IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/ Cross-Appellant v. Beau T. MARTIN Sergeant (E-5) United States Marine Corps, Appellant/ Cross-Appellee	APPELLANT'S REPLY/ CROSS-APPELLEE'S ANSWER Crim. App. Dkt. No. 201400315 USCA Dkt. No. 15-0754/MC

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

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Granted Issue

WHETHER THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE HUMAN LIE DETECTOR TESTIMONY OFFERED BY THE ALLEGED VICTIM'S HUSBAND WAS NOT MATERIALLY PREJUDICIAL.

Certified Issue

DID TRIAL DEFENSE COUNSEL INVITE ERROR WHEN HE OPENED THE DOOR TO HUMAN LIE DETECTOR TESTIMONY DURING THE CROSS-EXAMINATION OF THE VICTIM'S HUSBAND?

Statement of Statutory Jurisdiction

Sergeant (Sgt) Beau Martin's approved court-martial sentence included a bad-conduct discharge. Accordingly, his case fell within the lower court's Article 66, Uniform Code of Military Justice (UCMJ), jurisdiction.[1] On October 7, 2015, this Court granted review of Sgt Martin's petition for review, bringing his case within this Court's Article 67(a)(3), UCMJ, jurisdiction.[2]

Statement of the Case

On April 17, 2014, a panel of members with enlisted representation, sitting as a general court-martial, convicted Sgt Martin, contrary to his plea, of one specification of wrongful sexual contact, in violation of Article 120(m), UCMJ as a lesser-included offense of aggravated sexual assault.[3] He was also acquitted of two specifications of wrongful sexual contact,

[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867(a)(3).
[3] J.A. at 353; 10 U.S.C. § 920(m) (2008).

in violation of Articles 120(c) and 120(m), UCMJ.[4] The members sentenced Sgt Martin to a reduction to pay-grade E-1 and a bad-conduct discharge. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the sentence executed.[5]

On appeal, the Navy-Marine Court of Criminal Appeals affirmed the findings and sentence on June 18, 2015.[6] On August 14, 2015, Sgt Martin timely petitioned this Court for review. This Court granted review on October 7, 2015. On November 5, 2015, the Judge Advocate General of the Navy certified an additional issue at the Government's request.

Statement of Facts

The Government misstates key facts. In addition to the facts stated in Sgt Martin's initial brief, undersigned counsel adds the following.

The Government asserts that Lance Corporal (LCpl) CI had a character and reputation for truthfulness, and that Sgt Martin's attempts to discredit her fail.[7] According to the Government, "the only Marine who did question her character for truthfulness was the one who CRI filed an equal opportunity complaint against

[4] 10 U.S.C. §§ 920(c), (m) (2008).
[5] General Court-Martial Order 04-2014, Aug. 6, 2014.
[6] *United States v. Martin*, No. 201400315, 2015 CCA Lexis 250, *1 (N-M. Ct. Crim. App. June 18, 2015); J.A. at 001.
[7] Government's Br. at 58.

subjecting him to a stern counseling and a transfer."[8] This argument is not supported by the evidence. Master Sergeant (MSgt) Nolasco testified that LCpl CI was not forthcoming with her command about her pregnancy due dates, leading the command to contact the hospital for answers, and then reading LCpl CI her Article 31(b), UCMJ, rights.[9]

Staff Sergeant (SSgt) Seller had supervisory authority over LCpl CI.[10] He testified that LCpl CI's reputation for truthfulness was "questionable"[11] and that she made a false allegation of sexual assault against him.[12] The Government claims SSgt Seller admitted that LCpl CI filed an equal opportunity complaint against him alleging he discriminated against her because she was pregnant.[13] At trial, SSgt Seller explained LCpl CI alleged that SSgt Seller sexually assaulted her by pulling her hair.[14] Though SSgt Seller was counseled about the complaint, he denied ever pulling LCpl CI's hair or sexually assaulting her, and testified that he believed her allegation against him was false.[15]

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[8] Government's Br. at 58.
[9] J.A. at 212-13.
[10] J.A. at 230.
[11] J.A. at 230.
[12] J.A. at 233.
[13] Government's Br. at 22.
[14] J.A. at 231-32.
[15] J.A. at 233.

