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 REPLY BRIEF USCA Dkt. No. 15-0372/NA Crim.App. No. 201300311

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

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Argument

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.

The Government's position is that the muster reports were accurate and trustworthy and, thus, indicated that HM2 Bess was the only possible culprit for at least one of the allegations. The Government's position is also that evidence from that allegation could be used to show identity, etc. for all the other allegations. Yet the Government somehow believes this evidence was so unimportant that HM2 Bess did not deserve basic due process in attacking the accuracy of this evidence. This leads to a contradictory and flawed argument characterized by three things: (1) a failure to recognize the weaknesses in its evidence, (2) a misunderstanding of how the muster reports were used at this court-martial, and (3) confusion about the use of Military Rule of Evidence (M.R.E.) 404(b) in this case.

A. The Government considers its case to be "overwhelming" and completely ignores the significant problems with its evidence.

Here, the Government does not objectively evaluate the evidence in its own case. At trial, it admitted the limitations of some of its evidence, but now considers it "overwhelming."[1]

[1] Appellee's Br. at 29.

The trial counsel admitted to the members that the CHCS documents were not "failproof" and conceded there was "extensive testimony" the records "could be changed."[2] The trial counsel also admitted the x-ray markers were not "failproof" and between the markers and the CHCS reports, "neither one of the two is necessarily definitive."[3] But now in its Answer, the Government overlooks the problems with its eyewitness identifications and the documentary evidence supporting its charges.

The Government's use of the term "overwhelming" is misplaced. First, the Government obtained convictions on only six of the eleven specifications. HM2 Bess was also acquitted of all the allegations stemming from O.L.S. (though, for some reason, the Government devotes several pages to recounting the details of her allegations).[4] Second, this Court's examples of "overwhelming evidence" greatly differ from the Government's current assertions. Such language usually involves confessions or incontrovertible physical evidence.[5]

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[2] JA at 0727.
[3] JA at 0728.
[4] Appellee's Br. at 14-16. Similarly, the Government recounts in detail the allegations from Lance Corporal J.E. that resulted in an acquittal. *Id*. at 9-11. Is the Government's position that evidence that fails to result in a conviction contributes to the "overwhelming evidence" that renders this error harmless?
[5] *See, e.g.*, *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014) (finding "overwhelming evidence" consisted of appellant's own chat-logs with undercover law enforcement posing as minor, where he urged her to create child pornography); *United States v. Clifton*, 71 M.J. 489 (C.A.A.F. 2013) (finding "overwhelming

1. The Government relies on eyewitness identifications that have a substantial likelihood of misidentification.

The Government repeatedly assures this Court that the eyewitness identifications are proof enough to render any error harmless. Yet the Government never explains *why* these eyewitness identifications are of such unimpeachable value. These identifications were *only* in-court identifications and were made a significant time after the brief medical exams:

Witness	Days After Medical Exam:		
	NCIS Statement	Article 32	GCM
P.G.	244	473	741
ASM2 A.L.	257	472	738
LS3 D.B.	252	459	726
B.S.	195	telephonic	671
Average	237 days (8 months)	468 days (15.6 months)	719 days (2 years)

[6]

In the eyewitness identifications where HM2 Bess's identity is at issue, the witnesses simply pointed out who was sitting in the position of the accused, flanked by his defense counsel. There were no pretrial lineups, photographic arrays, or any other reliable methods of identification.

Had these identifications been pretrial identifications and conducted in the manner they were at trial, they would have been so "unnecessarily suggestive" that they would have been

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evidence" where appellant made written confession to injuring his daughter); *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011) (finding "overwhelming evidence" where appellant admitted to having sex with a detainee, and Government presented video evidence of fraternization with detainees, etc.).

[6] JA at 1208-11.

considered "conducive to a substantial likelihood of misidentification."[7]

Common sense tells us that someone would not have a good memory of a brief medical appointment from months or years prior, unless something remarkable happened. None of these witnesses made any contemporaneous reports. It is reasonable to believe nothing so remarkable or traumatic happened to them during their brief appointments that would imprint the identity of their x-ray technician into their memories—-particularly for a cross-racial identification.[8] Indeed, these witnesses did not realize that any criminal conduct occurred during their exams until contacted by NCIS.[9] The Government ignores all of these problems and just declares, without explanation, that these identifications were so compelling that it did not matter that HM2 Bess was not allowed to attack the accuracy of some of the Government's other evidence.

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[7] Mil.R.Evid. 321(a)(1),(a)(2)(B), and (d)(2); *United States v. Baker*, 70 M.J. 283, 288 (C.A.A.F. 2011) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1973)).

[8] "The available data, while not exhaustive, unanimously supports the widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race." *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972) (Bazelon, C.J., concurring); *see also*, *United States v. Thompson*, 31 M.J. 125, 128 (C.M.A. 1990).

