IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF APPELLEE
v.	Crim.App. Dkt. No. 201300311
Pedro M. BESS, Hospitalman Second Class (E-5) U.S. Navy Appellant	USCA Dkt. No. 15-0372/NA

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

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7430, fax (202)685-7687
Bar No. 36051

MARK K. JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 31195

SUZANNE M. DEMPSEY
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 36266

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NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to 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, convicted Appellant, contrary to his pleas, of two specifications of attempting to commit an indecent act and four specifications of indecent acts, in violation of Articles 80 and 120, UCMJ, 10 U.S.C. §§ 880 and 920 (2006). The Members sentenced Appellant to reduction to pay-grade E-1, two years of confinement, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence on October 28, 2014. *United States v. Bess*, No. 201300311, 2014 CCA LEXIS 803 (N-M. Ct. Crim. App. Oct. 28, 2014). This Court granted review on May 26, 2015.

Statement of Facts

A. While serving as a radiology technician, Appellant had several female patients fully disrobe and attempted to have others fully disrobe under the pretense that it was required in order to take their X-rays.

Appellant was a radiology technician at the Oceana medical clinic and its satellite clinic at Dam Neck, Virginia. (J.A. 655.) While working as an X-ray technician, Appellant had several female patients fully disrobe for X-rays and positioned them to maximize the exposure of their breasts and genital areas.

X-rays performed at Dam Neck and Oceana never require that patients be completely nude and the clinics' radiology technicians were always expected to provide a gown in any circumstance when any clothing had to be removed. (J.A. 301-05, 593-94, 619-20.)

1. Appellant attempted to have Lance Corporal (LCpl) AA fully undress and expose herself.

LCpl AA went to the Dam Neck medical clinic because of a rib injury. (J.A. 392.) She received a series of X-rays over multiple days. (J.A. 392.)

On May 17, 2011, LCpl AA went to the Dam Neck clinic for another set of X-rays. (J.A. 393.) She was met by a "tall, real skinny, dark, African-American," with a strong accent that she believed was from "an African country." (J.A. 393.) The man with the accent took LCpl AA's X-rays while she was wearing her underwear, skivvy shorts, and a skivvy shirt.[1] LCpl AA was accustomed to removing her utilities, boots, and blouse for X-rays. (J.A. 393.) The X-rays the man with the accent took were the same X-rays LCpl AA was used to having and everything seemed very normal to her. (J.A. 394.)

LCpl AA was told to pick up her X-rays at the Oceana clinic later that day. (J.A. 394-95.) At the Oceana clinic, LCpl AA encountered Appellant. (J.A. 395.) He met her in the waiting room and told her that he would check on her X-rays for her. (J.A. 395-96.) Appellant returned shortly thereafter and told LCpl AA that her X-rays had not been completed and that he needed to take additional X-rays. (J.A. 397.)

LCpl AA followed Appellant to an examination room, where Appellant told her that she would need two sets of X-rays, one set wearing what she normally wore for X-rays, and one set for which she must be completely naked. (J.A. 398.) However, after LCpl AA partially undressed for the first set of X-rays,

[1] "Skivvies" are green shorts and T-shirts typically worn by Marines under their utilities and for physical training.

Appellant returned to tell her that the first set of X-rays was not needed and she should disrobe fully. (J.A. 398-99.)

LCpl AA was confused and followed Appellant into the hall, saying she did not understand. (J.A. 400.) Appellant asked LCpl AA to return to the examination room, where he reiterated that she needed to remove all of her clothes for a "deep tissue X-ray". (J.A. 401.)

LCpl AA continued to question Appellant about the requirement that she be completely naked for the X-ray. (J.A. 401.) Appellant then asked LCpl AA if she would be more comfortable with a female standby present. (J.A. 402.) LCpl AA responded that she would.[2] (J.A. 402.) Appellant said he would get a standby, but before he left, he asked LCpl AA who had sent her for X-rays. (J.A. 402.) LCpl AA described the tall man with the accent, which caused Appellant to respond, "Oh, the Haitian?" (J.A. 403.) Appellant then left, saying he would "check on it again." (J.A. 403.) When Appellant returned, he told LCpl AA that no new additional X-rays were needed and that it would take about fifteen minutes to print her original X-rays. (J.A. 404.)

LCpl AA was concerned and confused by her encounter with Appellant, so before receiving her X-rays, she left the clinic

[2] Appellant incorrectly states that LCpl AA declined a female standby. (Appellant's Br. at 4.)

to call her Staff Sergeant for advice. (J.A. 404.) She re-entered the clinic with another Lance Corporal to be a witness to her interactions with Appellant. (J.A. 406.) They noted the last name and rank on his utility uniform. (J.A. 406.) Then LCpl AA collected her X-rays from Appellant and left the clinic. (R. 409.)

Based on LCpl AA's report to her chain of command, investigators inquired into Appellant's misconduct. (J.A. 409.)

2. Appellant had Aviation Structural Mechanic Second Class (AM2) AL fully disrobe for her X-rays.

AM2 AL[3] went to the Oceana clinic on February 25, 2011, to have X-rays taken because she had back problems. (J.A. 98-100.) AM2 AL initially had two X-rays taken by a female technician. (J.A. 100.) She wore a gown and underwear for those X-rays. (J.A. 100.) AM2 AL then returned to work. (J.A. 101.)

That afternoon, AM2 AL received a call from Portsmouth Hospital, which supervised the two clinics, telling her that the doctors needed additional X-rays from a standing position to better assess her condition. (J.A. 101.) She returned to the Oceana clinic and was met by Appellant. (J.A. 102-03.)

Appellant took AM2 AL to an X-ray room and instructed her to remove all of her clothing. (J.A. 104.) AM2 AL did not suspect anything was amiss, so she disrobed completely and put

[3] AM2 AL had left active duty by the time of her testimony.

on a hospital gown. (J.A. 105.) However, when Appellant returned, he told AM2 AL that the doctor had requested the X-rays be taken without a gown and that he would have her sign a consent form acknowledging that. (J.A. 105.) He asked AM2 AL to remove the gown while he was retrieving the form. (J.A. 105.)

This "didn't seem right" to AM2 AL, but the fact that she had to sign an acknowledgement form from a doctor made her believe the practice was legitimate. (J.A. 105.) Thus, after Appellant left the room, AM2 AL removed her gown and sat in the room fully nude. (J.A. 105.)

Appellant returned with a form bearing the doctor's name which stated that the X-rays must be taken without clothing or a gown. (J.A. 106.) Appellant had AM2 AL sign the form and told her that the reason for having her nude was that the X-rays would be more clear. (J.A. 106.)

Appellant had AM2 AL pose in front of the standing X-ray machine in several positions, approaching her between each X-ray to reposition her. (J.A. 108-09.) Her breasts, buttocks, and genital area were exposed and the experience made her very uncomfortable. (J.A. 108-09.) When AM2 AL attempted to cover herself, Appellant told her not to. (J.A. 130-31.) At no time did Appellant offer AM2 AL a female standby. (J.A. 109.)

After Appellant showed AM2 AL her X-rays, she left the clinic. (J.A. 109.) She did not report the incident until she was contacted by investigators. (J.A. 111.)

3. Appellant had Logistics Specialist Second Class (LS2) D.B.[4] fully disrobe for X-rays.

LS2 DB went to the Oceana medical clinic on March 10, 2011, to have X-rays taken because of hip pain. (J.A. 216.) LS2 DB initially went to the clinic in the morning and was asked to put on two gowns to cover her because she was not wearing shorts. (J.A. 217.) However, because the X-ray machines required repair, she was asked to return later that day. (J.A. 217.)

LS2 DB returned to the Oceana clinic later that day. (J.A. 218.) She was met by Appellant. (J.A. 219.) He took LS2 DB to the X-ray room and had her change into a gown as she had before. (J.A. 220.)

After LS2 DB changed, Appellant returned to the X-ray room and gave her a "consent form" to sign, acknowledging that she agreed to remove all of her clothing and that there was no female standby available. (J.A. 221.) LS2 DB agreed and accepted that there was no standby available. (J.A. 221.) Appellant then told her to remove all of her clothing and left so she could do so. (J.A. 222.)

[4] LS2 DB was a Logistics Specialist Third Class (LS3) at the time of Appellant's misconduct.

