned language rather than any attempt by HM2 Bess to view LCpl A.A.'s nude body. JA at 0605; see also Appellate Ex. XCIV, JA at 0892-93.

3. The Government investigates Petty Officer Bess and charges him.

LCpl A.A. made an Equal Opportunity (EO) complaint and requested mast, but no actions were taken against HM2 Bess.²⁶ Two months after LCpl A.A.'s appointment, another Marine in her command, LCpl J.E., reported that HM2 Bess had sexually assaulted her during an x-ray exam.

LCpl J.E. claimed, despite the presence of a civilian employee from the clinic in the exam room,²⁷ that HM2 Bess had placed her on her back on an exam table while she was completely nude and twice attempted to penetrate her vagina with his finger. Though her exam was in April 2011, and she described it as a traumatic experience, LCpl J.E. did not report this allegation for three months.²⁸

After LCpl J.E. requested mast (to the same Commanding Officer as LCpl A.A.) about HM2 Bess, the Naval Criminal Investigative Service (NCIS) investigated. LCpl J.E. gave HM2 Bess's name to NCIS. This prompted investigators to request medical records, known as CHCS records,²⁹ from the Dam Neck and Oceana clinics showing HM2 Bess performing chest, hip, or pelvis x-rays on women ages sixteen to twenty-six.

²⁶ JA at 0409, 0412.

²⁷ The civilian employee testified that none of what LCpl J.E. described actually happened. JA at 0636-39.

²⁸ JA at 0525.

²⁹ These are printouts from the hospital's network where patient information can be recorded. JA at 0934, 0323, 0534.

Apparently, NCIS did not learn of the CHCS records' unreliability until after it completed its investigation. At trial, four clinic workers testified that the CHCS records were easy to change and inaccurate.³⁰ During its investigation, the Government was also unaware of the unreliability of using the technician's x-ray "markers" to show who performed an x-ray. This was also shown at trial to be an inaccurate way of determining who performed an x-ray.³¹

The trial revealed that the clinic watchbills were the most accurate way to determine who was working at a particular time and place.³² However, they had been deleted long before the Government ever thought to ask for them.³³

The CHCS records led to four other alleged victims. Two civilians, P.G. and B.S., and two Sailors, Aviation Structural Mechanic Second Class (ASM2) A.L., and Logistics Specialist Third Class (LS3) D.B., were interviewed and made allegations that HM2 Bess improperly viewed, or attempted to view, their nude bodies during exams. NCIS also interviewed O.L.S.

Prior to the Article 32, UCMJ, investigation, none of the witnesses ever made in-person or photographic identifications of HM2 Bess. The only identifications were either at the Article

³⁰ JA at 0857-59, 0323-24, 0379, 0447-48, 0585, 0618-19.

³¹ JA at 0326, 0332-33, 0582, 0584.

³² JA at 0389-90.

³³ *Id.*

32, UCMJ, hearing--fifteen months after the exams--or at the court-martial, nearly two years after the exams.³⁴ Each identification took place while HM2 Bess sat at the defense table flanked by his counsel.³⁵ Of the seven complaining witnesses, only one, LS3 D.B., was the same race as HM2 Bess.³⁶

During the investigation, NCIS agents, and even the trial counsel, supplied some of the witnesses with HM2 Bess's name to assist them in making their allegations.³⁷ The interviews were conducted an average of eight months after the exams. The only witnesses who made contemporaneous allegations against HM2 Bess were O.L.S. (acquittal) and LCpl A.A. (using the word "naked").

Eventually, the Government charged HM2 Bess with the following misconduct:

- P.G. (February 24, 2011):
 - indecent act by observing her nude body,
 - assault consummated by battery for touching her shoulders,
- ASM2 (February 25, 2011):
 - indecent act by observing her nude body,

³⁴ The Article 32 was held on June 12, 2012, see Appellate Ex. CVI at 4, JA at 1208. The dates of the NCIS statements for P.G., ASM2 A.L. and LS3 D.B. were, respectively, October 26, 2011, November 9, 2011, and November 17, 2011. See Appellate Ex. CVI at 5-6, JA at 1209-10.

³⁵ Appellate Ex. CVI at 7, JA at 1211.

³⁶ Appellate Ex. CVI at 2, JA at 1206. All were white, except for LS3 D.B. Appellate EX. XXVI at 14 (LS3 D.B. statement to NCIS), JA at 1167.

³⁷ LS3 D.B. testified that the trial counsel told her that her x-ray technician was HM2 Bess. ASM2 A.L. testified that she "relearned" HM2 Bess's name from NCIS agents. JA at 118; see also JA at 112, 241, 453-54, 487-88.

- LS3 D.B. (March 10, 2011):
 - attempting to observe her nude body,
- O.L.S. (March 17, 2011):
 - indecent act by observing her nude body,
 - an assault consummated by battery,
- LCpl J.E. (April 13, 2011):
 - indecent act by observing her nude body,
 - assault consummated by battery,
 - attempted sexual contact by attempting to penetrate her with his finger,
- B.S. (May 4, 2011):
 - indecent act by observing her nude body,
- LCpl A.A. (May 17, 2011):
 - attempting to observe her nude body.³⁸

4. The Government introduces new evidence during the members' deliberations.

The court-martial lasted five days. The Government presented the complaining witnesses; the mother of O.L.S.; Government experts on x-ray procedures and radiology; a physician's assistant and a radiologist involved with LCpl J.E.'s x-rays; HM1 Brewer; and HM3 Philogene. Its physical evidence was the alleged victims' x-rays and CHCS reports.

The defense presented three co-workers of HM2 Bess as fact witnesses: HM1 Oliver, Mr. Rosenthal, and Ms. Lozada. The defense also provided pictures of x-ray markers, a CHCS document for ASM2 A.L., HM2 Bess's performance evaluations, and eight good military character affidavits, including one from HM1 Brewer, a Government witness. HM2 Bess also testified.

³⁸ Charge Sheet, JA at 0010-13.

When HM2 Bess was cross-examined, the trial counsel asked if he was aware the Hospital's "muster reports" showed he was at work for some of the dates in question.³⁹ He responded that he had no idea what the muster reports said.⁴⁰ The trial counsel did not offer the reports into evidence or even have them marked as Appellate Exhibits.⁴¹

On the evening of Thursday, March 7, 2013, the parties gave closing arguments and the military judge instructed the members.⁴² The court then recessed. The following morning at 0755, the members began deliberating.⁴³ About an hour later, at 0906, the members asked the military judge:

Will we be allowed to view statements from NCIS investigations? Will we be allowed to see the muster reports? Will we be allowed to see any counseling chits? Or any other documents used throughout the proceedings or are the exhibits we currently have all that we can view?⁴⁴

The military judge asked for each side's position and allowed some time to consider the question. "I don't think we need to give them an answer in ten seconds. I'd rather not wait

³⁹ JA at 0711-16.

⁴⁰ *Id.*

⁴¹ The trial counsel only had them marked as Appellate Exhibits during deliberations when he was admitting them into evidence. They were never marked in front of the members. JA at 0043; Appellate Ex. CII, JA at 0908.

⁴² This included an instruction under M.R.E. 404(b) allowing the members to consider evidence of any one allegation for any or all of the other allegations. See Appellate Ex. XCIV at 11-12, JA at 0904-95.

⁴³ JA at 0030.

⁴⁴ JA at 0030; Appellate Ex. CI, JA at 0908.

a half hour[.]”⁴⁵ Both parties and the military judge agreed that only the muster reports were at issue.⁴⁶

Civilian defense counsel objected on the basis of hearsay. The trial counsel responded he could overcome that objection by producing a records custodian.⁴⁷ Civilian defense counsel further objected, stating that the military judge should use his discretion under M.R.E. 921(b) against introducing new evidence:

I mean, my argument was based upon the evidence that was before the court, not something that was not before the court. So now do I get a new argument? Does trial counsel get a new argument? Do I get to bring in rebuttal witnesses? Where do you stop?⁴⁸

The military judge summoned the members and told them the other documents would not be entered into evidence, but “regarding the muster reports, we are working on them, so I don’t have an answer for you yet.”⁴⁹ The members resumed deliberating at 0935.⁵⁰ Meanwhile, the Government and defense argued over the accuracy of the reports. Each side presented a witness and each witness indicated the reports were untrustworthy.

Outside the presence of the members, the Government called Ms. Deloris Wilson, an administrative assistant at the Oceana

⁴⁵ JA at 0032.