[9] Even in their NCIS statements, the witnesses only say their appointments were "uncomfortable and weird" (ASM2 A.L.), JA at 1017; that it was "odd" (LS3 D.B.), JA at 1021; or that it was "odd" and "awkward" (P.G.) JA at 1019. P.G. admitted to lying about a significant portion of her statement to NCIS, JA at 0484-85.

The Government is also silent about the practice of its agents–-namely the trial counsel, and NCIS agents--feeding information to witnesses to aid them in these "identifications." The Government has no plausible explanation for why O.L.S. said her technician had an accent or P.G.'s admission that she lied about her allegation against Mr. Rosenthal. These problems taint the Government's entire investigation, and call into question the identifications.

2. The Government also relies on records from the clinic that it previously conceded were not "failproof."

The Government admits that "some evidence suggested that the [x-ray] markers and recordkeeping were imperfect."[10] With respect to the x-ray markers, the Government thinks it is significant that the markers did not implicate any other single technician.[11] The clinic had a general problem with the misuse of other technician's markers.[12] This chart shows no discernible pattern of the x-ray markers:

[10] Appellee's Br. at 55.
[11] *Id*. The Government forgets that HM3 Philogene was counseled for, among other things, using the x-ray markers of other technicians. JA at 0344, 0614.
[12] HM1 Brewer and Mr. Rosenthal testified that markers were sometimes improperly used. JA at 0326-27; 0332-33. HM1 Oliver said the use of other technician's markers was not a problem "to her knowledge." JA at 0582-84.

Witness	Date	Identity at Issue?	X-Ray Marker Used
P.G.	24-Feb	Yes	"DM5" "DM8"
ASM2 A.L.	25-Feb	Yes	"DM8" "DM5" "SP1" "DM5"
LS3 D.B.	10-Mar	Yes	"DM8"
O.L.S.	17-Mar	No	"DM5"
LCpl J.E.	13-Apr	No	Skull & Crossbones
B.S.	4-May	Yes	Skull & Crossbones
LCpl A.A.	17-May	No	n/a

[13]

The x-ray markers fail to create a level of clarity or trustworthiness that renders this error harmless.

The same holds for the CHCS records and their inaccuracies. The Government thinks it significant that "the CHCS records all indicate that Appellant was the radiology technician who performed x-rays of the victims."[14] These CHCS records could *only* show HM2 Bess as the technician because his name, and only his name, was part of the original search parameter for the investigation.[15] The investigators used CHCS records with HM2 Bess's name as the foundation of their investigation before learning that the CHCS records were generally inaccurate.[16]

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[13] JA at 0865-68; 0832-35; 0846-47; 0840-41; 0874-75; 0852-53. No pattern is discernible, here, nor is one possible to discern. The Government would need to produce all of the x-ray records for every technician to make any argument about any kind of a pattern.

[14] Appellee's Br. at 53.

[15] JA at 1208.

[16] It is unknown if the NCIS agents ever learned of the CHCS records' inaccuracy during the investigation. It is possible the Government only learned of the problems with the CHCS records during the court-martial when the clinic workers testified. JA at 0857-59, 0323-24, 0379, 0447-48, 0585, 0618-19.

A thorough investigation,[17] including one with photographic identifications or lineups, could have provided more compelling evidence of who was responsible. The Government chose not to use these methods and took a case to court-martial that was less than "overwhelming."

B. The Government misunderstands the way the muster reports were used during the court-martial and during deliberations.

The Government makes several arguments about the accuracy of the muster reports and recasts HM1 Odom's testimony as establishing that the muster reports "did not contain inaccurate information."[18] This assertion ignores two facts. First, HM1 Odom testified that the muster reports were not accurate.[19] This Court should consider HM1 Odom's own words instead of what the Government believes he ought to have said. Second, the Government ignores that it previously believed the reports and the methods for collecting the information were inaccurate during the relevant time-period and took remedial measures.[20]

Moreover, the Government's arguments about the accuracy of the muster reports here are beside the point. HM2 Bess is

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[17] The Government could have obtained a search authorization to locate the "bogus consent forms" that it references repeatedly.
[18] Appellee's Br. at 36.
[19] *Id*.
[20] *Id*. The Government says the procedures "*may* have changed." (emphasis added). The record shows that the command, that is to say, the Government, changed the procedures because they were inaccurate. JA at 0081. Now, the Government appears to question the existence of its own remedial actions.

arguing what he would like to have said before the members. The Government's counter arguments are irrelevant because they are also things that it could have argued to the members if the court-martial had been a fair and adversarial process. The Government is stuck with what the muster reports purport to state on their face. It is stuck with that because that, and only that, is what the members had before them. The Government had its day in court. HM2 Bess did not. And the fact is, the muster reports, on their face, appear to assist the Government in excluding HM3 Philogene as a suspect and leaving only HM2 Bess.

However, the issue with the muster reports is that HM2 Bess was unable to attack their accuracy before the factfinder. The Government argues that certain aspects of the muster reports only affected the "weight and not the admissibility of the reports."[21] This is the precise problem. The members did not receive all the necessary information to evaluate the weight they should give the reports. If the reports are accurate, as the Government claims, how could they not have contributed to the guilty findings?