LS2 DB was concerned because she had not been asked to remove all her clothes when she came in earlier that day. (J.A. 222.) She told Appellant she was uncomfortable, and he told her that he would try to "get the type of X-ray changed." (J.A. 222.) Appellant left, and returned a few minutes later saying that the type of X-ray had been changed. (J.A. 223.)

Appellant took the X-rays while LS2 DB was wearing a gown. (J.A. 224.) LS2 DB then received copies of her X-rays and left. (J.A. 224.) She did not report the incident until she was contacted by investigators. (J.A. 236.)

4. Appellant had Lance Corporal (LCpl) JE fully disrobe and he posed her in various revealing positions under the guise of taking her X-rays.

LCpl JE went to the Dam Neck clinic on April 12 and 13, 2011, to have X-rays taken because of hip pain. (J.A. 504-05.) On April 12, a tall African-American technician with a "Jamaican type accent" took a series of X-rays in which LCpl JE was in a "frog like [sic] position". (J.A. 505.) During these X-rays, LCpl JE was clothed in a skivvy shirt and disposable shorts provided by the clinic. (J.A. 506.) LCpl JE did not notice anything unusual about the X-rays. (J.A. 506.)

Later that day, LCpl JE received a call telling her that the X-rays did not turn out and needed to be retaken. (J.A. 506.) She returned to the clinic later that day and was met by Appellant. (J.A. 506-08.) Appellant took LCpl JE into an

examination room and told her that she needed to have “soft tissue X-rays” this time and that she would have to be nude. (J.A. 508.) Appellant told LCpl JE that she would need to sign a form consenting to being nude for the X-rays. (J.A. 508.)

Appellant then produced a consent form indicating that LCpl JE needed to be nude during the X-rays. (J.A. 509.) Appellant provided LCpl JE with a gown, but said it was to be used as a pillow and reiterated that she needed to be nude for the X-rays. (J.A. 510-11.)

Appellant had LCpl JE climb on the X-ray table and took X-rays of her in a “frog leg position” in which one leg was bent. (J.A. 512.) Appellant then took additional X-rays with both of her legs in a “frog position”. (J.A. 513.) Appellant physically manipulated LCpl JE’s legs to put her in the position he wanted. (J.A. 514.)

LCpl JE also testified that Appellant then showed her the X-rays and suggested that a gap between two vertebrae might be causing her pain. (R. 0515.) Appellant told LCpl JE that the condition might require surgery, which made her very anxious. (J.A. 515.) Appellant then told LCpl JE that there was a procedure they could use to take more accurate pictures to better diagnose the problem. (J.A. 515.) Appellant described a procedure in which he would insert his fingers into LCpl JE’s

vagina and take the picture at the moment when she winced. (J.A. 515.)

To LCpl JE, the procedure sounded like a pelvic exam. (J.A. 515.) She said that if the doctor believed she needed such a procedure, then she wanted to find out what was wrong. (J.A. 515.)

LCpl JE testified that Appellant then told her that the procedure could be performed as she lay on her back on the table, which would require more X-rays, or as she lay on her stomach in a "doggy style position", which would require fewer X-rays. (J.A. 516.) LCpl JE responded that she wanted to do whichever was faster. (J.A. 516.)

LCpl JE testified that Appellant positioned her on the table with a foam block beneath her pelvis "with [her] butt arced in the air." (J.A. 516.) Appellant then told her to spread her legs apart as he put gloves on. (J.A. 517.) LCpl J.E. was very uncomfortable, but she had gynecological examinations before, so it "just seemed like procedure." (J.A. 517.)

LCpl JE testified that as Appellant was touching her thigh, the phone rang, interrupting Appellant as he was about to digitally penetrate her vagina. (J.A. 517.) Appellant spoke briefly to the person on the phone, then returned to LCpl JE.

(J.A. 519.) Then the phone rang and once again interrupted Appellant. (J.A. 519.)

LCpl JE testified that Appellant told her it was the doctor and the radiologist on the phone arguing about whether she needed the "procedure". (J.A. 519.) Then he said he did not think she needed the "procedure" and that she should get dressed. (J.A. 519.) The phone then rang a third time and Appellant told the person on the line that LCpl JE was crying, did not want the procedure, and had already left. (J.A. 520.) He then told LCpl JE that the doctor did not believe she needed the "procedure", but that she could have it if she wanted. (J.A.A 520.) LCpl JE agreed to follow the doctor's advice and declined the vaginal penetration procedure Appellant had suggested. (J.A. 520.) Appellant then told LCpl JE that she could leave and did not need to check out with anyone. (J.A. 521.)[5]

After she left, LCpl JE had conversations with friends and family that made her realize that what Appellant did at the clinic was not right. (J.A. 524.) She broke down crying from embarrassment, believing she should have known that what happened "wasn't right". (J.A. 524.) LCpl JE reported the

[5] Appellant was acquitted of physically assaulting and attempting to physically assault LCpl JE.

incident later after a uniformed victim advocate gave a brief and mentioned similar incidents. (J.A. 525.)

5. Appellant had BS[6] fully disrobe for X-rays.

BS was an enlisted Navy airframer. (J.A. 247.) On May 4, 2011, BS went to the Oceana clinic to have X-rays as part of her application package to become an aircrew member. (J.A. 247.)

Appellant met BS at the clinic and took her to an examination room. (J.A. 248.) He told BS that she must remove her blouse, T-shirt, and bra for the X-rays. (J.A. 248.) BS challenged Appellant, noting that her sports bra had no underwire and should not interfere with the X-ray. (J.A. 249.) Appellant insisted that she must be naked for the X-ray. (J.A. 249.) BS removed her clothes, but used her arms and T-shirt to cover her breasts and genital area. (J.A. 250.) At the time, she believed Appellant was simply incompetent, and did not think anything more about the requirement that she had to fully disrobe. (J.A. 253.)

BS did not report the incident until she was contacted by investigators. (J.A. 255.)

[6] BS had divorced by the time Appellant was convicted. The initials she used at the time of Appellant's misconduct, when she was married, are used for consistency.

6. Appellant had PG fully disrobe for X-rays and manipulated her into revealing positions.

PG is the daughter of a Navy Commander. (J.A. 451.) She went to the Oceana clinic for X-rays on February 24, 2011 because of neck pain related to a car accident. (J.A. 452.)

At the clinic, Appellant and an older, white male technician met PG and took her to an examination room where they told her they would take chest X-rays. (J.A. 454.) They took several X-rays of PG while she was fully clothed, except for her jacket and bra, which she removed. After these X-rays, the white technician told PG that she could get dressed. (J.A. 456.)

When PG left the bathroom after getting dressed, the white technician was no longer there, and Appellant told PG that he was going to "take more invasive X-rays because [she] was in a head-on collision". (J.A. 456.) Appellant told PG that the doctor wanted to check every part of her body. (J.A. 456.) Appellant told PG to undress completely, and he stepped out of the room. (J.A. 456.)

PG had never received medical X-rays before, and she believed Appellant's explanation that her doctor wanted to check every part of her body, so she did not suspect anything was amiss. (J.A. 457.) She undressed completely and lay on the table as Appellant had instructed her. (J.A. 458.)

Appellant took several X-rays of PG, manipulating her into different positions as he did so. (J.A. 459.) He took one set of X-rays with PG's feet together and her legs spread out in a "frog position". (J.A. 460.) Appellant took additional X-rays of PG while she was on her stomach with a foam roller elevating her hips. (J.A. 461-62.)

The experience made PG very uncomfortable. (P.G. 463.) When Appellant began taking X-rays while PG was in the "frog position" with her genital area fully exposed, PG told Appellant she did not wish to continue the X-rays. (J.A. 464.) Appellant said that he would talk to the doctor. (J.A. 464.) Appellant returned shortly thereafter and said that PG could leave. (J.A. 464.)

7. OLS accused Appellant of having her fully disrobe in order to take her X-rays[7].

OLS was the daughter of a Navy Commander. (J.A. 135-36.) She was seventeen at the time of trial, and fifteen at the time of Appellant's misconduct. (J.A. 136-37.) OLS went to the Oceana clinic with her father on March 17, 2011, to have X-rays because she suffered from asthma and had fluid on her lungs. (J.A. 137.)