⁴⁶ JA at 0034.

⁴⁷ JA at 0035.

⁴⁸ JA at 0038-39.

⁴⁹ JA at 0040.

⁵⁰ *Id.*

Medical Clinic.⁵¹ Ms. Wilson described how she received morning reports from each section of the various clinics and transposed and saved them on the shared drive space on her computer.⁵² She would save the morning reports in a folder bearing the name of the relevant month and the file name would bear the date.⁵³ The same day she was called to testify, she created the morning reports the Government sought to have admitted by accessing the shared drive and printing the files for 24 February, 10 March, 17 March, 13 April, and 4 May.⁵⁴

These reports purported to show the following information about some of the allegations:

HM2 Bess's Time and Place of Work			Alleged Victim	Pros. Exhibit #	Identity of X-ray tech at Issue?
Date	Clinic	Status			
24-Feb-11	Oceana	Late Stay/Special Detail	P.G.	26	Yes
10-Mar-11	Oceana	Late Stay/Special Detail	LS3 D.B.	27	Yes
17-Mar-11	Oceana	Present	O.L.S.	28	No
13-Apr-11	Dam Neck	Present	LCpl J.E.	29	No
4-May-11	Oceana	Present	B.S.	30	Yes

Because the morning reports had no entry indicating the date, she handwrote the date on the reports that corresponded with the file name.⁵⁵ She was unaware of situations in which people who were not present were marked as present and people

⁵¹ Ms. Wilson's testimony: JA at 0056-66.

⁵² JA at 0058-59

⁵³ JA at 0059.

⁵⁴ See Pros. Ex. 26, 27, 28, 29, 30, JA at 0876-85; Appendix.

⁵⁵ JA at 0061.

who were marked as only late when they were not present.⁵⁶ When asked if she could "[i]n any manner determine whether or not these muster reports are accurate as to who was present for their full shift that particular day?" she answered only, "No."⁵⁷

The defense renewed its hearsay objection, arguing the Government had not established sufficient foundation. Civilian defense counsel added:

If these documents are presented, Your Honor, then I would ask that this--Ms. Wilson testify in front of the members, and I have a Petty Officer Odom, who is noted as being the individual--the LPO who submitted two of these muster reports and is available to testify.⁵⁸

The defense then called HM1 Cedric Odom, the individual who prepared two of the five muster reports.⁵⁹ The members were not allowed to see his testimony, either. HM1 Odom testified about the muster reports, and indicated the following:

- they were riddled with missing entries for personnel, indicating they were not filled out properly,⁶⁰
- the department heads were supposed to call around to their subordinate sections and get accurate word from those section leaders, but that did not always happen,⁶¹

⁵⁶ JA at 0065.

⁵⁷ JA at 0066.

⁵⁸ JA at 0068.

⁵⁹ HM1 Odom's testimony: JA at 0069-84.

⁶⁰ JA at 0071.

⁶¹ JA at 0072-3.

- even when that did happen, that did not mean the department heads had physical accountability for the personnel on the muster reports,⁶²
- the use of the term "late stay/special detail" could mean personnel working later shifts, but it usually meant a supervisor did not want to mark down personnel as "UA" when they weren't accounted for at 0800, but were expected to arrive soon,⁶³
- the muster reports were really only a snapshot of where personnel may or may not have been at 0800 on any given day,⁶⁴
- and that the muster reports were kept on the shared drive that everyone in the clinic could access and change them.⁶⁵

HM1 Odom also recalled two incidents where the First Class Petty Officers "kind of got reamed by the chain of command" for improperly completing the muster reports.⁶⁶ As a result, the old method of "calling each department" was replaced with more reliable "face-to-face musters."⁶⁷ Thus, "in the March, February timeframe of 2011" according to HM1 Odom, the muster reports were simply not accurate or trustworthy.⁶⁸

The military judge heard argument from both parties. The Government believed it had laid the appropriate foundation and civilian defense counsel repeated his objection that these

⁶² JA at 0074.

⁶³ JA at 0078-83.

⁶⁴ JA at 0074.

⁶⁵ JA at 0077.

⁶⁶ JA at 0081.

⁶⁷ *Id.*

⁶⁸ *Id.*

documents did not satisfy the requirements of M.R.E. 803(6).

The military judge disagreed and stated:

So at this point I'm going to admit these into evidence. And one reason that -- I understand there is some issue with -- these aren't perfect documents and so forth, but we're not going to give any explanations. I'm just going to simply hand these to the members. So if they ask for explanation, I want these witnesses available to give it, if requested.⁶⁹

The civilian defense counsel noted one final objection for the record.⁷⁰ The military judge responded by telling him he was being overruled, in part, because he made such a "big deal" of the muster reports in his closing argument.⁷¹ At 1316, the members were brought in and handed the muster reports without any explanation or instruction that they could ask for further explanation.⁷²

Just thirty-three minutes after receiving the muster reports, the members passed their findings worksheet to the military judge.⁷³ They returned the following findings:

⁶⁹ JA at 0081.

⁷⁰ JA at 0089-90.

⁷¹ JA at 0090. Civilian defense counsel's closing argument occupies forty-two pages of the record. JA at 0774-0816. Approximately one page (two percent of the total) discusses the muster reports and HM2 Bess's testimony. JA at 0789-90.

⁷² JA at 0091.

⁷³ JA at 0093.

Complaining Witness	Allegation	Finding	Identity of Tech at Issue?
P.G.	observing her nude body	Guilty	Yes
	assault consummated by battery	Not Guilty	
ASM2 A.L.	observing her nude body	Guilty	Yes
LS3 D.B.	attempt to observe her nude body	Guilty	Yes
LCpl J.E.	observing her nude body	Guilty	No
	assault consummated by battery	Not Guilty	
	attempted vaginal penetration	Not Guilty	
B.S.	observing her nude body	Guilty	Yes
LCpl A.A.	attempt to observe her nude body	Guilty	No
O.L.S.	observing her nude body	Not Guilty	No
	assault consummated by battery	Not Guilty	

Summary of Argument

The military judge abused his discretion by admitting the muster reports. These reports did not qualify as a hearsay exception under M.R.E. 803(6) because they were untrustworthy. The reports were simply not prepared in a way that normal, and legally admissible, business records are--and thus, cannot qualify under the exception. The Government's witness testified that they were unreliable as did a defense witness.

Even if, as a matter of law, the muster reports were admissible, it was error for the military judge to prevent HM2 Bess from attacking the accuracy of the reports before the factfinder. The military judge violated HM2 Bess's due process and Sixth Amendment rights. An accused is entitled to cross-

examination and confrontation of the witnesses and evidence against him, to present witnesses in his own defense, and to comment on evidence in closing arguments. The military judge deprived HM2 Bess of all these rights.

The error was prejudicial, in part, because the military judge granted the Government an instruction under M.R.E. 404(b) that allowed evidence of any one specification to be used as evidence for all of the specifications. Thus this Court can assume the muster reports contributed to each of HM2 Bess's convictions. Additionally, the significant problems and weaknesses in this case were shored up by the muster reports-- the very same reports HM2 Bess was prevented from attacking.

In analyzing the admission of evidence during deliberations, this Court should adopt the following rule. During deliberations, evidence is only admitted properly if:

- 1) the accused has had a full and fair opportunity before the finder-of-fact to contest the evidence or testimony through cross-examination,
- 2) the accused has had the opportunity to present witnesses or evidence in his own defense against the new evidence,
- 3) the accused has an opportunity to comment to the finder-of-fact about the newly admitted evidence, and
- 4) the right of an accused to ensure the reliability of the evidence by subjecting it to an adversary proceeding before the trier of fact was not undermined.

Here, none of the above were met. Therefore, this Court should set aside the findings and sentence.

Argument

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE ADMISSION OF THE MUSTER REPORTS, AND COMMITTED CONSTITUTIONAL ERROR WHEN HE DENIED PETTY OFFICER BESS THE OPPORTUNITY TO ATTACK THE ACCURACY OF THAT EVIDENCE BEFORE THE FACTFINDER.

Standard of Review

This Court reviews the admission of business records under M.R.E. 803(6) for an abuse of discretion.⁷⁴ "[An] error of constitutional magnitude must be tested for prejudice under the standard of harmless beyond a reasonable doubt. The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" ⁷⁵ This Court reviews *de novo* whether a constitutional error was harmless beyond a reasonable doubt.⁷⁶

⁷⁴ *United States v. Grant*, 56 M.J. 410, 413 (C.A.A.F. 2002).