The Government attempts to promote LCpl CI's credibility by noting the consistency between her testimony and the other Government witnesses.[16] Again, the Government limits the number of inconsistencies on important facts. For instance Mr. DW testified he heard LCpl CI verbally resist Sgt Martin, saying "Stop it. Stop touching me."[17] According to Mr. DW, Sgt Martin then lay back down on the floor, and LCpl "just continued, like, to sleep as if [Sgt Martin] was never in the bed."[18] About five minutes later, the host's wife entered the bedroom and told Sgt Martin, Mr. DW, and Cpl L, who was also sleeping in the bedroom, to sleep downstairs because she only wanted married couples upstairs.[19]

This testimony is directly contradicted by LCpl CI, who testified she recalled feeling "paralyzed, like, I couldn't speak, couldn't move," and that she never said "no," "stop," or any words to make Sgt Martin stop.[20] LCpl CI testified that Sgt Martin got out of the bed and left the room.[21] She made no mention of the host's wife entering the room immediately after this occurred, or to seeing Mr. DW or Cpl L lying on the floor.[22]

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[16] Government's Br. at 15-18.
[17] J.A. at 152-54; Government's Br. at 10-11.
[18] J.A. at 154.
[19] J.A. at 154-55.
[20] J.A. at 101-02.
[21] J.A. at 083.
[22] J.A. at 079, 084.

Furthermore, there is significant inconsistency between LCpl CI's account of the alleged touching, and Cpl Visconti's testimony. LCpl CI testified that Sgt Martin's fingers penetrated her vagina, and that the experience felt like it lasted three to five minutes;[23] but Cpl Visconti only testified that LCpl CI told her Sgt Martin "put his hands in her pants."[24]

The Government also asserts that Mr. DW's character for truthfulness was never successfully challenged and that his disciplinary issues were isolated to the last three months of active duty.[25] What the Government fails to note is that even Government witnesses could not consistently vouch for Mr. DW's truthfulness: one testified that Mr. DW was "pretty truthful," but that he also had a reputation for "malingering kind of, like, he's not--he does things to get out of things"[26]; another was unable to provide an opinion on Mr. DW's reputation for truthfulness among Marines'[27] and another acknowledged that MSgt Nolasco, a Defense character witness, had a good basis to judge Mr. DW's credibility.[28] Among the staff NCOs and officers in his unit, Mr. DW had a reputation for "not being truthful; not

[23] J.A. at 082.
[24] J.A. at 198.
[25] Government's Br. at 11.
[26] J.A. at 256.
[27] J.A. at 259-60.
[28] J.A. at 251-52.

honest."[29] Additionally, the timing of Mr. DW's misconduct does not undermine the character of his offenses: a false official statement and malingering, unauthorized absence and disobeying his command, and making a bomb threat.[30]

Summary of Argument

The admission of human lie detector testimony without curative instruction compromises the fairness of the proceedings. *United States v. Knapp*, 73 M.J. 33, 37-38 (C.A.A.F. 2014). On direct examination, the Government asked Cpl AI to provide the members an explanation of why he initially doubted his wife, but grew to believe in the truth of her allegation. On cross-examination, the Defense explored Cpl AI's reservations. In its re-direct, the Government patently asked Cpl AI if his wife was telling the truth, and why he believed she was telling the truth.

Cpl AI's testimony constituted improper human lie detector testimony. The military judge provided neither a prompt, nor an appropriately tailored instruction to offset the prejudicial impact of this testimony. The erroneous admission of Cpl AI's testimony was clear and obvious, and resulted in plain error.