The Government concludes its interpretation of the muster reports with the argument that HM2 Bess should be satisfied because he "was able to cross-examine Ms. Wilson before the

[21] Appellee's Br. at 36.

admission of the evidence."[22] The Government does not explain how this cross-examination, which was not done in front of the members, allowed HM2 Bess to attack the accuracy and the weight the members should give the muster reports. In an Article 112(a), UCMJ, court-martial, should an accused be satisfied if he is only allowed to cross-examine the Government's drug-expert in an Article 39(a), UCMJ, session, but is prohibited from doing so in front of the members? How would he attack the accuracy of the urinalysis litigation package and defend himself against it?

Moreover, the Government contends that Ms. Wilson's handwritten notes "*merely* included the documents' existing date title."[23] The date on the muster reports is the key piece of writing that makes them of any evidentiary value. At trial, the Government told the military judge that the reports were "essentially meaningless" without the dates.[24] The Government's current position is like saying that a handwritten accession number or a handwritten nanogram level on a urinalysis litigation package was *merely* the handwritten information that previously existed somewhere on a shared network of computers for a couple of years. Foundation and the rules of evidence exist so that a finder-of-fact does not have to take the

[22] Appellee's Br. at 40.
[23] *Id*. (emphasis added).
[24] JA at 0044.

Government's word for hearsay documents and how much weight to give them.

The Government also insists that HM2 Bess was able to make a full defense at court-martial.[25] One could consider that he did make a full defense of all the evidence the Government put before the members. At least, that is, until deliberations. Then the Government got to admit additional unchallenged evidence.

The Government also misunderstands how damaging the existence of the muster reports was. It guts the defense's argument during closing that the muster reports must not exist or that if they do, they don't support a conviction.[26] The civilian defense counsel said, "If he [the trial counsel] had the records, I assumed he would have produced them in court."[27] HM2 Bess's counsel argued this because the Government did not present the reports, and merely implied their existence during HM2 Bess's cross-examination. The Government's ability to later present these reports to the members, especially unchallenged,

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[25] Appellee's Br. at 42, 43. The Government compares this case to an unpublished opinion from the U.S. Court of Appeals for the Ninth Circuit, *United States v. Sandoval-Gonzalez*, 95 Fed. Appx. 203, 204-05 (9th Cir. 2003), where a conviction was affirmed despite the appellant not being allowed to re-open closing argument on a derivative citizenship instruction that was properly denied. This unpublished case has no bearing on this case because the issue was collateral rather than a substantive argument about the Government's evidence.

[26] Appellee's Br. at 44.

[27] JA at 0790.

could have been a fatal blow to the credibility of HM2 Bess's counsel and any arguments he made.

C. The Government misunderstands how Military Rule of Evidence 404(b) functioned in this case.

The Government believes Petty Officer Bess has an "erroneous view of the effects of the Rule 404(b) instruction provided to the Members" resulting in a "bald suggestion that 404(b) created spillover."[28] But then the Government admits that Petty Officer Bess is "correct that his conduct toward one victim does demonstrate his intent to commit indecent acts with the other victims."[29] The Government specifically desired that the members use evidence for each specification as part of the "basis for finding guilt of another offense."[30] Yet, for some reason, it denies there was a spillover effect.

It is important for the Government to deny the obvious implications of the muster reports. If any one of the muster reports, on its face, indicates that HM2 Bess, and not HM3 Philogene, is the only possible suspect, then it is extremely likely the reports contributed to a finding of guilt for that specification. If so, then the members were instructed by the military judge at the behest of the Government to use that evidence in some way for each and every other allegation. The

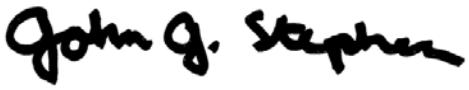
[28] Appellee's Br. at 54.
[29] *Id*. at 55.
[30] *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009).

muster reports speak for themselves. The problem here is that Petty Officer Bess was prohibited from responding.

Conclusion

The Government is so certain of HM2 Bess's guilt that it believes he is not entitled to the sort of trial where he is permitted to cross-examine certain witnesses or respond to certain evidence. While the Government may desire to "cut down every law in England" to get at HM2 Bess, this Court should be more circumspect and consider the precedent this case sets. If HM2 Bess is as guilty as the Government says he is, then it has little to fear in a court-martial where he is allowed to attack the accuracy of the Government's evidence before the factfinder--in other words, a fair trial.

WHEREFORE, Appellant asks this Honorable Court to reverse the opinion of the lower court and remand this case.



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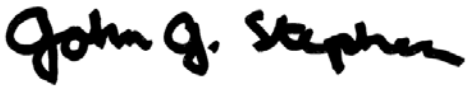
CERTIFICATE OF FILING AND SERVICE

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 August 20, 2015.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(b)(3) because it contains less than fifteen pages. 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 2010 with 12-point-Courier-New font.



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