⁷⁵ *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) (citing *Chapman v. California*, 368 U.S. 18, 24 (1967); *United States v. Sidwell*, 51 M.J. 262, 265 (C.A.A.F. 1999); *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)).

⁷⁶ *United States v. (Jason) Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002).

Discussion

A. The morning reports did not qualify as a hearsay exception under Military Rule of Evidence 803(6) because the circumstances of their preparation made them untrustworthy.

Morning reports are normally admitted as a hearsay exception under M.R.E. 803(6), "unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness."⁷⁷ If a document, such as a morning report is (1) "prepared in the normal course of business;" (2) was made "at or near the time of the events it records;" and (3) was based on the "personal knowledge of the entrant or an informant who had a business duty to transmit the information to the entrant," then it may fall within the exception.⁷⁸

However, a document that meets all three requirements can still be excluded if "the source of the information or the method or circumstances of preparation make it untrustworthy."⁷⁹ In fact, the "principal precondition to admissibility" is that the record has "sufficient indicia of trustworthiness to be

⁷⁷ Mil. R. Evid. 803(6).

⁷⁸ *Hertz v. Luzenac America, Inc.*, 370 F.3d 1014, 1017 (10th Cir. 2004).

⁷⁹ *Echo Acceptance Corp. v. Household Retail Servs.*, 267 F.3d 1068, 1090 (10th Cir. 2001).

considered reliable."⁸⁰ Merely "some indicia" of the trustworthiness of the documents is insufficient for admission.⁸¹

Here, the circumstances behind the muster reports indicates a lack of trustworthiness. The method of compiling the information for the morning reports was itself untrustworthy and was simply not performed "consistently and conscientiously."⁸² The term "morning reports" in the military implies a certain level of trustworthiness, only because of their consistent and conscientious compilation and preparation.

For example, every morning the Marines of 1st platoon, Lima Company, Third Battalion, Second Marine Regiment, would normally physically muster in a platoon formation. The platoon sergeant would pass this word to the company clerk who would enter everyone's status into a written or electronic report. The company First Sergeant would glance at it before the report was sent to the battalion S-1 office. The battalion would then compile all the reports and send them up to the Regiment, the Division, and higher up. The reports are credible because this happens the same way every day and the information, at its

⁸⁰ *Saks Int'l. v. M/V 'EXPORT CHAMPION'*, 817 F.2d 1011, 1013 (2nd Cir. 1987).

⁸¹ *United States v. Pelullo*, 964 F.2d 193, 201 (3rd Cir. 1992).

⁸² *United States v. Ramsey*, 785 F.2d 184, 192 (7th Cir. 1986) (Easterbrook, J.) (occasional entry on desk calendar not admissible as business record when made at the whim of the writer and not with regularity that supports reliability).

heart, relies on the platoon sergeant physically ensuring accountability of his Marines--which he has a duty to do.

Here, there were no physical musters, nor were physical musters even possible.⁸³ The health clinics were organized into departments, one of them being the clinical services, or "ancillary" department.⁸⁴ The ancillary department contained the laboratory, radiology, and physical therapy sections in both Oceana and Dam Neck.⁸⁵ HMI Odom was sometimes the ancillary lead petty officer, despite working in another section, and was required to call each of the ancillary sections for the muster report.⁸⁶ He, or whoever compiled the muster report information, relied solely on a section supervisor to tell them who was present.⁸⁷

The reports did not reflect whether personnel who were running late were marked as "present" or "late stay."⁸⁸ "Late stay/special detail" meant that an individual was not at work by 0800 because he had a later work schedule.⁸⁹ Of course, in reality, it just as often meant an individual was running late and his supervisor was "covering" for him.⁹⁰ The reports only

⁸³ JA at 0073.

⁸⁴ JA at 0077.

⁸⁵ *Id.*

⁸⁶ JA at 0077-78.

⁸⁷ JA at 0073.

⁸⁸ JA at 0076.

⁸⁹ JA at 0078.

⁹⁰ JA at 0079-80.

reflected a snapshot of 0800 each morning--when they were due.⁹¹ The reports do not indicate if the individual ever showed up for work, left immediately after 0800, or worked at a different clinic for the rest of the day.⁹²

The reports were also saved on a shared "public drive" for over two years where they were accessible (and able to be changed) by anyone in the hospital with computer access.⁹³ Printouts of computer records may be untrustworthy due to errors from data entry. In a U.S. Court of Appeals for the Sixth Circuit case, when a custodian conducting data entry testified she was accurate and double-checked her data entry, the printouts were admissible.⁹⁴ The finder-of-fact was allowed to determine if any inaccuracies affected the "weight of the printouts."⁹⁵ Here, Ms. Wilson could not say whether the reports were accurate⁹⁶ or if anyone else had accessed them on the public drive⁹⁷ in the two years since the data was originally entered.

⁹¹ JA at 0082.

⁹² JA at 0082-83.

⁹³ JA at 0077.

⁹⁴ *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988).

⁹⁵ JA at 0156.

⁹⁶ JA at 0066. Even if Ms. Wilson testified that her data-entry was perfectly accurate, this only extends to *her* business duty and the "fact that it may be recorded with scrupulous accuracy is of no avail" if the "supplier of the information does not act in the regular course." *Romano v. Howarth, et al.*, 998 F.2d 101, 108 (2nd Cir. 1993).

⁹⁷ JA at 0058.

When asked, Ms. Wilson could not say if the muster reports were "accurate as to who was present for their full shift that particular day."⁹⁸ HM1 Odom also testified at the Article 39(a), UCMJ, session that they were untrustworthy.⁹⁹ But the record also indicates that even the Government itself thought these muster reports were untrustworthy.

According to HM1 Odom, the method of calling around to each section to complete the muster reports was unsatisfactory to the command because this method rendered the reports untrustworthy.

[w]e got—kind of reamed by the chain of command, and all the first classes then said, to make sure our personnel is there, we started doing face-to-face musters instead of, you know, me calling each department saying, like you know, who is here or who is not here.¹⁰⁰

If the method of preparation was so untrustworthy to the Government in the "March, February timeframe of 2011,"¹⁰¹ that it ordered remedial measures,¹⁰² then how can it now credibly argue

⁹⁸ JA at 0066.

⁹⁹ When the individual responsible for the information in the document denies that the information is accurate, the "circumstances indicate the document may be untrustworthy." *McNeese v. Reading and Bates Drilling Co.*, 749 F.2d 270, 275 (5th Cir. 1985) (explaining individual whose name appeared on accident report denied preparing it, signing it, and did not know source of information contained in it).

¹⁰⁰ JA at 0081.

¹⁰¹ *Id.*

¹⁰² The remedial actions taken should bear heavily against the Government. Subsequent remedial measures after "an injury" can be so dispositive that evidence of remediation is suppressed at trial. Mil. R. Evid. 407. Commenting on the more practical reason for the identical Federal Rule of Evidence 407, Judge

that those same reports were trustworthy? Why are the reports not trustworthy for administrative purposes, but trustworthy enough for a court-martial?

B. It was constitutional error to prevent Petty Officer Bess from attacking the accuracy of the muster reports before the members.

HM2 Bess is entitled to have the finder-of-fact decide the weight and credibility of all evidence presented against him. The military judge's acquiescence to a one-sided presentation of evidence by the Government completely undermined this fundamental right.

1. The military judge prevented Petty Officer Bess from cross-examining the Government's records custodian about the muster reports.

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."¹⁰³ Here, HM2 Bess's confrontation right is not necessarily just the right to cross-examine the custodian to observe her demeanor¹⁰⁴ or

Posner writes, "the victim of the accident . . . will sue the injurer and make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger." *Flamino v. Honda Motor Co.*, 733 F.2d 463, 470 (7th Cir. 1984). Here, HM2 Bess was unable to make "devastating use" of these remedial actions because the military judge kept this information from the finder-of-fact.

¹⁰³ *United States v. Vazquez*, 72 M.J. 13, 23 (C.A.A.F. 2013) (citing *Maryland v. Craig*, 497 U.S. 836, 845 (1990)).

¹⁰⁴ *Vazquez*, 72 M.J. 13 at 21.

challenge any testimonial statements,¹⁰⁵ but to confront the non-testimonial statements contained in the muster reports.