The invited error doctrine does not preclude this Court from granting a remedy for the material prejudice Sgt Martin

[29] J.A. at 211.
[30] J.A. at 165, 168.

suffered. The invited error doctrine applies where the party seeking relief is responsible for the error, which is not the case here. The Government initiated the discussion of LCpl CI's credibility and truthfulness in its direct examination of Cpl AI. It invited the Defense's cross-examination. Furthermore, the Government's re-direct examination was far outside the bounds of a "fair response" to the Defense's cross-examination or to the Defense's case strategy. The Government seeks to walk through a door on re-direct examination that it opened on direct examination under the guise of the invited error doctrine. This Court should not allow it.

Argument

ADMISSION OF CPL AI'S HUMAN LIE DETECTOR TESTIMONY WAS PLAIN ERROR. THE INVITED ERROR DOCTRINE DOES NOT APPLY BECAUSE THE DEFENSE DID NOT PROVOKE IMPROPER HUMAN LIE DETECTOR TESTIMONY. THE GOVERNMENT ELICITED CPL AI'S OPINION ON THE COMPLAINING WITNESS'S CREDIBILITY, THEN EXPLICITLY ASKED IF THE COMPLAINING WITNESS TOLD THE TRUTH IN MAKING HER ALLEGATION. DEFENSE COUNSEL'S CROSS-EXAMINATION WAS A FAIR RESPONSE TO THIS EVIDENCE.

To prove plain error, an appellant must show: "(1) error that is (2) clear or obvious, and (3) results in material prejudice to [the accused's] substantial rights." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citing *United States v.* Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007)).

A. Admission of Cpl AI's human lie detector testimony was erroneous.

Testimony qualifies as "human lie detector testimony" when it offers "'an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case.'" *Knapp*, 73 M.J. at 36 (citing *Brooks*, 64 M.J. at 328). In *United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003), this Court found:

> The picture painted by the trial counsel at the outset of the prosecution's case through [the special agent]'s testimony was clear: a trained investigator, who had interrogated many suspects, applied her expertise in concluding that this suspect was lying when she denied drug use and was telling the truth when she admitted to one-time use. Such "human lie detector" testimony is inadmissible. Admission of such testimony was clear or obvious.

Kasper, 58 M.J. at 319.

The lower court correctly found that Cpl AI's testimony constituted impermissible human lie detector testimony. *United States v. Martin*, NMCCA No. 201400315, 2015 CCA LEXIS 250, *9-10 (N-M. Ct. Crim. App. June 18, 2015). Throughout his testimony, Cpl AI testified regarding LCpl CI's believability, concluding with his testimony that his wife was "telling the truth."[31]

B. The invited error doctrine does not apply because the Defense was not responsible for the improper admission of human lie detector testimony.

The invited error doctrine precludes a party from raising error on appeal "that he himself invited or provoked the [lower]

[31] J.A. at 063.

court . . . to commit." *United States v. Wells*, 519 U.S. 482, 488 (1997) (internal quotations omitted). Where testimony from a defense witness results in inadmissible testimony, the invited error doctrine precludes any relief. *See United States v. Dinges*, 55 M.J. 308, 311 (C.A.A.F. 2001). Similarly, where impermissible testimony is elicited by defense counsel during cross-examination, "invited error does not provide a basis for relief." *United States v. Raya*, 45 M.J. 251 (C.A.A.F. 1996); *see also United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999).

In *Eggen*, the defense cross-examined a Government expert about inconsistencies between the complaining witness's comments in therapy sessions and his statements to investigators. The defense counsel then focused on whether the complaining witness may have "faked" his emotional state during therapy sessions. On re-direct, the trial counsel asked the expert "if she had 'any indication' that the information [the complaining witness] gave her 'was false.'" *Eggen*, 51 M.J. at 161.

On appeal, the appellant argued he was materially prejudiced when the Government expert commented on the complaining witness's credibility. The Government emphasized that its direct examination of the expert contained no questions about the complaining witness's truthfulness, and that the subject was first pursued on cross-examination. *See id.* at 161.