OLS testified that Appellant met her at the clinic and took her to an examination room. (J.A. 138-39.) OLS's father

[7] Appellant was acquitted of all misconduct involving OLS.

remained in the waiting room. (J.A. 139.) Appellant began to take X-rays, but told OLS that the machine was not working. (J.A. 140.) Appellant told OLS that she would need to remove her pants because her belt buckle was interfering with the machine. (J.A. 140.)

OLS testified that she removed her pants as Appellant instructed her, leaving her in her tank-top and underwear. (J.A. 141.) This made OLS feel strange, but she reasoned that "you can feel strange around doctors and it's still okay." (J.A. 443.) However, Appellant told OLS that the machine was still not working, and that she would need to remove her underwear and tank top. (J.A. 142.) OLS did as Appellant said. (J.A. 142.) Appellant continued taking X-rays, physically manipulating OLS into the positions he wanted her in. (J.A. 143.)

OLS testified that after Appellant took the X-rays, he showed them to her and told her she could leave. (J.A. 147.) After OLS left, she disclosed what had happened to her mother, who became very angry. (J.A. 149.) OLS eventually reported the event to investigators. (J.A. 149.)

The morning after OLS's X-rays, her mother, SS, went to the Oceana clinic. (J.A. 203.) She spoke with a female supervisor there, who looked up the name of the technician who performed the X-rays. (J.A. 204-05.) The X-ray technician was not

available, so SS left her number and asked that he call her. (J.A. 205.)

Later that day, SS received a phone call. (R. 205.) Appellant told SS that there was a gown available for OLS, but she had not put it on. (J.A. 206.)

B. The victims identified Appellant with varying degrees of specificity.

There were six uniformed radiology technicians at the Oceana and Dam Neck clinics at the time of Appellant's misconduct——Hospitalman First Class (HM1) Oliver, Hospitalman Second Class (HM2) Brewer, Hospitalman Third Class (HM3) Thomas, HM1 Bradford, HM3 Philogene, and Appellant. (J.A. 609.) Only five technicians worked at the Oceana clinic from February to May, 2011——HM1 Oliver, HM3 Philogene, HM1 Brewer, a civilian named Mr. Rosenthal, and Appellant. (J.A. 277.) HM3 Philogene and Appellant were the only two uniformed black men. (J.A. 277.) HM3 Philogene is tall and has a thick Haitian accent. (J.A. 277.) Appellant does not have an accent. (J.A. 277.)

After 1600, only one of the technicians in radiology would work at the Oceana clinic. (J.A. 0715, 278-79.) Similarly, only one radiology technician would work at the Dam Neck satellite clinic at a time, and that person would work from 0700 to 1530. (J.A. 280-81.)

1. LCpl AA identified Appellant by face and name.

At trial, LCpl AA remembered Appellant as an African-American man with skin that was lighter than the technician she encountered at the Dam Neck clinic. (J.A. 396.) She visually identified Appellant for the Members. (J.A. 397.) At the Article 32, UCMJ, investigation, LCpl AA identified Appellant by name, rate, and pay grade. (J.A. 1213.)

LCpl AA testified at trial that Appellant also was not as skinny as the African-American technician she had met at the Dam Neck clinic. (J.A. 396.) LCpl AA also visually identified Appellant during the court-martial. (J.A. 397.) At the end of her visit to the clinic, LCpl AA and her friend also noted Appellant's name and rank on his utility uniform. (J.A. 407.)

During her encounter with Appellant, Appellant referred to the tall African-American technician at Dam Neck as "the Haitian." (J.A. 403.) LCpl AA testified that this technician at the Dam Neck clinic had a "deep accent." (J.A. 429.)

Appellant acknowledged at trial that he spoke to LCpl AA about her X-rays, but suggested that the attempt to have her fully disrobe was based on a misunderstanding. (J.A. 687-93.)

2. AM2 AL identified Appellant by face and name.

At Appellant's court-martial, AM2 AL visually identified him as the X-ray technician in question. (J.A. 103.) She also

visually identified Appellant during the Article 32, UCMJ, investigation. (J.A. 1026.)

At trial, AM2 AL remembered that Appellant was wearing his HM2 insignia on his uniform when she went to him for X-rays. (J.A. 103.) She also remembered that he was a tall black man with short hair. (J.A. 103.) AM2 AL initially forgot Appellant's name, but recalled it when Naval Criminal Investigative Service (NCIS) agents interviewed her. (J.A. 119-20.) She did not remember his name at the time she made her statement, but recalled it later. (J.A. 120.) NCIS did not provide her with Appellant's name. (J.A. 119.)

In a statement to investigators, AM2 AL had identified Appellant as a black male and an HM2. (J.A. 1012, 1016.) Her CHCS medical records indicate that Appellant performed her X-rays between 1600 and 1800 on February 25, 2011. (J.A. 827-35.) The CHCS records detailed the arrival and departure of radiology patients and noted the technician performing their X-rays. (J.A. 447.) Radiology technicians were expected to personally check their patients in and out, though at times a technician might check a patient out for another technician. (J.A. 448.)

3. LS2 DB visually identified Appellant and remembered seeing him on other occasions.

At Appellant's court-martial, LS2 DB visually identified Appellant as the technician who took her X-rays. (J.A. 219.)

She remembered Appellant was African-American, about six feet tall, stocky, and was a Second Class Petty Officer. (J.A. 219.) She testified that Appellant did not have a noticeable accent of any kind. (J.A. 219.) LS2 DB also remembered seeing Appellant at the clinic on other occasions after she had her X-rays. (J.A. 224.)

In her statement to NCIS, LS2 DB also identified the technician as a stocky, black male HM2 who appeared to be in his mid-twenties. (J.A. 1014, 1021.) As at trial, LS2 DB visually identified Appellant at the Article 32, UCMJ, investigation as her X-ray technician. (J.A. 1213.)

LS2 DB's CHCS medical records indicate that Appellant performed her X-rays between 1645 and 1800 on March 10, 2011. (J.A. 843-847.)

4. LCpl JE visually identified Appellant and distinguished him from the other black uniformed technician, who had an accent.

LCpl JE visually identified Appellant during his court-martial. (J.A. 508.) She remembered that he had no noticeable accent. (J.A. 507.) This was different from the first technician she dealt with, who had what she described as something like a Jamaican accent. (J.A. 507.) In a written statement made to her command in July 2011, LCpl JE identified Appellant by name. (J.A. 889.)

LCpl JE's CHCS medical records indicate that Appellant performed her X-rays between 0900 and 1100 on April 13, 2011. (J.A. 871.)

5. BS described Appellant and testified that he did not have a not a foreign accent.

BS remembered the technician who took her X-rays as a light-skinned black man. (J.A. 248.) Trial Counsel did not ask her to visually identify him in court. (J.A. 248.) BS remembered that Appellant did not have a foreign accent, but perhaps was from "New York or somewhere like that". (J.A. 248.) She thought he was an HM3, but could not remember his rank with certainty. (J.A. 258.)

BS's CHCS medical records indicate that Appellant took her X-rays between 0930 and 1130 on May 4, 2011. (J.A. 849-53.)

6. PG visually identified Appellant and remembered that his name began with a B.

At Appellant's court-martial, PG visually identified him as her X-ray technician. (J.A. 453.) She remembered that he was a "younger, black guy" and that his name started with a B. (J.A. 454.) She had read the name on his uniform. (J.A. 454.)

In her statement to investigators, PG identified her X-ray technician as a black man who was approximately five feet nine inches tall and was no more than twenty-five years old. (J.A. 1013, 1018.) She also identified Appellant as the technician in question at the Article 32 hearing. (J.A. 1049.)

PG's CHCS medical records also indicate that Appellant took her X-rays at 1709 on February 24, 2011. (J.A. 862.)

7. OLS described Appellant and testified that her technician did not have an accent.

OLS identified the technician who took her X-rays as a tall African-American man with a shaved head. (J.A. 138.) She was not able to make a visual identification of Appellant as the X-ray technician at trial. (J.A. 200.) Also, OLS testified that the technician who took her X-rays did not have a noticeable accent. (J.A. 152.) However, she had previously told investigators that the technician had a Caribbean accent. (J.A. 154.) OLS explained that the idea that the technician had a Caribbean accent came from her parents, and that at the time she did not even know what a Caribbean accent was. (J.A. 153.)

SS did not remember the person who called her from the clinic having a Caribbean accent. (J.A. 209.) She believed that the suggestion that the person may have had a Caribbean accent came up during NCIS's investigation. (J.A. 210.)