The primary method of confronting the evidence is to cross-examine the custodian.¹⁰⁶ The standard for non-testimonial statements is whether they fall within a firmly-rooted hearsay exception or bear other particularized guarantees of trustworthiness.¹⁰⁷ Therefore, the analysis returns to the trustworthiness of the muster reports.

There was simply no way for the members to learn the muster reports were untrustworthy without cross-examination of the custodian in their presence. On cross-examination, the members would have learned the custodian only input the information she received¹⁰⁸ and could not vouch at all for the accuracy of the reports.¹⁰⁹ They would have also learned the custodian was unaware that "people would be marked as present when they were not present" and "marked as late because they were not present...because putting them down as 'not present'...gets

¹⁰⁵ *Crawford v. Washington*, 541 U.S. 36 (2004). Appellant does not concede that the muster reports are non-testimonial. The handwritten dates--the only writing that makes the report of any evidentiary value--was certainly "made in response to a prosecutorial inquiry" in that Ms. Wilson was asked to write it down for the court-martial so that the document could be produced at trial.

¹⁰⁶ *United States v. (Judy) Hall*, 58 M.J. 90, 93 (C.A.A.F. 2003) (cross-examination at the core of the Confrontation Clause).

¹⁰⁷ *Ohio v. Roberts*, 448 U.S. 56 (1990).

¹⁰⁸ JA at 0064.

¹⁰⁹ JA at 0066.

somebody in trouble."¹¹⁰ The members would have also seen the custodian respond combatively to HM2 Bess's counsel.¹¹¹

Cross-examination would have given the members the ability to evaluate the muster reports for weight and credibility. The U.S. Court of Appeals for the Sixth Circuit reached the same conclusion in *United States v. Stavroff*.¹¹² That Court found the admission of business ledgers did not violate Rule 803(6), in large part, because the jury watched the defense cross-examine the evidence. Stavroff contended the ledgers were untrustworthy because they did not have names showing who made the entries. The Sixth Circuit held there was no evidence of inaccuracy in the recording of the data for the ledgers, but also that after cross-examination, "the jury remained free to assign whatever weight it found appropriate to the evidence."¹¹³ HM2 Bess's members were not as free as the *Stavroff* jurors.

¹¹⁰ JA at 0065.

¹¹¹ Ms. Wilson first agreed that a name should accompany the report for it to be filled out properly. When counsel pointed out that one of the reports did not have a name, she said that it "doesn't have to be." JA at 0063-64.

¹¹² 149 F.3d 478 (6th Cir. 1998).

¹¹³ *Stavroff*, 149 F.3d at 484. The opinion suggests that the records custodians were subject to cross-examination. This inference is even more reasonable in that one of the other challenges on appeal was the trial judge's limitation of cross-examination of another government witness in a different matter. If the trial judge had limited, or prohibited, cross-examination of the records custodian, it is likely it would have been raised as an issue.

In fact, the military judge "unreasonably restricted [HM2 Bess's] ability to cross-examine witnesses and violated his Sixth Amendment rights."¹¹⁴ In *United States v. Israel*, this Court held that an accused was deprived of his constitutional rights when he was prevented from cross-examining a Government drug laboratory expert about previous, but unrelated, laboratory mistakes on urinalysis reports. This cross-examination was potentially "relevant and admissible to attack the general presumption of regularity" of the substance of the report.¹¹⁵ The same is true, here.

In *Israel*, the appellant was "precluded . . . from responding to the Government's case because they kept from him the tools he needed to attack the reliability of the urinalysis process."¹¹⁶ HM2 Bess suffered the same harm. Here, as in *Israel*, "arguments that the process", be it urinalysis reports or muster reports, "has had irregularities in the past are better made to the fact-finder."¹¹⁷

2. The military judge prevented Petty Officer Bess from putting on a witness in his own defense.

HM2 Bess's civilian defense counsel asked the military judge if HM1 Odom (along with the custodian) could testify in

¹¹⁴ *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005).

¹¹⁵ *Id.* at 489.

¹¹⁶ *Id.* at 491.

¹¹⁷ *Id.*

front of the members.¹¹⁸ This request was denied. HM2 Bess has the "right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."¹¹⁹

It is "undeniable that a defendant has a constitutional right to present a defense"¹²⁰ and the Sixth Amendment's guarantee of compulsory due process "includes both the right to compel the attendance of defense witnesses and the right to introduce their testimony into evidence."¹²¹ It is also undeniable that HM1 Odom had relevant testimony that went directly to the weight and credibility the members should have given the muster reports. The military judge denied the members this testimony.

The Constitution requires that criminal defendants are "afforded a meaningful opportunity to present a complete defense."¹²² Few things could have been more meaningful to HM2 Bess's complete defense on the crucial evidence of the muster reports than a witness with first-hand knowledge of their untrustworthiness.

¹¹⁸ JA at 0068.

¹¹⁹ *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (quoting *Washington v. Texas*, 338 U.S. 14 (1967)).

¹²⁰ *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001).

¹²¹ *Dimberio*, 56 M.J. at 24 (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994) (internal quotations omitted)).

¹²² *United States v. Jones*, 52 M.J. 60, 63 (C.A.A.F. 1999) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984) (internal quotations omitted)).

3. The military judge prevented Petty Officer Bess from commenting on the evidence after all of it was admitted.

The military judge not only prevented HM2 Bess from cross-examining a witness against him and presenting his own witnesses, but he also prevented HM2 Bess from fully arguing on the charges against him based on all the evidence. "Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."¹²³ The military judge stripped HM2 Bess of his Sixth Amendment rights but also his right under R.C.M. 919 "to make reasonable comment on the case . . . after the closing of the evidence."¹²⁴

In *Herring v. New York*, the Supreme Court held that the right of an accused to make a closing argument implicates the Sixth Amendment right to counsel.¹²⁵ In emphasizing the importance of a criminal defendant's right to a closing, the Court stated:

For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade

¹²³ *United States v. Tefteau*, 58 M.J. 62, 67 (C.A.A.F. 2003) (quoting *Dunn v. United States*, 442 U.S. 100 (1979)).

¹²⁴ R.C.M. 919(a) and (b) (emphasis added).

¹²⁵ 422 U.S. 853 (1975).

the trier of fact that there may be reasonable doubt of the defendant's guilt.¹²⁶

The military judge deprived HM2 Bess of his right to make a closing argument after all of the evidence, to include the muster reports, was admitted. This right is so fundamental, that when an accused is completely deprived of his right to make a closing argument, reversal is required regardless of prejudice.¹²⁷ Here, HM2 Bess was able to make a closing argument, just not one where he could attack a critical piece of evidence against him.

4. All of the above errors were constitutional errors.

There is no doubt that a constitutional error occurred here. Suppose that during the Government's case-in chief, it laid foundation and had these muster reports admitted into evidence. At the end of a perfunctory direct examination, the defense counsel rose to cross-examine the custodian, but the

¹²⁶ *Herring*, 422 U.S. at 862.

¹²⁷ *United States v. Arbolaez*, 450 F.3d 1283 (11th Cir. 2006) (denial of right to make closing argument to finder of fact is denial of accused's Constitutional right to a defense); *Hunter v. Moore*, 304 F.3d 1106 (11th Cir. 2002) (complete denial of right to make closing is denial of fundamental Constitutional right requiring reversal regardless of prejudice); *People v. Stevens*, 338 Ill. App. 3d 806 (1st Dist. 2003) (same); *Hardeman v. State*, 281 Ga. 220 (Geo. 2006) (abridgment of right to make closing not to be tolerated); *State v. Webster*, 218 W.Va. 173 (W.Va. 2005) (abridgement of right cannot be cured by remand for new closing argument); *cf. Palma v. State*, 280 Ga. 108 (Geo. 2005) (presumption of harm requiring new trial can only be overcome if abridgment was not total and evidence so overwhelming that any version of events different from Government's is virtually without belief).

trial counsel asked for an Article 39(a), UCMJ session. At the 39(a), the military judge said, "I understand there is some issue with -- these aren't perfect documents and so forth, but we're not going to give any explanations. I'm just going to simply hand these to the members."¹²⁸ Then the military judge refused to allow any cross-examination of the custodian in front of the members.