This Court held "it was defense counsel who first suggested that [the complaining witness] was not being truthful about the symptoms . . . ." *Eggen*, 51 M.J. at 162. Therefore, the Defense brought the inadmissible evidence to the members, and invited error did not provide a basis for relief.

The Government argues Defense counsel's cross-examination of Cpl AI provoked trial counsel to elicit human lie detector testimony, and therefore the invited error doctrine precludes this Court from invoking the plain error rule and reversing the lower court's findings.[32] These facts are incorrect and, therefore, the Government's reasoning is flawed.

1. The Government first elicited testimony about the credibility of LCpl CI's allegations, not the Defense.

In Sgt Martin's court-martial, unlike *Eggen*, the Government was responsible. In its direct examination of Cpl AI, the Government presented evidence to the members that Cpl AI initially doubted his wife's credibility, but grew to believe her allegation was true. The Government asked:

> Q: When you originally talked to NCIS you told NCIS that you thought it possibly could have been you who had touched your wife?
> A: Yes, sir.
>
> Q: Why did you say that?
> A: I'm the kind of person that if it's even remotely an option I think about it like that. I guess I'm, like, a by-the-numbers-type of person. So, I mean, my wife could have thought about, you know, maybe it

[32] Government's Br. at 31-32.

> could have been another night. But just the way she has been since then, then I know it wasn't me. She wouldn't be acting the way she does nowadays, like, if it would have been me. Even if it was something that she wasn't expecting from me she wouldn't be acting that way.
>
> . . .
>
> Q: And you would had [sic] previously lived together before this assault, correct?
> A: Yes, sir.
>
> Q: So you would have basis to judge how her behavior was before and how her behavior was after?
> A: Yes, sir.
>
> Q: And so there was -- and please clarify, you know, but there was a marked change in her behavior right at the point of the sexual assault?
> A: Yes, sir.[33]

These questions and Cpl AI's responses relayed to the members how Cpl AI initially questioned whether LCpl CI was telling the truth, or whether she could have been mistaken or confused about her allegations. Through their questions, the Government provided a descriptive "before and after" account of how LCpl CI's demeanor had changed since the alleged incident and how Cpl AI came to believe her. Cpl AI's opinion testimony on direct examination impermissibly bolstered LCpl CI's credibility. The Government's action opened the door to cross-examination by Defense counsel that challenged Cpl AI's observations and the foundation of his opinion on his wife's credibility.

[33] J.A. at 051-052.

2. An accused has the right to an effective cross-examination. Trial defense counsel acted within the bounds of lawful cross-examination in questioning Cpl AI and did not open the door to further human lie detector evidence.

"Credibility is at issue in nearly all cases involving witness testimony." *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005). Witness credibility is particularly paramount where, as here, the Government presents a case with no physical evidence and only witness testimony.

The Government's direct examination explored Cpl AI's impressions of when LCpl CI first told him her allegations. Trial defense counsel responded by eliciting more details to undermine the Government's point that Cpl AI believed his wife:

> Q: When she initially told you she didn't give anything in detail, did she?
> A: No, sir.
>
> Q: And you initially thought that maybe she imagined it?
> A: I just -- I was kind of in disbelief.
>
> ...
>
> Q: And, initially, when you talked to NCIS you, kind of, told them you didn't really remember too much?
> A: Yes, sir.
>
> Q: And you [sic] first thought was that, hey, maybe it was you who did it?
> A: Yes, sir.
>
> . . .
>
> Q: Okay, so you weren't entirely convinced that this happened then?
> A: No, sir.

Q: And you told NCIS that?
A: Yes, sir.[34]

Effective cross-examination is a constitutionally-protected right. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'") (citing *Smith v. Illinois*, 390 U.S. 129, 131 (1968) (internal citations omitted)); *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. at 316. In fact, even where cross-examination elicits otherwise inadmissible evidence, it is permitted when the Government "opens the door to consideration of such matters." *United States v. Savala*, 70 M.J. 70, 72 (C.A.A.F. 2011).