OLS's CHCS medical records indicate that Appellant performed her X-rays between 0900 and 1030 on March 17, 2011. (J.A. 837-41.)

Appellant acknowledged at trial that he saw OLS, but denied that he had her undress during the examination. (J.A. 687.) He

also acknowledged calling her mother to discuss what happened. (J.A. 687.)

C. Markers on some of the X-rays indicate that Appellant was the technician who performed them.

The technicians at Oceana and Dam Neck used markers to verify which technician had performed X-rays. (J.A. 289.) The markers were leaded indicators placed on the X-ray to identify the technician who performed the X-ray directly on the image. (J.A. 289.) Each technician had a unique marker. (J.A. 289.) However, there were other markers not assigned to any of Appellant's coworkers that were left around the clinics by previous technicians who were no longer stationed there. (J.A. 292.) Appellant's unique marker bore his initials and a skull and crossbones. (J.A. 674.) HM3 Philogene used a marker that read "OC3" and Mr. Rosenthal's marker read "OC4." (J.A. 290-91.) HM1 Oliver's marker read "JO" and HM2 Brewer's marker read "SLB." (J.A. 290.)

AM2 AL and PG's X-rays were marked with markers reading "DM8," "DM5," and "SP1." (J.A. 832-35, 865-68.) LS2 DB's X-rays are marked with a marker reading "DM8." None of the radiology technicians at the Oceana or Dam Neck clinics used these markers to identify themselves. (J.A. 292-95.)

BS and LCpl JE's X-rays bore Appellant's marker. (J.A. 852-53, 874-75.)

D. The Military Judge admitted five muster reports over defense objection.

During his cross-examination of Appellant, Trial Counsel asked if Appellant was aware that muster reports indicated that he was working at the Oceana clinic on the mornings of March 17, April 13, and May 4, and on the afternoons of February 24 and March 10, all dates when the victims' X-rays were taken. (J.A. 711-16.) Trial Counsel did not seek to admit the muster reports.

During his closing argument, Civilian Defense Counsel commented on Trial Counsel's decision not to seek admission of the muster reports. (J.A. 789-790.)

During deliberations, the Senior Member submitted a question to the Military Judge asking if the Members would be allowed to view statements from the NCIS investigation, muster reports, counseling chits, or other documents used throughout the proceedings. (J.A. 31, 908.)

Both Parties initially agreed that these documents should not be admitted. (J.A. 32-33.) However, the Military Judge noted that the Members had a right to ask for evidence. (J.A. 34.) Trial Counsel then reiterated that the NCIS statements and counseling chits were clearly inadmissible, but noted that a foundation for the admission of the muster reports could potentially be established with additional evidence. (J.A. 35.)

Civilian Defense Counsel agreed that given the way Trial Counsel had used the muster reports, they were hearsay and lacked a proper foundation. (J.A. 37.)

The Military Judge asked Trial Counsel to produce the records and a custodian who might lay a foundation for them. (J.A. 41.) Civilian Defense Counsel objected that the case was closed and the reports should not be admitted. (J.A. 41.) He explained:

> My understanding [sic], the government does, in fact, have a custodian. Based upon the custodian being available, defense would still state its position, that the case is closed and the evidence should not be presented to the members. But if the court decides the evidence is to be presented to the members, the defense does not object on the grounds of foundation at this particular point. We have the muster reports.

(J.A. 41.) Civilian Defense Counsel later reiterated his argument that the Military Judge, as a matter of discretion, should not admit the muster reports, adding: "The [G]overnment utilized these rosters in a very limited format and very limited basis, did not utilize them in their case in chief. The only time they utilized them was on cross-examination." (J.A. 49.) The Military Judge then asked Civilian Defense Counsel whether he had any objection beyond that "big picture" objection. (J.A. 51.) Civilian Defense Counsel responded in the negative, adding:

> [I]f the court is going to allow any of these to come in, then my position is, I will not raise a foundation

> objection, and the evidence comes in without a foundation——a witness being put on the stand. They come in exactly as they are, no further explanation, not an explanation as to the dates or anything else—— no witness. They come in as they are. These are the documents used during the course of the trial.

(J.A. 51.)

After Trial Counsel contacted the records custodian, he informed the Judge that the muster reports as printed were "essentially meaningless" because they did not contain the date when they were produced, only the date when they were printed. (J.A. 44.) Accordingly, Trial Counsel intended to have the records custodian write the date for each report, which was contained in the electronic file name for each muster report's electronic file, on the printed copy of the report. (J.A. 45.)

The Trial Counsel then called Ms. Wilson, the administrative assistant for the Oceana and Dam Neck Clinics. (J.A. 57.) Ms. Wilson testified that she was responsible for producing muster reports to document accountability every morning for both clinics. (J.A. 58.) Every morning, Ms. Wilson saved the daily muster report as an Excel spreadsheet in a public drive dedicated to those muster reports. (J.A. 58.)

Ms. Wilson testified that she printed the muster reports, Prosecution Exhibits 26-30, (J.A. 876-84), and wrote the date at the top of each one. (J.A. 60-61.) The handwritten date was the date when each muster report was filed. (J.A. 61.) Ms.

Wilson acknowledged that she personally maintained the documents and that they were kept in the regular course of business. (J.A. 62.)

During cross-examination, Ms. Wilson agreed that there should be a name on the muster reports noting who submitted them, but that no name was present on Prosecution Exhibit 29, (J.A. 882). (J.A. 63.) However, she clarified that the person submitting the report did not have to be identified for her to see that everyone was accounted for. (J.A. 64.)

Ms. Wilson explained that she called each department every morning and asked them to submit the reports, which she compiled and then submitted to Portsmouth Hospital's muster report. (J.A. 64-65.) Ms. Wilson acknowledged that she could not guarantee the accuracy of the information submitted to her in the reports. (J.A. 65.)

Civilian Defense Counsel then objected that the United States had not established a sufficient foundation. (J.A. 67.) He argued that the United States had not demonstrated that the documents were sufficiently reliable. (J.A. 68.) Civilian Defense Counsel then added:

> And I do have another witness. 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 [Lead Petty Officer] who submitted two of these muster reports and is available to testify.

(J.A. 68.)

The Military Judge then asked Civilian Defense Counsel to call HM1 Odom. (J.A. 68.) HM1 Odom testified that he submitted the muster reports contained in Prosecution Exhibits 26 and 30, (J.A. 876, 884). (J.A. 70.) HM1 Odom explained that where there were missing entries, as for some of the individuals reported on Prosecution Exhibit 26, which indicated that the person responsible for their accountability did not know where that person was when the report was submitted. (J.A. 71.)

HM1 Odom explained that as the Assistant Lead Petty Officer for the "ancillary" medical services department, he would call each department to see who was present and would then submit the report. (J.A. 72.) HM1 Odom agreed that he relied on supervisors to provide the input for the reports, and that someone who was not present might be marked as present or "late stay" and that if someone took leave immediately after muster, that would not be reflected in the muster report. (J.A. 74.)

HM1 Odom also agreed that if Appellant arrived fifteen minutes late, he might be marked as "late stay/special detail", when HM1 Odom knew where he was but he was not physically present. (J.A. 76, 80.) However, if someone was not present at 0800 and nobody had spoken to him or her, that person would be marked as "UA" (unauthorized absence). (J.A. 82.) "Late stay/special detail" was usually used to document those who had

an alternative work schedule and did not begin work at 0800. (J.A. 78.) It could also mean the individual was taking a class at the hospital, working at the Dam Neck clinic, or doing something elsewhere on the base. (J.A. 78.)

HM1 Odom also could not attest that Appellant was present for his entire shift on the dates when he was marked present. (J.A. 76.)

Trial Counsel then moved to admit the muster reports, arguing that they were business records admissible under Military Rule of Evidence 803(6). (J.A. 85.)

Based on HM1 Odom and Ms. Wilson's testimony, Civilian Defense Counsel argued that the muster reports were not maintained or generated in the regular course of business. (J.A. 85.) He asserted that if the records were inaccurate, then they were not kept in the regular course of business. (J.A. 85-86.)

The Military Judge noted that Ms. Wilson testified to the procedure she personally used to generate the muster reports, and found that they were kept in the regular course of business. (J.A. 87.) The Military Judge explained that it is always possible to "lie" on a muster report or for someone to leave during the day——these did not mean that the requirements of Rule 803(6) could not be met. (J.A. 87.)