Further imagine that during the defense case-in chief, HM2 Bess attempted to call HM1 Odom as a witness to testify about the inaccuracies and untrustworthiness of the muster reports, but the military judge refused to allow HM1 Odom to testify. And finally, imagine if during closing, the military judge prohibited the defense from arguing to the members about the muster reports. Would there be any doubt that HM2 Bess's due process rights were violated, or that his rights under the Sixth Amendment to confront witnesses or present witnesses in his own defense were violated?

The only difference, here, is that this all happened during deliberations. This makes the violations worse, because HM2 Bess had no ability to recover from these violations during the trial.

¹²⁸ JA at 0088.

C. It is reasonable to believe Petty Officer Bess was harmed when he was prevented from challenging the very evidence the members requested.

This Court can conduct an independent review of the impact of these constitutional errors.¹²⁹ Because the Government benefitted from a constitutional error, it bears the burden of demonstrating harmlessness beyond a reasonable doubt.¹³⁰ The Government must show that admitting the muster reports, while not allowing HM2 Bess to attack their accuracy before the members, had "no causal effect upon the findings. Specifically, the Government must demonstrate that there was no reasonable *possibility* that [the error] contributed to the contested findings of guilty."¹³¹

The Government cannot meet its high burden for two reasons; first, it requested the military judge instruct the members pursuant to M.R.E. 404(b), and second, its case was weak, circumstantial, and poorly investigated.

1. It is reasonable for this Court to conclude that the M.R.E. 404(b) instruction meant the muster reports possibly contributed to the guilty findings.

The five muster reports provided unchallenged evidence of HM2 Bess's whereabouts for three of the alleged victims: P.G. on February 24, 2011, LS D.B. on March 10, 2011, and B.S. on May 4,

¹²⁹ *United States v. Kreutzer*, 61 M.J. at 299.

¹³⁰ *Id.* (citing *Chapman v. California*, 368 U.S. 18, 24 (1967)).

¹³¹ *Kreutzer*, 61 M.J. at 299 (citing *Gutierrez v. McGinnis*, 389 F.3d 300, 307-08 (2nd Cir. 2004)) (emphasis in the original).

2011. Whether HM2 Bess was the x-ray technician for O.L.S. (acquittal) and LCpl J.E. (partial acquittal) was not in dispute.

The military judge granted the Government's request to have an M.R.E. 404(b) instruction. This meant that evidence of any one allegation was able to be used "for the limited purpose of its tendency, if any, to: identify the accused as the person who committed the other offenses, to prove a plan or design of the accused regarding the other offense, and to prove that the accused intended to commit the offenses."¹³² If the muster reports tended to show guilt on any single allegation, then that evidence in turn could be used for every other allegation, particularly to identify HM2 Bess.

a. ASM2 A.L.

ASM2 A.L. never reported what happened to her. She was contacted by NCIS over eight months after her exam.¹³³ She claimed that NCIS agents never told her the name of her technician, but that she "relearned" HM2 Bess's name "when we [she and the NCIS agents] started talking about the whole situation."¹³⁴ ASM2 A.L. never participated in a photographic line-up. The only identification she ever made of her technician was pointing-out HM2 Bess at the Article 32 hearing,

¹³² Appellate Ex. XCIX at 11, JA at 0904.

¹³³ JA at 0112.

¹³⁴ JA at 0112, 0119.

fifteen months after her exam, and at the court-martial, two years after her exam.¹³⁵ Each time, HM2 Bess was flanked by his defense counsel.¹³⁶

ASM2 A.L. could not remember whether the technician offered her a female standby for the exam.¹³⁷ A member asked why she could remember the technician's description, but not any details about a female technician from the same day.¹³⁸ She replied, "Because this was two years ago and they never asked me if I knew specific details about the female."¹³⁹ When the trial counsel asked her if the technician had "what appeared to sound like a foreign accent" (as HM3 Philogene did)¹⁴⁰ she answered, "I don't remember."¹⁴¹ Notably, the x-ray images showed, not HM2 Bess's marker, but a marker that belonged to someone else.¹⁴² It is reasonable to believe that if the members used the muster reports on any single guilty finding, that those guilty findings aided them in their decision to find guilt on this particular specification.

¹³⁵ Appellate Ex. CVI at 6; JA at 0102-03. During the court-martial, she made her identification even before being asked by the trial counsel.

¹³⁶ Appellate Ex. CVI at 7, JA at 1210.

¹³⁷ JA at 0132-33.

¹³⁸ JA at 0101. Member question is Appellate Ex. LV, JA at 0888.

¹³⁹ JA at 0130.

¹⁴⁰ Appellate Ex. CVI at 2, JA at 1206.

¹⁴¹ JA at 0127.

¹⁴² JA at 0126.

b. LS3 D.B.

LS3 D.B. also never reported this incident to anyone and never participated in a photographic lineup. She also only identified HM2 Bess at the Article 32 hearing and at the court-martial, fifteen months and over two years, respectively, after her exam.¹⁴³ She could only recall that her technician was a black male, an HM2,¹⁴⁴ whom she believed was wearing "peanut butters", or the Navy Service Uniform.¹⁴⁵ The x-ray marker shows, not HM2 Bess's marker, but one that appears "DM8."¹⁴⁶ It was the trial counsel who told her that HM2 Bess was the name of her technician.¹⁴⁷

It is important to remember that the Government only charged HM2 Bess with *attempting* to view LS3 D.B. in the nude. During her exam, she claimed that the technician asked her to sign a consent form because the x-rays required her to be completely nude.¹⁴⁸ She declined to do so and had her x-rays taken with her clothes and gown on.¹⁴⁹ Even if the technician was, in fact, HM2 Bess, but he is not the person who committed any of the other crimes, then this looks much less like an

¹⁴³ See Appellate Ex. CVI at 6, JA at 1210. LS3 D.B.'s exam was on or about March 10, 2011, and she gave her NCIS statement eight months later on November 17, 2011.

¹⁴⁴ JA at 0241.

¹⁴⁵ JA at 0243.

¹⁴⁶ Pros. Ex. 7, JA at 0846-47.

¹⁴⁷ JA at 241.

¹⁴⁸ JA at 221.

¹⁴⁹ JA at 223.

attempt to view LS3 D.B. in the nude, and more like an orders violation or failing to follow the clinic's procedures.

c. P.G.

P.G. also did not make a report of her visit to anyone and never participated in a photographic lineup. Her only identifications of HM2 Bess were similar in time and manner to ASM2 A.L. and LS3 D.B.¹⁵⁰

Initially she claimed she spoke with NCIS only two months after her visit, but then said she could not remember how many months it was.¹⁵¹ It was actually eight months.¹⁵² NCIS agents told her other "girls" had similar stories as hers.¹⁵³ She claimed to recall that her x-ray technician's name started with a "B", but that one of the NCIS agents "filled in the blanks" that his name was "Bess."¹⁵⁴

During cross-examination, she admitted to making a false accusation in her NCIS statement. She originally claimed that Mr. Rosenthal,¹⁵⁵ one of the clinic's civilian employees, also

¹⁵⁰ Appellate Ex. CVI at 5, JA at 1209; JA at 0453. Like ASM2 A.L., P.G. identified HM2 Bess at the court-martial even before being asked by the trial counsel.

¹⁵¹ JA at 0465, 0471.

¹⁵² Appellate Ex. CVI at 5, JA at 1209. Her exam was on or about February 24, 2011, and she was interviewed by NCIS on October 26, 2011.

¹⁵³ JA at 0473-75.

¹⁵⁴ JA at 0453-54, 0487-88.

¹⁵⁵ When Mr. Rosenthal testified, he stated that he was interviewed by NCIS after P.G. gave her statement. NCIS never informed him that he was suspected of any crimes or advised him

took x-rays of her while her breasts were exposed. When confronted about her false statements, she began crying.¹⁵⁶ The military judge granted trial counsel's request for a recess, where she was able to collect herself for twenty-four minutes before continuing.¹⁵⁷ The exam markers on her x-rays show "DM5" and "DM8" rather than HM2 Bess's skull and crossbones markers or Mr. Rosenthal's "OC4" markers.¹⁵⁸ It is simply unreasonable to believe there was no possibility that P.G.'s allegations were unaided by some M.R.E. 404(b) evidence.

d. LCpl J.E.

LCpl J.E. alleged that HM2 Bess observed her nude body, assaulted her by touching her knee and waist while she was nude, and twice attempted to penetrate her vagina with his fingers while she was flat on her back and nude on an exam table.¹⁵⁹ The members only convicted HM2 Bess of observing her in the nude.