Here, the Government opened the door to the Defense's cross-examination of Cpl AI. The Defense explored the reservations Cpl AI discussed in his direct examination, and the Government's assertion that Cpl AI no longer had doubts about his wife's truthfulness. Cpl AI testified on direct that he did not believe he could have unknowingly touched LCpl CI, and that something must have happened to her because "just the way she

[34] J.A. at 057-058.

has been since then[.]"[35] Through this testimony, the Government set in the members' minds that LCpl CI was the victim of a crime and that her husband believed her allegation. Thus, the Government's direct examination invited the cross-examination at issue. Defense counsel cross-examined Cpl AI on, among other things, his statement to NCIS--the very topic the Government used to elicit testimony from Cpl AI that his wife was believable.

Finding that the Defense's cross-examination of Cpl AI was improper after the Government bolstered LCpl CI's credibility would enable "the prosecution to enhance the credibility of its version [of the case] while handcuffing the defense." *See Savala*, 70 M.J. at 78.

In its brief, the Government cites *United States v. Banks*, 36 M.J. 150 (C.A.A.F. 1992), in support of its argument that "a party may sometimes introduce otherwise inadmissible evidence if the opposing party opens the door to such rebuttal evidence."[36] The Government's reliance on *Banks* is misplaced for two reasons. First, Sgt Martin's defense counsel did not initiate discussion of inadmissible evidence. The Government did. The Government cites to no authority for the idea that a party may "double down" on its inadmissible evidence merely because the Defense

[35] J.A. at 051.
[36] Government's Br. at 36.

attempted to mitigate it in cross-examination. Second, in *Banks* this Court indicated that because the Government had provided controversial "profile" evidence in its direct examination, defense counsel could have done the same on cross-examination if counsel had laid the appropriate foundation for the expert opinion. *Banks*, 36 M.J. at 164.

Similarly, this Court should find: (1) the Defense's discussion of LCpl CI's credibility on cross-examination of Cpl AI was permissible because the Government invited it; and (2) the Government is not allowed to go further in bolstering LCpl CI's credibility on re-direct examination than it did on direct because Sgt Martin exercised his right to cross-examination and walked through the door that the Government opened on direct.

3. The Government injected even further error in its re-direct of Cpl AI. The Government's question "And she's telling the truth?" exceeded the bounds of a "fair response" and blatantly elicited impermissible human lie detector testimony.

This Court has rejected the notion that any defense challenge to a witness's credibility opens the door under the invited reply doctrine to impermissible prosecutorial comments, because doing so "would swallow protections guaranteed by the Fifth Amendment." *Carter*, 61 M.J. at 34.

The Government cites *United States v. Cacy*, 43 M.J. 214 (C.A.A.F. 1995), to argue there was no plain error because the prosecution's solicitation of inadmissible testimony was

permissible under the invited reply doctrine.[37] This reliance on *Cacy* is misplaced. In *Cacy*, though this Court held that the defense's theory may permit rebuttal evidence on the believability of a witness's statement, it reached this conclusion partially because the court-martial was by military judge alone. *See Cacy*, 43 M.J. at 218 ("'We assume . . . that the judge did not in any way rely on any inference he might have drawn as to . . . [the expert]'s opinion of . . . [the victim]'s credibility.'") (citing *United States v. Deland*, 22 M.J. 70, 74 (C.M.A. 1986)). This assumption is a fair one where a military judge "is presumed to know the law and apply it correctly." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000) (citing *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996)). The same assurance cannot be presumed in Sgt Martin's case because it was a members trial.

Furthermore, the Government argues that the Government's re-direct was justified because "[f]rom opening to closing, the Defense focused on the Government's allegedly untruthful witnesses with alleged motives to fabricate."[38] This win-at-all-cost justification is akin to arguing that the Government may strike foul blows in response to the Defense striking hard blows. This argument disregards the very notion of criminal

[37] *See* Government's Br. at 36-37.
[38] Government's Br. at 39.

rights and the purpose of a military justice proceeding--to challenge the Government's evidence against an accused.