The Military Judge added: "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 [M]embers. So if they ask for explanation, I want these witnesses available to give it, if requested." (J.A. 88.)

Civilian Defense Counsel reiterated his objection that had the matter been litigated during the course of trial, he would have presented witnesses regarding the reports. (J.A. 89.) The Military Judge then explained that he was allowing the documents to be admitted in part because Civilian Defense Counsel had drawn the Members' attention to them in his closing argument. (J.A. 90.)

The Military Judge then admitted the five muster reports. (J.A. 91-92.)

Summary of Argument

The Members have a statutory right to ask for additional evidence and the Military Judge did not err in providing the Members with the muster reports. The reports were non-testimonial and did not trigger a right to confrontation. Also, while Appellant does have a right to present a full defense, any exclusion of witnesses was harmless, because the muster reports were of minor importance and were cumulative with the United States' overwhelming evidence. Where seven victims all identified Appellant with varying degrees of specificity, where

he used a common modus operandi to make his actions seem legitimate, and where the victims' identifications were supported by other documentary evidence, the muster reports simply could not have had any impact on the verdict.

Argument

THE MEMBERS HAVE A STATUTORY RIGHT TO REQUEST EVIDENCE, AND THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN PROVIDING THE MUSTER REPORTS TO THEM. ANY ERROR CAUSED BY REFUSING APPELLANT THE OPPORTUNITY TO CHALLENGE THE MUSTER REPORTS BEFORE THE MEMBERS WAS HARMLESS BEYOND A REASONABLE DOUBT BECAUSE OF THE EXCEPTIONAL STRENGTH OF THE UNITED STATES' CASE.

A. Standards of Review.

This Court reviews a military judge's decision to grant or deny the members' request for additional evidence for an abuse of discretion. *See United States v. Lampani*, 14 M.J. 22, 23 (C.M.A. 1982).

Similarly, this Court reviews a Military Judge's decision to admit evidence as a business record pursuant to Military Rule of Evidence 803(6) for an abuse of discretion. *United States v. Grant*, 56 M.J. 410, 413 (C.A.A.F. 2002) (citing *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001)). The proponent must demonstrate by a preponderance of the evidence that documents are records of regularly conducted activity meeting the foundational elements of Rule 803(6). *United States v. Tebsherany*, 32 M.J. 351, 355 (C.M.A. 1991).

Whether evidence constitutes testimonial hearsay is a question of law reviewed *de novo*. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009). However, failure to object forfeits the issue, and this Court reviews for plain error. *United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2011) (citation omitted). Here, Appellant objected to admission of the muster reports on foundation grounds, but not confrontation grounds. (J.A. at 85-90.) Accordingly, this Court should review that question for plain error, asking whether (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. *Sweeney*, 70 M.J. at 304.

B. The Military Judge did not err in admitting the muster reports requested by the Members because they were nontestimonial business records the Members had a statutory right to request.

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. *United States v. Martinsmith*, 41 M.J. 343, 347 (C.A.A.F. 1995) (citing Art. 46, UCMJ, 10 U.S.C. § 846). "On its face, this statute requires that a member's request for evidence be considered in light of presidential rulemaking pertaining to admissibility of evidence at courts-martial." *Id.*

Military Rule of Evidence 614(a) permits members to call witnesses, "and all parties are entitled to cross-examine witnesses thus called." *Id.* Rule for Court-Martial 921(b) also provides that "[m]embers may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request." "Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the objections of the parties to reopening the evidence are among the factors the trial judge must consider." *Lampani*, 14 M.J. at 26.

Here, while Appellant did object based on foundation, there was only limited delay associated with admitting the records and there was no claim of privilege that could have attached to the documents. Given the Members' statutory right to request evidence, the lack of delay, and the fact that Civilian Defense Counsel specifically referenced the documents in his closing argument, the Military Judge was well within his discretion to provide the Members the muster reports, which were nontestimonial business records.

1. The United States established that the muster reports were business records admissible under Rule 803(6).

At trial, the Government bears the burden of establishing an adequate foundation for admission of evidence against an accused. *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013) (citing *United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993)). The Government may meet its burden of proof with direct or circumstantial evidence. *Id*. at 150-51.

Military Rule of Evidence 803(6) provides that a record is not hearsay and is generally admissible where the proponent can establish that the record was "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

The business records exception should be "construed generously in favor of admissibility." *See United States v. Foerster*, 65 M.J. 120, 125 (C.A.A.F. 2007) (quoting *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1996)). Also, strict adherence to established procedures in creating a document is not required for the document to be qualified as a

business record. *See United States v. Weatherbee*, 10 M.J. 304, 306 (C.M.A. 1981).

The act of using a document and relying on its contents in the regular course of business is enough to satisfy the business record exception. *See Foerster*, 65 M.J. at 125 (citations omitted). Such reliance, in itself, also speaks directly to the issue of truthfulness. *See United States v. Grant*, 56 M.J. 410, 415 (C.A.A.F. 2002) (physician's reliance on drug screen report in patient's medical record indicated that report was reliable).

Here, contrary to Appellant's assertion, (Appellant's Br. at 18), the method of creating the muster reports was sufficiently trustworthy to meet Rule 803(6)'s requirements. The documents were kept daily in the regular course of business by a custodian who personally testified to the circumstances under which they were created. (J.A. 63-65, 87.) Ms. Wilson testified that she personally called each department every morning to solicit their input for the report, and spoke to the supervisors within those departments, such as HM1 Odom. (J.A. 58-65.)

The fact that Ms. Wilson did not personally witness those whose status was reported in the muster records is inconsequential. She and the command relied on the reports for determining accountability of their personnel, indicating that they regarded them as trustworthy. *See Foerster*, 65 M.J. at

125; *see also Grant*, 56 M.J. at 415. Further, those submitting the reports could have been subjected to false official statements charges or adverse administrative action for submitting inaccurate reports. *See Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1343-44 (Fed. Cir. 1999) (that servicemembers who submitted false claims could be fined or imprisoned indicated the trustworthiness of estimates attached to those claims).

Moreover, HM1 Odom testified to the process used to obtain personnel accountability before reports were submitted to Ms. Wilson. (J.A. 70-74.) While he initially testified that marking someone as "late stay" might indicate that the person was missing and nobody knew where they were, (J.A. 81), he later clarified that if someone in his section was marked as "late stay" it meant he had spoken to them. (J.A. 82.) If they were absent without talking to him, they would be marked as "UA". (J.A. 82.)

Further, HM1 Odom testified that when entries were left blank, it meant that the person responsible for their accountability did not know where that person was when the report was submitted, and "didn't want to vouch for it". (J.A. 71.) This demonstrates both that it was not the practice of supervisors at the clinics to submit false reports, and that they understood there were consequences for false reporting.

Indeed, HM1 Odom's testimony establishes that the reports did not include inaccurate information——when a servicemember was not present, they were not marked present. It is inconsequential whether they remained for their entire shift as the muster reports do not purport to establish the location of any servicemember for an entire day or entire shift. (J.A. 876-85.) Likewise, the fact that muster procedures may have changed at some point to include face-to-face musters, (J.A. 81), does not indicate that the reports were untrustworthy. As explained above, whether the musters occurred by telephone or through face-to-face verification, inaccurate information was not included in the muster reports. Personnel were marked present, UA, or, when their whereabouts were known but they were not present, "late stay/special detail". (J.A. 78, 80-82.) In the event that the reporter did not want to assert an unknown location, the entry was left blank rather than falsified. (J.A. 71.) Thus, some of the muster reports were incomplete in certain respects as opposed to inaccurate, all of which went to the weight and not the admissibility of the reports.

The Military Judge needed only to find by a preponderance of the evidence that the reports were trustworthy. *Tebsherany*, 32 M.J. at 355. Here, the evidence supports the trustworthiness of the muster reports and the Military Judge did not abuse his discretion in admitting them.

2. The muster reports were not testimonial and did not trigger any right to confrontation.

The Sixth Amendment's Confrontation Clause prohibits testimonial hearsay without an opportunity for cross-examination. *United States v. Crawford*, 541 U.S. 36, 53-54 (2004); *United States v. Blazier (Blazier II)*, 69 M.J. 218, 222 (C.A.A.F. 2010). The Confrontation Clause applies only to witnesses——those who bear testimony. *See Crawford*, 541 U.S. at 51.