LCpl J.E. never reported this traumatic event to anyone for three months. She claimed to have decided to report this only

of his rights. JA at 0616. Mr. Rosenthal testified that he demanded to know if he had been accused by a patient of wrongdoing, because he would initiate a civil lawsuit if there was an allegation. JA at 0626. He noted that P.G.'s CHCS record showed that he was the arriving and departing technician and he testified as to the significant reliability problems with these records. Pros. Ex. 12; JA at 0618-19.

¹⁵⁶ JA at 0485.

¹⁵⁷ JA at 0486-87.

¹⁵⁸ Pros. Ex. 13, JA at 0864-68; JA at 0611; Defense Ex. E, JA at 0886.

¹⁵⁹ Charge Sheet, JA at 0010-13.

after she attended a brief where a uniformed victim advocate stated he "had just recently dealt with a case where an x-ray technician . . . told someone they had to be nude."¹⁶⁰ In her Request Mast form, she specifically named "Navy tech Bess" a name she remembered from three months prior.¹⁶¹

Additionally, LCpl J.E. was in the same training command as another complaining witness, LCpl A.A. The two had at least one mutual friend--LCpl Mosely.¹⁶² LCpl A.A. testified that she learned that LCpl J.E. had requested mast from LCpl Mosely.¹⁶³ LCpl Mosely also told her that he and LCpl J.E. "had dated...for a while."¹⁶⁴ But LCpl J.E. not only denied ever dating LCpl Mosely, she denied ever telling him anything about her alleged incident.¹⁶⁵ Under cross-examination, she admitted it was possible that she actually discussed the alleged incident with LCpl Mosely.¹⁶⁶

Finally, a civilian employee, Ms. Lozada, acted as a same-sex standby and completely contradicted LCpl J.E.'s testimony.

¹⁶⁰ JA at 0525.

¹⁶¹ Appellate Ex. LXXXI, JA at 0889-90.

¹⁶² LCpl A.A. described LCpl Mosley as "one of my friends." JA at 0410-11.

¹⁶³ JA at 0410-14.

¹⁶⁴ JA at 0410-11.

¹⁶⁵ JA at 0528, 0529-30.

¹⁶⁶ JA at 0529-30.

Ms. Lozada remembered LCpl J.E.'s visit because her last name was the same as a prominent basketball player.¹⁶⁷

The members already rejected most of LCpl J.E.'s testimony. It is reasonable to think that the muster reports or the M.R.E. 404(b) evidence possibly contributed to the guilty findings for observing her in the nude.

e. LCpl A.A.

Without the muster reports and M.R.E. 404(b) evidence, LCpl A.A.'s allegation cannot reasonably be seen as an attempt to observe her "genitalia, buttocks, and nipples" as charged.

LCpl A.A. testified that when she spoke to the clinic supervisor, HM1 Oliver, she told her, "I just don't understand. I want to clarify with you, under the circumstances, if there should be an x-ray taken where a patient or an individual would have to be completely naked."¹⁶⁸

HM1 Oliver remembered the conversation differently. She testified that LCpl A.A. complained about the words HM2 Bess used: "I almost got you naked for nothing," rather than actually attempting to get her completely nude for an x-ray exam.¹⁶⁹ As a remedial action, she gathered the technicians and told them, "Please don't use the word 'naked,' 'undressed' would be more

¹⁶⁷ JA at 0636.

¹⁶⁸ JA at 0408.

¹⁶⁹ JA at 0604-05.

suitable."¹⁷⁰ Mr. Rosenthal, present at the counseling, recalled HM1 Oliver's version of events, rather than LCpl A.A.'s.¹⁷¹

HM1 Oliver also testified that she would have a duty under a NAVMED Instruction to immediately report a complaint such as LCpl A.A. claimed to have made.¹⁷² She did not make a report.

The crux of LCpl A.A.'s complaint was that HM2 Bess used the word "naked" rather than took some preparatory steps to attempt to observe her "genitalia, buttocks, and nipples." The Government presented no evidence of HM2 Bess's intent for this specification. All evidence for the intent element logically came from evidence of the other alleged crimes pursuant to M.R.E. 404(b). Not only is it reasonable that the muster reports and the M.R.E. 404(b) evidence possibly contributed to the conviction--it is the only possibility.

¹⁷⁰ JA at 0602.

¹⁷¹ Appellate Ex. XCIV, JA at 0893, ("I guess HM2 Bess misunderstood and told her to disrobe and at some point used the word naked during his conversation with the female Marine. HM1 Oliver called us all into the office to advise us of the problems with using that verbiage.").

¹⁷² JA at 0601; Appellate Ex. XCI, JA at 0891. In contrast, HM1 Oliver did report the complaint from O.L.S.

2. The muster reports, left unchallenged, purported to show that HM2 Bess was, undoubtedly, at work at the time and place alleged by the Government.

The unchallenged muster reports purport to show HM2 Bess was available to be P.G.'s x-ray technician,¹⁷³ available to be LS3 D.B.'s x-ray technician,¹⁷⁴ and available to be B.S.'s x-ray technician.¹⁷⁵ The muster reports also show that it was likely HM2 Bess was available to be B.S.'s x-ray technician where HM3 Philogene was likely not available.¹⁷⁶ The muster report for May 4, 2011, shows HM2 Bess as "present" at Oceana, but HM3 Philogene as "late stay/special detail."¹⁷⁷ B.S.'s x-ray exam was sometime between 0940 and 1122.¹⁷⁸

It is entirely reasonable the members concluded that because that particular muster report put HM2 Bess at the scene of the crime and excluded HM3 Philogene, that HM2 Bess, and only HM2 Bess, was the x-ray technician who was committing all the misconduct.

During the court-martial, the members saw many documents, such as the x-rays and the CHCS reports. Each of these documents had problems with accuracy and trustworthiness for

¹⁷³ Pros. Ex. 26, JA at 0876-77.

¹⁷⁴ Pros. Ex. 27, JA at 0878-79.

¹⁷⁵ Pros. Ex. 30, JA at 0884-85.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Pros. Ex. 8, JA at 848-50. B.S. testified that her exam was in the "early afternoon...maybe from 11 to 1 o'clock." JA at 0271.

determining who committed the misconduct. The x-rays for P.G., ASM2 A.L., and LS3 D.B. did not have HM2 Bess's distinctive x-ray marker affixed to them.¹⁷⁹ Mr. Rosenthal and HM1 Oliver told the members that the CHCS reports were unreliable.¹⁸⁰ HM1 Brewer testified that the most accurate way to determine who was working as a technician was using the watchbills--which had been destroyed long ago.¹⁸¹ The defense theme was that the Government had the wrong person. But, now, the Government provided the members the answer to their question--and the answer appeared to come through the unchallenged and, presumably, reliable and trustworthy muster reports.

Even more important is the timeline of the members' deliberations.¹⁸²

- 0755: Members begin deliberations.
- 0906: Members request muster reports and continue deliberations.
- 0935: Military judge tells members he is "working on" the muster reports.
- 1316: Members receive muster reports and resume deliberations.**
- 1349: Members announce findings.**

¹⁷⁹ See Pros. Ex. 13, 3, 7, JA 0864-68, 0831-35, 0845-47.

¹⁸⁰ JA at 0619; 0585.

¹⁸¹ JA at 0389-90.

¹⁸² Timeline from JA at 0030, 0031, 0040-41, 0091, 0093.

Once they received the reports, the seven members managed to (1) review the five single copies of the muster reports (the record does not indicate that copies were made for each member) without knowing about their untrustworthiness or any explanation of what they reflected or meant, (2) continue deliberations, (3) vote on the three Charges, for a total of eleven separate specifications in secret ballot following the military judge's instructions and consistent with R.C.M. 921(c), (4) alert the military judge they had reached a verdict, and (5) reassemble in the courtroom with all parties present in only thirty-three minutes. It defies reason and common sense that there was "no reasonable *possibility* that [the muster reports] contributed to the contested findings of guilty."¹⁸³

D. This Court should apply basic due process to the admission of evidence during deliberations.

The four-factor test under *United States v. Lampani*¹⁸⁴ is appropriate to analyze whether a military judge should admit evidence during deliberations. However, this Court should now articulate a similar test to review the manner in which military judges admit such evidence.

This Court can be satisfied that admission of evidence by the Government during deliberations is proper only if:

¹⁸³ *United States v. Kreutzer*, 61 M.J. at 299 (citing *Gutierrez v. McGinnis*, 389 F.3d 300, 307-08 (2nd Cir. 2004)) (emphasis in the original).