The defense counsel's decision to attack the credibility of the Government's witnesses, when that witness testimony was the only evidence against Sgt Martin, did not invite the Government to introduce impermissible evidence. In a case that relied exclusively on witness testimony, some of which was sourced from witnesses with credibility issues, the Defense would be derelict to not challenge their credibility.

Just as the Government had the ability in its opening statement to assert that Sgt Martin "abused his position as an NCOIC and [was] a Sergeant who wouldn't take no for an answer,"[39] Sgt Martin had the right to develop a case strategy. The Defense's opening statement and cross-examinations of Government witnesses, in which it explored their credibility, did not open the door to the Government's presentation of impermissible evidence.

The Government's re-direct examination exceeded the boundaries of a fair response to the Defense's cross-examination of Cpl AI by blatantly eliciting further human lie detector testimony:

> Q: Now, you just told the defense counsel that you had your doubts?
> A: Yes, sir.

[39] J.A. at 274.

Q: You do believe your wife, though, correct?
A: I do, sir.

Q: And she's telling the truth?
A: She is, sir.

Q: And why do you think that?
A: The way -- the way that it's affect her, the way that she's changed, the way that it's affected our marriage -- the way that it's negatively impacted us just as a family - - we have two kids, we have three dogs, and she's just depressed. And I understand that a mother is, obviously, is stressed out from all that, especially with me deploying again. But even on good days, she'll just snap sometimes. And just the way that it's affected her, something as big as it had on her wouldn't have happened over a small situation, sir.[40]

C. The erroneous admission of Cpl AI's human lie detector testimony was clear and obvious, but that issue is not before this Court.

The Government argues that the lower court erred in finding plain error.[41] This argument is irrelevant because the issue of whether the testimony is human lie detector testimony is not before this Court. Nonetheless, the Government's argument is without merit.

This Court has been "resolute" in rejecting the admissibility of human lie detector testimony. *Knapp*, 73 M.J. at 36. This prohibition applies to both expert and lay witness testimony. *Kasper*, 58 M.J. at 315; *Martin*, 2015 CCA LEXIS 250 at *10. Following this Court's precedent, the lower court

[40] J.A. at 063.
[41] *See* Government's Br. at 34-35.

correctly found that permitting Cpl AI to offer human lie detector testimony was clear or obvious error. *Martin*, 2015 CCA LEXIS 250 at *10. Cpl AI testified that LCpl CI was truthful in making her allegation against Sgt Martin, and provided the members reasons to believe her.

The timing of Cpl AI's testimony was significant to its purpose. The Government called Cpl AI as a witness immediately before LCpl CI testified. Given the credibility concerns the Defense had already noted, the Government called Cpl AI to preemptively inoculate the members against disbelief of LCpl CI's account. The Government highlighted Cpl AI's expertise in his wife's behavior and provided foundation for his knowledge and length of experience with her. Cpl AI presumably knew his wife better than the child psychologists from *Brooks ever* knew their patients. Moreover, few, if any, child psychologists have years to observe an alleged victim in advance of an incident. He testified about his initial doubt toward the truthfulness of LCpl CI's allegation, followed by his transition to believing her.[42] On re-direct, the Government explicitly asked Cpl AI if his wife was telling the truth.[43] Cpl AI's testimony was human lie detector testimony. This error was clear and obvious.

[42] J.A. at 051-052.
[43] J.A. at 063.

D. Sgt Martin suffered material prejudice. Cpl AI's testimony that the complaining witness was telling the truth improperly bolstered her credibility and interfered with the members' exclusive function to determine witness credibility.

This Court's human lie detector jurisprudence, though diverse, is well-established. "An obvious error materially prejudices the substantial rights of the accused when it has 'an unfair prejudicial impact on the [court members'] deliberations." *Knapp*, 73 M.J. at 37 (quoting *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)).