This holding turns on the phrase "testimonial statements." *Davis v. Washington*, 547 U.S. 813, 821 (2006). "The language used by the Supreme Court to describe whether and why a statement is testimonial is far from fixed." *United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013); *see also United States v. Squire*, 72 M.J. 285, 288 (C.A.A.F. 2013) (noting "[t]he Supreme Court has not articulated a comprehensive definition of testimonial statements") (internal quotations omitted).

The Supreme Court has noted testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (internal citations omitted). The *Crawford* Court declined to provide a comprehensive definition of "testimonial." *Ohio v. Clark*, 192 L. Ed. 2d 306, 314 (U.S. 2015) (citing *Crawford*, 541 U.S. at 68). The Court did, however, identify examples of core

testimonial statements, including prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations. *Id*. (citing *Crawford*, 541 U.S. at 68.) The Court has also noted that business records are generally admissible absent confrontation because——having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—— they are not testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

This Court has delineated the boundary between testimonial and nontestimonial statements in detail. *United States v. Katso*, No. 14-5008, 2015 CAAF LEXIS 588, *16-*17 (C.A.A.F. June 30, 2015). A statement is testimonial if made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id*. (citing *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011); *Crawford*, 541 U.S. at 51-52; *Tearman*, 72 M.J. at 58). In making this determination, this Court has asked whether it would be reasonably foreseeable to an objective person that the purpose of any individual statement is evidentiary, considering the formality of the statement as well as the knowledge of the declarant. *Id*. (citing *Tearman*, 72 M.J. at 58).

In *Tearman*, this Court concluded that laboratory chain of custody documents and internal review worksheets were not testimonial, in part because an objective witness would reasonably believe that the documents were filled out for internal control, not to create evidence, and because they lacked any indicia of formality or solemnity. *Katso*, 2015 CAAF LEXIS 588, at *17 (citing *Tearman*, 72 M.J. at 59-61).

Conversely, in *Sweeney*, this Court held that a signed memorandum reporting the results of a drug and a signed, "formal, affidavit-like" document certifying the integrity of the sample and compliance with protocol were testimonial. *Id*. (citing *Sweeney*, 70 M.J. at 299, 304). Similarly, in *Blazier I*, this Court decided that signed declarations served an "evidentiary purpose" because they summarized and set forth an accusation and were generated in response to a command request. *Id*. (citing *United States v. Blazier (Blazier I)*, 68 M.J. at 440, 443 (C.A.A.F. 2010)).

Although not every business record is necessarily nontestimonial, the characteristics that distinguish documents prepared in the course of a regularly conducted business activity from those prepared in anticipation of litigation under Rule 803(6), are also indicative of an administrative purpose rather than an evidentiary purpose. *Tearman*, 72 M.J. at 61 (citation omitted).

The muster reports challenged by Appellant were not created in anticipation of litigation, but instead were produced daily for the administrative purpose of personnel accountability. They are not signed, sealed, or otherwise formalized. (J.A. 876-85.) The reports documented unambiguous facts, and Ms. Wilson's handwritten notes merely included the documents' existing date title. (J.A. 60-61.) Nothing in the documents suggests an evidentiary purpose, and the declarant did not have any knowledge of Appellant's misconduct or the possibility of trial proceedings at the time the data was compiled. Accordingly, it was not reasonably foreseeable that the purpose of the documents or the information contained therein was evidentiary. Therefore the muster reports are not testimonial, and Appellant's right to confrontation is not triggered by their admission. Further, Appellant was able to cross-examine Ms. Wilson before admission of the evidence.

Appellant has not demonstrated that the Military Judge erred, much less that the error was plain or that it materially prejudiced his substantial rights.

The Members had a statutory right to request additional evidence. The requested muster reports were nontestimonial business records, and the Military Judge did not abuse his discretion in admitting them.

C. The Military Judge did not abuse his discretion in reserving testimony and argument pending additional questions by the Members.

1. The Military Judge did not abuse his "considerable discretion" in limiting the reopening of the case considering the Members' limited request for the muster reports and Civilian Defense Counsel's argument questioning whether the muster reports actually exist.

"Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Compulsory due process includes both the right to compel the attendance of defense witnesses and the right to introduce their testimony into evidence. *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001) (citing *Washington*, 388 U.S. at 18).

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, as in *Chambers* v. *Mississippi,* 410 U.S. 284, 302 (1973), or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, as in *Washington*, 388 U.S. at 23, and *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *See Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (citing *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)); *cf*. *Strickland* v. *Washington*, 466 U.S. 668, 684-685

(1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). Exclusion of exculpatory testimony deprives an accused of the basic right to have the government's case encounter and survive "the crucible of meaningful adversarial testing." *See Crane*, 476 U.S. at 690-91 (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)); *see also United States v. Campbell*, 37 M.J. 1049, 1051 (N-M. Ct. Crim. App. 1993) (finding appellant had a right to cross-examine witness requested by members during deliberations).

A military judge has "considerable discretion" in deciding whether additional testimony requires "reargument, resinstructions, and that type of thing." *Lampani*, 14 M.J. at 26. The judge's decision "would be guided by the nature and scope of the additional evidence presented." *Id.*

Here, although, Appellant was not allowed to present evidence to respond to evidence offered by the United States upon the Members' request, the Military Judge's ruling was appropriately limited to allow only those items specifically requested by the Members that had already been discussed on the merits. Appellant was able to present a full defense before the Members retired and the Military Judge did not err in admitting the muster reports without additional testimony.

2. The Military Judge did not err in failing to provide Appellant an opportunity to present additional argument because Appellant's theory and defense were fully covered in his original summation.

A trial judge may not prohibit an accused from making any summation at all. *See Herring v. New York*, 422 U.S. 853, 863 (1975). However, "[t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion." *Id*. (citation omitted).

This case is similar to *United States v. Sandoval-Gonzalez*, 95 Fed. Appx. 203, 204-05 (9th Cir. 2003), where the court found that the trial judge did not abuse his discretion in refusing to allow additional closing argument after he issued a supplemental jury instruction. The Court of Appeals for the Ninth Circuit decided that the judge was within his discretion because the appellant's theory of the case had been adequately covered in the closing argument given before the jury retired to deliberate. *Id*.

Here, Appellant was able to make his closing argument and explain his theory to the Members. Trial Defense Counsel

emphasized Appellant's good military character and character for truthfulness, (J.A. 779-85), discussed the burden of proof, (J.A. 786-87), attacked the reliability of the markers and recordkeeping systems, (J.A. 787-89), castigated the Government for failing to provide the muster reports that Trial Counsel questioned Appellant about, (J.A. 789-90), attacked the clinics' standby policy, (J.A. 796-98), and attacked the motives and reliability of the witnesses, (J.A. 792-94, 801-04, 807, 809.) While additional evidence did come before the Members, that evidence had already been discussed prior to closing arguments and could not have fundamentally altered his argument that the testimony and records were not sufficiently reliable to meet the burden of proof. Because Civilian Defense Counsel specifically emphasized in his closing argument the absence of the muster reports from the Government's case to imply their non-existence, when the Members requested the muster rosters, additional argument would not have meaningfully added anything to Appellant's theory of the case. Accordingly, the Military Judge was within his discretion to deny additional argument.

D. Appellant was not prejudiced by the admission of the muster reports or by his inability to challenge them with testimony or argument because the United States' case, including identifications made by all seven victims and inculpatory medical records, was overwhelming. Even had the records not been admitted or even had Appellant been able to attack them, the outcome of the trial would have been no different.

1. Standards of Review.

This Court tests a military judge's decision to provide members with evidence they request for material prejudice to the accused's substantial rights. *Cf. Martinsmith*, 41 M.J. at 349 (analyzing prejudice from military judge's refusal to allow appellant to respond to a member's question using Article 59(a), UCMJ, standard).

If the military judge commits constitutional error by depriving an accused of his right to present a defense, the test for prejudice on appellate review is whether the appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt." *United States v. McAllister*, 64 M.J. 248, 251 (C.A.A.F. 2007) (quoting *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996)); *see also Chapman v. California*, 386 U.S. 18, 24 (1967).