¹⁸⁴ 14 M.J. 22 (C.M.A. 1982).

- 1) the accused has had a full and fair opportunity before the finder-of-fact¹⁸⁵ to contest the evidence or testimony through cross-examination,
- 2) the accused has had the opportunity to present witnesses or evidence in his own defense¹⁸⁶ against the new evidence,
- 3) the accused has an opportunity to comment to the finder-of-fact about the newly admitted evidence,¹⁸⁷ and
- 4) the right of an accused "to ensure the reliability of the evidence" . . . "by subjecting it to an

¹⁸⁵ Mil.R.Evid. 104(c), "*Weight and credibility*. This rule does not limit the right of a party to introduce before the members evidence relevant to weight and admissibility"; see also, *United States v. Lubich*, 72 M.J. 170, 175 (C.A.A.F. 2013) ("Once this preliminary standard for reliability was established, the defense had the opportunity to attack the perceived weaknesses in the case through cross-examination of [the witness]," and "Once these exhibits were admitted, it was then up to the members to determine the true authenticity and probative value of the evidence based on [the witness'] testimony.") (emphasis added).

¹⁸⁶ *United States v. Brewer*, 61 M.J. 425, 429-30 (C.A.A.F. 2005) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.")); see also, Mil.R.Evid. 611(a) ("The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation *effective for the ascertainment of the truth*...[.]") (emphasis added); Mil.R.Evid. 614(a) ("The military judge may, *sua sponte*, or at the request of the members or the suggestion of a party, call witnesses, and *all parties are entitled to cross-examine witnesses thus called*.") (emphasis added).

¹⁸⁷ R.C.M. 919. From the Discussion, "If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal." Here, the trial counsel was allowed to introduce new evidence, (after) closing, but the military judge prohibited any "reply in rebuttal."

adversary proceeding before the trier of fact" was not undermined.¹⁸⁸

Applying that test, here, it is clear the military judge erred in his administration of the court-martial. A military judge may only properly exercise his role as the gatekeeper of evidence if that evidence is subject to an adversarial process.

This Court should adopt such a test because of the nature of courts-martial. Military efficiency requires courts-martial to depart from some aspects of the civilian system for deliberations -- two of the most obvious being the requirement the Government only persuade two-thirds of a panel for a conviction¹⁸⁹ and the impossibility under the Rules for a "hung jury."¹⁹⁰

The court-martial system invites members to seek additional evidence during deliberations. On such occasions, an accused is still entitled to fundamental due process and an adversarial proceeding if his constitutional rights are to be protected. Here, they were not.

¹⁸⁸ *Maryland v. Craig*, 487 U.S. 836 (1990).

¹⁸⁹ R.C.M. 921(c)(2)(B) for non-capital offenses.

¹⁹⁰ *United States v. Jones*, 33 C.M.R. 389, 391 (C.M.A. 1963) ("in effect, ... there may be no 'hung jury' on the question of guilt or innocence").

Conclusion

The military judge abused his discretion by improperly admitting the muster reports. This caused a constitutional error that this Court should rectify by setting aside the findings and sentence.

John J. Stephens

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APPENDIX

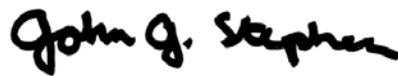
(1) Prosecution Exhibits 26 - 30.

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 July 10, 2015.

CERTIFICATE OF COMPLIANCE

This brief complies with the word count limitations of Rule 24(c)(1) as it contains 9,985 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word version 2003 with 12-point-Courier-New font.

A handwritten signature in black ink that reads "John J. Stephens". The signature is written in a cursive, slightly slanted style.

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Bar No. 36142

24 Feb 11

BMS OCEANA MUSTER REPORT

3/8/2013 11:02 AM

ANCILLARY			
OFFICER	ENLISTED	TOTAL	
1	11	12	
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0	0	0	
0	2	2	
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0	0	0	
0	0	0	
0	0	0	
0	0	0	
0	0	0	
1	18	19	
			11

HM1 ODOM

SUBMITTED BY:

CONTACT #: 3-3820

OFFICERS	Rank	Status
BUSTAMANTE	LCDR	PRESENT
KINNEY	LT	TAD

Name	Rank	Location/Date
------	------	---------------

ENLISTED	HM2	LATE STAY/SPECIAL DETAIL
VALINE	HM1	PRESENT
CAMPBELL (Pharmacy)	HM1	PRESENT
HARE (Phys.Thrpy)	HM1	PRESENT
JONES (Lab)	HM1	PRESENT
NIEVES (Pharmacy)	HM1	PRESENT
OLIVER (Radiology)	HM1	PRESENT
ODOM (Phys.Thrpy)	HM2	PRESENT
AESCHLIMANN (Pharmacy)	HM2	LATE STAY/SPECIAL DETAIL
BESS (Radiology)	HM2	LATE STAY/SPECIAL DETAIL
BREWER (Radiology)	HM2	PRESENT
GARCIA-VEGA (Lab)	CSM2	PRESENT
KIRCH (PhysThrpy) Limdu	STG2	PRESENT
OLLAR (PhysThrpy)	HM3	LATE STAY/S DAM NECK
GILFIN (Lab)	HM3	CONLV
HANNON (Pharmacy)	HM3	CONLV
NESTER (Lab)	EM3	PRESENT
NEUMANN Non-Deploy (OPT)	HM3	LATE STAY/S DAM NECK
PHILOGENE (Radiology)	HM3	PRESENT
REHM (Lab)	HM3	PRESENT
STAFFORD (Lab)		

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ATTACHED TAD:
RICHMOND (Phys. Thrpy.)

EMG

LATE STAY/S TPU (F/F THURS

CS Personnel

ASPA, JULIUS	PRESENT
BAILEY, ARTHUR	PRESENT
BLIZZARD, TONIA	LATE STAY/SPECIAL DETAIL
BLUETT, CATHERINE	PRESENT
BOUCHARD, SARA	PRESENT
EDWARDS, ROGER	PRESENT
ESPIRITU, DELFIN	PRESENT
EVANS, MICHAEL	PRESENT
HOLLY, LACY	PRESENT
JOHNSON, KENT	
LEHAN, CARLA	
MAROTTA, AMANDA	
PALETRACIO, ANGELICA	
THOMAS, ABBY	PRESENT
TURTURRO, MICHELLE	

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BM OCEANA MUSTER REPORT

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3/8/2013 11:08 AM

10 APR 11

ANCILLARY			
OFFICER	ENLISTED	TOTAL	TOTAL
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CONLV	0	1	1
TERMLV	0	0	0
LEAVE	0	2	2
DEPLOYED	0	0	0
SIQ	0	0	0
UA	0	0	0
TAD	0	0	0
DUTY	0	0	0
TOTAL	1	20	21

ATTACHED TAD: **HM1 Hare**

SUBMITTED BY: **HM1 Hare**

CONTACT #: **3-3820**

OFFICERS: BUSTAMANTE
KINNEY

Enlisted Name Rank Location/Date

VALINE HMC LATE STAY/SPECIAL DETAIL
 CAMPBELL (Pharmacy) HM1 LATE STAY/SPECIAL DETAIL
 HARE (Phys.Thrpy) HM1 PRESENT
 JONES (Lab) HM1 PRESENT
 NIEVES (Pharmacy) HM1 LEAVE
 OLIVER (Radiology) HM1 LIBERTY
 ODOM (Phys.Thrpy) HM1 LEAVE
 RESCHLIMANN (Pharmacy) HM2 LATE STAY/SPECIAL DETA DAM NECK
 BESS (Radiology) HM2 LATE STAY/SPECIAL DETAIL
 BREWER (Radiology) HM2 LATE STAY/SPECIAL DETA DAM NECK
 GARCIA-VEGA (Lab) HM2 LATE STAY/SPECIAL DETAIL
OLLAR (PhysThrpy) STG2 PRESENT
 GILPIN (Lab) HM3 LATE STAY/SPECIAL DETAIL
 HANNON (Pharmacy) HM3 LATE STAY/SPECIAL DETA EXAM
 NESTER (Lab) HM3 CONLV UNTIL 03/15/11
NEUMANN Non-Deploy (OPT) RM3 LATE STAY/SPECIAL DETA DAM NECK
 PHILOGENE (Radiology) HM3 LATE STAY/SPECIAL DETA EXAM
 REHM (Lab) HM3 LATE STAY/SPECIAL DETA EXAM
RICHMOND Non-Deploy (PT) EM3 LATE STAY/SPECIAL DETA EXAM
 STAFFORD (Lab) HM3 LATE STAY/SPECIAL DETA EXAM