This Court's human lie detector jurisprudence focuses on a number of different factors to assess prejudice.[44] However, there are two central factors: (1) whether the error went to the central issue of the case, *Kasper*, 58 M.J. at 319; and (2) whether the military judge provided curative instruction to the members, to offset any prejudice. *See Knapp*, 73 M.J. at 37-38; *Brooks*, 64 M.J. at 330; *Kasper*, 58 M.J. at 319; *United States v. Whitney*, 55 M.J. 413 (C.A.A.F. 2001).

[44] The Government suggests this Court adopt a prejudice test that considers "the severity of the error, the curative measures taken, and the strength of the government's case."[44] The Government's "severity prong" is encompassed in whether the military judge provided a curative instruction. "'Absent evidence to the contrary, court members are presumed to comply with the Military Judge's instructions.'" *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010) (citing *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)). Therefore, the severity of the error is not as central a factor as whether the military judge provided the members a curative instruction.

1. Cpl AI's human lie detector testimony went to a central issue in the Government's case: LCpl CI's truthfulness.

Cpl AI's improper testimony resulted in serious error to the Defense's case because it went to the central issue of the Government's case. He offered evidence that LCpl CI was truthful *in a case devoid of <u>any</u> physical evidence*. The Government's attempts to downplay Cpl AI's testimony, and the critical role it played in the Government's case is misleading.[45] The Government exploited Cpl AI's ability to add credibility to LCpl CI's allegation. And the defense counsel's attempt to counter the damage of that testimony through cross-examination and closing argument is not improper.[46] Rather, it is exactly what advocacy calls for--addressing testimony even if it is erroneously admitted.

Without appropriate instruction, it is impossible to accurately identify the scope of prejudice to Sgt Martin's defense caused by Cpl AI's testimony that his wife was telling the truth. The fact that the Defense elicited testimony from other witnesses that LCpl CI was not truthful does not mitigate the prejudice suffered by Sgt Martin. In the end, in a case with no physical evidence, the members were left with testimony

[45] *See* Government's Br. at 50.
[46] *See* Government's Br. at 51 ("[I]t cannot be underscored that the Defense used Cpl AI's response elicited on cross-examination to argue for an acquittal. Indeed, the Defense asked the Members to acquit because 'her own husband' was not convinced.").

by the one person who likely knew the complaining witness better than any other person on the face of the planet telling the members that he believed her and they should too because she is "telling the truth." The inability to determine what "filter" Cpl AI's testimony imposed on the members' perception of LCpl CI, in context of the entire court-martial, undermines the argument that any harm caused by Cpl AI's testimony was "mitigated."[47]

2. The military judge failed to provide appropriate instruction to the members concerning the human lie detector testimony. Sergeant Martin suffered prejudice from the members' improper consideration of Cpl AI's testimony about LCpl CI's truthfulness.

Human lie detector testimony is 'an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case.'" *Knapp*, 73 M.J. at 36 (citing *Brooks*, 64 M.J. at 328). Upon the erroneous admission of human lie detector testimony, a military judge must provide prompt cautionary instruction to the members to avoid the improper use and prejudicial impact of such testimony. *Kasper*, 58 M.J. at 315.

In *Knapp*, this Court held that the general credibility instruction was insufficient guidance to members in the appropriate use of a special agent's testimony that the accused was deceptive in his interrogations. *Knapp*, 73 M.J. at 37-38.

[47] *See* Government's Br. at 52.

Where a military judge's instruction, or lack thereof, undermines confidence that human lie detector testimony did not have a prejudicial impact on the members' deliberations, there is prejudice. *Knapp*, 73 M.J. at 37-38; *see also Kasper*, 58 M.J. at 320.

In *Brooks*, this Court found the admission of improper human lie detector testimony was prejudicial because the erroneous testimony impacted the members' ability to view "the [complaining witness's] credibility without the filter of an expert's view of the [complaining witness's] credibility." *Brooks*, 64 M.J. at 330 (citing *Kasper*, 58 M.J. at 315). The Government contends that Cpl AI's testimony "'did not carry the same weight with the panel members as the testimony offered in *Brooks*.'"[48] This claim utterly ignores the weight of Cpl AI's testimony in Sgt Martin's court-martial and is without any support in the record. It is supported only by the Government's speculation.