Relief for Confrontation Clause errors will be granted only where they are not harmless beyond a reasonable doubt. *Tearman*, 72 M.J. at 62 (citation omitted). Whether a constitutional error was harmless beyond a reasonable doubt is a question of

law reviewed *de novo*. *Id*. To determine whether a Confrontation Clause error is harmless beyond a reasonable doubt, this Court has adopted the balancing test established in *Van Arsdall*, considering such factors as: "[1] the importance of the unconfronted testimony in the prosecution's case, [2] whether that testimony was cumulative, [3] the existence of corroborating evidence, [4] the extent of confrontation permitted, and [5] the strength of the prosecution's case." *Id*. (quoting *Sweeney*, 70 M.J. at 306, and *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). This list of factors is not exhaustive, and "[the] determination is made on the basis of the entire record." *Id*. (quoting *Sweeney*, 70 M.J. at 306).

More generally, the inquiry to determine whether an error was harmless beyond a reasonable doubt is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained. *United States v. McDonald*, 74 M.J. 426, 434 (C.A.A.F. 2014) (citations and quotation marks omitted).

Here, regardless what standard this Court applies, Appellant is due no relief because any error was harmless. Admission of the muster reports without affording Appellant an opportunity to present additional witnesses or argument to respond to those reports did not contribute to the guilty verdicts.

2. The muster reports did not contribute to the verdicts.

a. The muster reports did not contribute to the conviction involving LCpl AA.

Appellant acknowledges that his identity was not at issue in the charges involving LCpl AA. (Appellant's Br. at 15.) Indeed, no muster report was admitted for the date of this offense. (J.A. 876-85.) Accordingly, the only question the Members needed to decide was whether he intended to commit indecent acts, or if there was some mistake, as he suggested. He testified at trial that he had, in fact, spoken to her about her X-rays, but asserted that there was a misunderstanding and he did not instruct her to disrobe. (J.A. 687-93.)

On top of Appellant's own admissions, LCpl AA provided compelling testimony about her experience. Appellant's conduct left such an impression on her that she sought out his supervisor and also immediately reported the incident to her chain of command. (J.A. 409.)

Critically, LCpl AA interacted with both Appellant and HM3 Philogene and was able to explain the significant differences between the two. (J.A. 393, 402-03). This eliminated HM3 Philogene, the only reasonable alternative to Appellant, as the technician victimizing female patients. In his argument, Civilian Defense Counsel even agreed that HM3 Philogene had a

very distinctive accent, acknowledging, "[y]ou don't confuse the two of these guys." (J.A. 813.)

Appellant's argument regarding HM1 Oliver's testimony fails to fully address her testimony. While HM1 Oliver did testify to counseling her subordinates about not using the word "naked" in response to LCpl AA's complaint, she also acknowledged immediately afterward that LCpl AA asked about procedures involved in receiving an X-ray and asked if it was necessary to get "naked" for an X-ray exam. (J.A. 605.) This corroborates LCpl AA's testimony that she was concerned by Appellant's direction that she disrobe, not by his use of the word "naked".

Also, contrary to Appellant's assertion, (Appellant's Br. at 39), Appellant's intent can plainly be inferred from his actions toward LCpl AA, and needed no support from his other misconduct. However, to the extent the Members might have used his other misconduct to determine Appellant's intent, his actions toward LCpl JE, in which his identity was not disputed, certainly provided the most obvious support.

The Members simply rejected Appellant's self-serving testimony and decided that LCpl AA was truthful in her account of Appellant's actions. The muster reports bore no relation to Appellant's attempts toward LCpl AA and could not have contributed to that conviction.

b. The muster reports did not contribute to the convictions involving AM2 AL.

AM2 AL visually identified Appellant. (J.A. 103.) She remembered his rank from the day they interacted and eventually recalled his name. (J.A. 119-20.) Appellant used his common "consent form" ruse to legitimize his instructions in AM2 AL's eyes. (J.A. 105.) Finally, AM2 AL's medical records indicate that it was Appellant who performed her X-rays.

The muster reports were simply unnecessary to prove that Appellant was the technician who victimized AM2 AL. Indeed, no muster reports were introduced from the date of AM2 AL's X-rays. (J.A. 876-85.) Given the strength of her identification, the records, and that Appellant was already established to be the culprit in the specifications involving LCpl's AA and JE, the muster reports could not have contributed to this conviction.

c. The muster reports did not contribute to the conviction involving LS2 DB.

LS2 DB visually identified Appellant and remembered his rank. (J.A. 219.) She remembered that Appellant did not have a noticeable accent. (J.A. 219.) Notably, LS2 DB also remembered seeing Appellant on other occasions after the X-ray incident. (J.A. 224.) Appellant also used the fraudulent "consent form" to attempt to have LS2 DB remove her clothes. (J.A. 221.) When she challenged him, he made up a story about "having the type of X-ray changed" to explain why she could have her X-rays with her

clothes on. All this demonstrates the strength of LS2 DB's identification, and also demonstrates a calculated attempt to view her nude body, not a mere deviation from procedures, as Appellant suggests. (Appellant's Br. at 34-35.) Finally, LS2 DB's medial records indicate that Appellant was the technician who performed her X-rays. (J.A. 843.) The muster reports did not contribute to Appellant's conviction for the attempt involving LS2 DB.

d. The muster reports did not contribute to the conviction involving LCpl JE.

Appellant acknowledges that his identity was not at issue in the charges with LCpl JE. (Appellant's Br. at 15.) She identified him in trial and remembered his name. (J.A. 508.) LCpl JE is also linked to other victims in that Appellant utilized the fraudulent "consent form" ruse to induce LCpl JE to follow his directions to completely disrobe. (J.A. 508.)

It is not accurate, as Appellant suggests, (Appellant's Br. at 38), that the Members rejected most of LCpl JE's testimony. The most reasonable explanation for Appellant's acquittal on the attempt charges is LCpl JE's testimony about Appellant's telephone conversation and her testimony that he did not actually penetrate her vagina when he had the chance, which could have easily raised a reasonable doubt regarding those specifications.

Further, given the strength of the identification LCpl JE made, it is extremely unlikely that the muster reports could have contributed to the conviction on the specification involving her. To the extent evidence of Appellant's other misconduct contributed to the conviction, it was surely Appellant's actions toward LCpl AA (identify of Appellant not contested) and the common modus operandi he demonstrated to multiple victims, including LCpl JE. The muster reports therefore could not have contributed to this conviction.

e. The muster reports did not contribute to the conviction involving BS.

BS was the only victim that did not visually identify Appellant. She provided only a physical description and testified that she believed he was an HM3. (J.A. 248.) However, she did note that her technician did not have a foreign accent. (J.A. 248.) Also, BS's medical records indicate that Appellant performed her X-rays. (J.A. 849-53.) Given that BS was able to exclude HM3 Philogene based on his strong accent, and given that Appellant's other misconduct overwhelmingly demonstrated his identity and intent, the muster reports could not have contributed to Appellant's conviction involving BS.

f. The muster reports did not contribute to the conviction involving PG.

PG visually identified Appellant and remembered that his name began with a B. (J.A. 453.) PG's medical records also

demonstrate that he was the technician who victimized her. (J.A. 862-68.)

Appellant claims it is "[s]imply unreasonable to believe there was no possibility that [PG's] allegations were unaided by some [Rule] 404(b) evidence." (Appellant's Br. at 36.) Even if this is true, it is the evidence of Appellant's identity evidence provided by LCpl's AA and JE, AM2 AL, and LS2 DB that would have provided any necessary support. The muster reports were simply cumulative of this more important evidence and could not have contributed to the verdict.

3. The muster reports did not impact the Members' overall decisionmaking, as evidenced by the Members' acquittal of Appellant's misconduct involving OLS despite the muster report inculpating him in that misconduct.

Appellant was acquitted of all misconduct involving OLS, despite the fact that the muster reports indicate that he was present at the clinic on March 17 when OLS's X-rays were taken. (J.A. 880.) This is some of the most compelling evidence that the muster reports did not contribute to the Members' decisionmaking.

The most reasonable explanation for the acquittals is that the Members found reasonable doubt caused by OLS's prior statement that the technician who took her X-rays had an accent, like HM3 Philogene. This would also indicate that the Members noted that the other victims excluded HM3 Philogene as a suspect

by affirmatively stating that their technicians did not have accents. The muster reports could not have contributed to Appellant's convictions where such reliable evidence already inculpated Appellant.