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RMG PRESENT RESERVIST

GS Personnel
 ASPA, JULIUS PRESENT
 BAILEY, ARTHUR LATE STAY/SPECIAL DETAIL
 BLIZZARD, TONIA PRESENT
 BLOTT, CATHERINE LEAVE
 BOUCHARD, SARA LEAVE
 EDWARDS, ROGER PRESENT
 ESPIRITU, DELFIN PRESENT
 EVANS, MICHAEL PRESENT
 HOLLY, LACY LATE STAY/SPECIAL DETAIL
 JOHNSON, KENT LATE STAY/SPECIAL DETAIL
 LEHAN, CARLA PRESENT
 MAROTTA, AMANDA PRESENT
 PALERACIO, ANGELICA PRESENT
 THOMAS, ABBY LATE STAY/SPECIAL DETAIL
 TURTURRO, MICHELLE LATE STAY/SPECIAL DETAIL

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 PAGE 27 OF 28 PAGES

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17 MAR 11

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TERMLV	0	0	0
LEAVE	0	0	0
DEPLOYED	0	0	0
STQ	0	0	0
UA	0	0	0
TAD	0	0	0
DUTY	0	0	0
TOTAL	1	20	21

ATTACHED TAD: **HM1 Hare**

SUBMITTED BY:

CONTACT #: 3-3820

OFFICERS

BUSTAMANTE

KINNEY

LCDR

LT

Rank

Status

LATE STAY/SPECIAL DETAIL

PRESENT

Location/Date

Enlisted

VALINE

CAMPBELL (Pharmacy)

HARE (Phys.Thyry)

JONES (Lab)

NIEVES (Pharmacy)

OLIVER (Radiology)

ODON (Phys.Thyry)

AESCHLIMANN (Pharmacy)

BESS (Radiology)

BREWER (Radiology)

GARCIA-VEGA (Lab)

OLLAR (PhysThyry)

GILFIN (Lab)

HANNON (Pharmacy)

NESTER (Lab)

NEUMANN Non-Deploy (OPT)

PHILOGENE (Radiology)

REHM (Lab)

RICHMOND Non-Deploy (PT)

STAFFORD (Lab)

LATE STAY/SPECIAL DETAIL

PRESENT

PRESENT

PRESENT

LATE STAY/S NMCP

LATE STAY/SPECIAL DETAIL

LATE STAY/S OLD GYM

LATE STAY/S DAM NECK

PRESENT

LATE STAY/S DAM NECK

PRESENT

STG2

LATE STAY/SPECIAL DETAIL

LATE STAY/SPECIAL DETAIL

PRESENT

EM3

LATE STAY/S DAM NECK

PRESENT

LATE STAY/S DAM NECK

PRESENT

BMC OCEANA MUSTER REPORT

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ATTACHED TAD:

WEE (LAB)

RMG

PRESENT

RESERVIST

GS Personnel

ASPA, JULIUS

BAILEY, ARTHUR

BLIZZARD, TONIA

BLUETT, CATHERINE

BOUCHARD, SARA

EDWARDS, ROGER

ESPIRITU, DELFIN

EVANS, MICHAEL

HOLLY, LACY

JOHNSON, KENT

LEHAN, CARLA

MAROTTA, AMANDA

PALETRACIO, ANGELICA

THOMAS, ABBY

TURTURRO, MICHELLE

PRESENT

LEAVE

LEAVE

PRESENT

LEAVE

PRESENT

PRESENT

LATE STAY/SPECIAL DETAIL

LATE STAY/SPECIAL DETAIL

LATE STAY/SPECIAL DETAIL

PRESENT

PRESENT

LATE STAY/SPECIAL DETAIL

LATE STAY/SPECIAL DETAIL

13 Apr 11

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3/8/2013 10:57 AM

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SUBMITTED BY:

CONTACT #:

Officers
 BUSTAMANTE LCDR
 KINNEY LT

Status
 PRESENT
 PRESENT

Location/Date

Name	Rank	Location/Date
VALINE	HM2	LATE STAY/SPECIAL DETAIL
CAMPBELL (Pharmacy)	HM1	PRESENT
JONES (Lab)	HM1	PRESENT
NIEVES (Pharmacy)	HM1	DUTY
OLIVER (Radiology)	HM1	PRESENT
ODOM (Phys.Thyryp)	HM1	PRESENT
AESCHLIMANN (Pharmacy)	HM2	PRESENT
BESS (Radiology)	HM2	PRESENT
BREWER (Radiology)	HM2	PRESENT
GARCIA-VEGA (Lab)	HM2	PRESENT
GILPIN (Lab)	HM3	LATE STAY/SPECIAL DETAIL
HANNON (Pharmacy)	HM3	LATE STAY/SPECIAL DETAIL
NESTER (Lab) NonDeployable	HM3	PRESENT
NEUMANN Non-Deploy (OPT)	EM3	PRESENT
PHILOGENE (Radiology)	HM3	PRESENT
REHM (Lab)	HM3	PRESENT
RICHMOND Non-Deploy (PT)	EM3	PRESENT
STAFFORD (Lab)	HM3	PRESENT

ATTACHED TAD:
 WEE (LAB) RMG

PRESENT

RESERVIST

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 BLIZZARD, TONIA
 BLUETT, CATHERINE
 BOUCHARD, SARA
 EDWARDS, ROGER
 ESPIRITU, DELFIN
 EVANS, MICHAEL
 HOLLY, LACY
 JOHNSON, KENT
 LEHAN, CARLA
 MAROTTA, AMANDA
 PALERACIO, ANGELICA
 THOMAS, ABBY
 TURTURRO, MICHELLE

PRESENT
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 LATE STAY/SPECIAL DETAIL

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 PAGE 2 OF 2 PAGES

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04MAY 11

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TERMLY	0	0	0
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SIC	0	0	0
UA	0	0	0
TAD	0	1	1
DUTY	0	0	0
TOTAL	1	18	19

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SUBMITTED BY: HM1 ODOM

CONTACT #: 953-3820/3806

OFFICERS
 BUSTAMANTE LCDR Status
 KINNEY LT LEAVE
 PENA (Pharmacy DH) LT PRESENT

Location/Date

ENLISTED
 VALINE HMC LATE STAY/SPECIAL DETAIL
 CAMPBELL (Pharmacy) RM1 LATE STAY/SPECIAL DETAIL
 JONES (Lab) RM1 PRESENT
 NIEVES (Pharmacy) RM1 TAD
 OLIVER (Radiology) RM1 PRESENT
 ODOM (Phys.Thyryp) RM1 PRESENT
 AESCHLIMANN (Pharmacy) RM2 LEAVE
 BESS (Radiology) RM2 PRESENT
 BREWER (Radiology) RM2 LIBERTY
 GARCIA-VEGA (Lab) RM2 PRESENT
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 HANNON (Pharmacy) RM3 LATE STAY/SPECIAL DETAIL
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0884

PROSECUTION EXHIBIT 30
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 PAGE 1 OF 2 PAGES

BMS OCEANA MUSTER REPORT

3/8/2013 11:05 AM

ATTACHED TAD:

WEE (LAB) RMG
 FRYE BM2

PRESENT RESERVIST
 LATE STAY/S F/F TUES

GS Personnel

ASPA, JULIUS LEAVE
 BLIZZARD, TONIA PRESENT
 BLUETT, CATHERINE LATE STAY/SPECIAL DETAIL
 BOUGHARD, SARA PRESENT
 EDWARDS, ROGER PRESENT
 ESPIRITU, DELFIN LEAVE
 EVANS, MICHAEL PRESENT
 HOLLY, LACY LATE STAY/SPECIAL DETAIL
 JOHNSON, KENT LATE STAY/SPECIAL DETAIL
 LEHAN, CARLA PRESENT
 MAROTTA, AMANDA LATE STAY/SPECIAL DETAIL
 PALERACIO, ANGELICA LATE STAY/SPECIAL DETAIL
 THOMAS, ABBY PRESENT
 TURTURRO, MICHELLE PRESENT

0885

PROSECUTION EXHIBIT 30
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 PAGE 2 OF 2 PAGES