The majority of Appellant's victims visually identified him. Some remembered his name and many remembered his rank. He used a common modus operandi——a bogus "consent form"——to make several of the victims believe his instructions were legitimate. The victims were also able to differentiate HM3 Philogene, the only reasonable alternative culprit, by his strong accent. Appellant himself acknowledged taking X-rays of some of the victims. Finally, the CHCS records all indicate that Appellant was the radiology technician who performed X-rays of the victims.

Civilian Defense Counsel acknowleged: "[t]he [G]overnment utilized these rosters in a very limited format and very limited basis, did not utilize them in their case in chief. The only time they utilized them was on cross-examination." (J.A. 49.) Also, the Members requested the reports along with a host of other documents used throughout the trial, indicating thoroughness, not a particular interest in the muster reports' contents. (J.A. 31, 908.)

4. The 404(b) instruction strengthened the United States' case, rather than poisoning otherwise sound proof.

Much of Appellant's argument is predicated on an erroneous view of the effects of the Rule 404(b) instruction provided to the Members, (J.A. 904), on particular specifications. Appellant essentially argues that charges involving weaker victim identifications were supported by the evidence he was not able to challenge, and that those charges somehow infected the charges with stronger victim identifications by demonstrating intent, which he asserts was otherwise unproven. (Appellant's Br. at 31-32.) Elsewhere, his argument devolves to a bald suggestion that 404(b) created spillover, (Appellant's Br. at 38.)

But, in actuality, the specifications involving weaker identifications would have drawn support from the more clear identifications, not the other way around. Appellant concedes that his identity was not at issue in the two specifications involving LCpls AA and JE. (Appellant's Br. at 15.) He acknowledged at trial that he had X-rayed LCpl AA, (J.A. 687-93), and both women identified him visually and by name. (J.A. 396-407, 508.) Also, in dealing with LCpl JE, Appellant used a fraudulent "consent form" to legitimize his actions, a modus operandi common to his actions toward several of the other victims.

Appellant is correct that his conduct toward one victim does demonstrate his intent to commit indecent acts with the other victims, but this support does not derive from the muster reports, which could only contribute to identifying Appellant as the guilty technician, not any other element.

5. The markers and medical records all implicate Appellant and nobody else.

It is true that some evidence suggested that the markers and recordkeeping were imperfect. However, it is essential to remember that none of the markers or records implicated any other technician. Where Appellant's marker was not used, an unassigned marker was used that was not linked to, or associated with, any other radiology technician assigned to the Oceana or Dam Neck clinics. (J.A. 508-09.) Similarly, even if the system used to check patients in and out of the clinic was not foolproof, none of the records indicated that anyone but Appellant provided X-ray services to the victims at the times when they were fraudulently induced to remove their clothes. (J.A. 826-75.) Certainly, Mr. Rosenthal is listed alongside Appellant as providing some services to PG, but that is consistent with her explanation that he was present for the beginning of her X-ray but left before Appellant had her disrobe. (J.A. 859-68.)

Appellant understates the evidentiary value of the markers and medical records, none of which point to anyone other than Appellant.

The muster reports were simply minor, cumulative additions to the overwhelming evidence of Appellant's guilt. Had the reports not been introduced, or had Appellant been able to attack their reliability with testimony from Ms. Wilson or HM1 Odom or present additional argument, this Court can be satisfied beyond a reasonable doubt that the outcome of the trial would have been the same. Accordingly, the muster reports did not contribute to the verdict and Appellant is entitled to no relief. This Court need not issue any new test, but should simply determine that Appellant suffered no prejudice from any error here.

Conclusion

Wherefore, the United States respectfully requests that this Court affirm the decision of the lower court.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7430, fax (202)685-7687
Bar No. 36051

SUZANNE M. DEMPSEY
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7059, fax (202)685-7687
Bar No. 36266

MARK K. JAMISON
Colonel, U.S. Marine Corps
Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7427, fax (202)685-7687
Bar No. 31195

Appendix

1. Victim Identification Chart.

Certificate of Compliance

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on August 10, 2015.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7430, fax (202)685-7687
Bar No. 36051

Name	Date/Time Testimony	CHCS Record	Marker	Clinic	Identification	Muster Report
LCpl AA*	"Early Afternoon", May 17, 2011 (J.A. 392, 418.)	HM3 Philogene performed AA's X-rays the morning before she met Appellant. (J.A. 391-94, 855.)	N/A	Oceana	• Visually identified Appellant in Court (J.A. 397) • Remembered Appellant as a stocky African-American man of average height (J.A. 396-97.) • Distinguished HM3 Philogene as a tall, skinny African-American with a strong "African" accent (J.A. 393.) • Consciously noted Appellant's name and rank on his uniform (J.A. 406.) • Appellant acknowledged that he spoke with LCpl AA about her X-rays (J.A. 687-93.)	No muster report related to this date presented to the Members.
AM2 AL	1500-1600, Feb. 25, 2011 (J.A. 98, 101.)	Appellant performed AL's X-rays. She arrived at 1645. (J.A. 827-29.)	DM8, DM5, SP1	Oceana	• Visually identified Appellant to the Members (J.A. 103.) • Remembered Appellant was a tall African-American and was wearing his HM2 insignia (J.A. 103.) • Recalled Appellant's name during the investigation (J.A. 120.) • Appellant used "consent form" ruse (J.A. 105.)	No muster report related to this date presented to the Members.

LS2 DB	**1600, Mar. 10, 2011 (J.A. 217-18.)**	**Appellant performed LS2 DB's X-rays. She arrived at 1647. (J.A. 843.)**	**DM8**	**Oceana**	**• Visually identified Appellant to the Members (J.A. 219.) • Remembered Appellant was a tall, stocky African-American HM2 (J.A. 219.) • Remembered seeing Appellant on other occasions (J.A. 224.) • Remembered that Appellant did not have an accent (J.A. 219.) • Appellant used "consent form" ruse (J.A. 221.)**	**Appellant marked "Late Stay/Special Detail". (J.A. 878.)**
LCpl JE*	**"Just before lunch", Apr. 13, 2011 (J.A. 504-06.)**	**HM3 Philogene performed LCpl JE's first set of X-rays beginning at 1448 on April 12. Appellant performed additional X-rays beginning at 0921 on April 13.**	**Appellant**	**Dam Neck**	**• Visually identified Appellant to the Members (J.A. 508.) • Remembered Appellant did not have a noticeable accent (J.A. 507.) • Distinguished Appellant from HM3 Philogene, who had a "Jamaican" accent (J.A. 507.) • Appellant used "consent form" ruse (J.A. 508.)**	**Appellant marked "Present" at Dam Neck. (J.A. 882.)**
BS	**May 4, 2011 (J.A. 247.)**	**Appellant performed BS's X-rays. She arrived at 0940. (J.A. 840.)**	**Appellant**	**Oceana**	**• Remembered Appellant was a light-skinned African-American (J.A. 248.) • Believed Appellant was an HM3, but could not remember his rank with certainty (J.A. 258.) • Remembered Appellant did not have a foreign accent, but may have been from "New York or somewhere like that" (J.A. 248.)**	**Appellant marked "Present". (J.A. 884.)**

PG	**Feb. 24, 2011 (J.A. 452.)**	**Mr. Rosenthal performed PG's X-rays beginning at 1535. Appellant performed additional X-rays bginning at 1709. (J.A. 860-62.)**	**DM8, DM5**	**Oceana**	**• Visually identified Appellant for the Members (J.A. 453.) • Remembered Appellant was a "younger black guy" (J.A. 454.) • Remembered Appellant's name started with a B (J.A. 454.)**	**Appellant marked "Late Stay/Special Detail". (J.A. 876.)**
OLS*	**Mar. 17, 2011 (J.A. 439)**	**Appellant performed OLS's X-rays. She arrived at 1000. (J.A. 837.)**	**DM5**	**Oceana**	**• Remembered Appellant was a tall African-American with a shaved head (J.A. 138.) • Remembered Appellant did not have a noticeable accent (J.A. 152.) • Not able to make a visual identification at trial (J.A. 200.) • Appellant acknowledged performing the X-rays and calling OLS's mother (J.A. 687.)**	**Appellant marked "Present". (J.A. 880.)**
***Appellant acknowledges that his identity was not at issue with respect to these victims.**						