As previously briefed by Appellant, Cpl AI's relationship with his wife and highly-personalized opinion of her credibility discussed in his testimony interfered with the members' ability to independently assess LCpl CI's credibility. The fact that Cpl AI testified less than an hour before LCpl CI testified, and

[48] Government's Br. at 48 (citing *Mullins*, 69 M.J. at 117).

that Sgt Martin's court-martial was a members trial, further magnified the prejudicial impact of his testimony.

3. The Government's "*Fletcher* prejudice test" supports a finding of prejudice to Sgt Martin.

The Government encourages this Court to adopt the *Fletcher* factors to assess prejudice resulting from the erroneous admission of human lie detector testimony.[49] However, in *Fletcher*, this Court addressed prejudice resulting from prosecutorial misconduct (e.g., trial counsel's argument), which the members are instructed is not evidence. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). Improper argument is inherently less prejudicial than the erroneous admission of Cpl AI's testimony because his testimony was evidence considered by the members on any point they believed it was relevant. The context of Sgt Martin's case demonstrates that he suffered material prejudice from the admission of human lie detector testimony.[50]

First, as discussed *supra*, Cpl AI's testimony that he believed LCpl CI and that she was telling the truth about what happened to her was highly damaging to the Defense. Thus, the "severity of the error" prong is in Sgt Martin's favor.

[49] Government's Br. at 47, 56.
[50] Sgt Martin does not endorse the Government's proposed prejudice test, but addresses it for the purpose of this Brief.

Second, the military judge's instruction to the members consisted only of the standard instructions on credibility of witnesses. It was neither prompt, nor tailored to human lie detector testimony.[51] Thus, the "curative measures taken" prong also favors Sgt Martin.

Finally, the Government's case against Sgt Martin was not strong. The Government's case relied solely on witness testimony. As discussed *supra*, LCpl CI's credibility was at issue throughout the court-martial. The Defense presented testimony from several witnesses that LCpl CI had a poor reputation among Marines for her truthfulness: (1) MSgt Nolasco discussed how LCpl CI's command investigated her for suspicion of untruthfulness and planned to bring her to non-judicial punishment;[52] (2) LCpl CI admitted that her command confronted her about her maternity leave and she was read her rights;[53] and (3) SSgt Seller, one of LCpl CI's supervisors, testified that LCpl CI's reputation for truthfulness was "questionable."[54] The Government emphasizes that "the members had no reason not to believe Cpl Visconti,"[55] but her credibility has little impact on the veracity of the hearsay she was repeating. In other words,

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[51] *See* J.A. at 063, 346.
[52] J.A. at 212-13. Appellant's Brief contains an error in citing evidence supporting LCpl CI's credibility issues. *See* Appellant's Br. at 14.
[53] J.A. at 117-19.
[54] J.A. at 230.
[55] Government's Br. at 59.

Cpl Visconti's credibility does not address whether LCpl CI was actually truthful in her statements to Cpl Visconti.

The Government's only other eye witness to the alleged incident had significant credibility issues, no matter the positive color the Government attempts to give him.[56] In his unit, Mr. DW had a reputation among the staff NCOs and officers for "not being truthful; not honest."[57] Furthermore, the witnesses the Government called to attempt to bolster Mr. DW's credibility were unable to successfully do so: one testified that Mr. DW was "pretty truthful," but that he also had a reputation for "malingering kind of, like, he's not –- he does things to get out of things"[58]; another was unable to provide an opinion on Mr. DW's reputation for truthfulness among Marines[59]; and another acknowledged that MSgt Nolasco had a good basis to judge Mr. DW's credibility.[60]

The members' conviction on a lesser-included offense does not prove that Cpl AI's testimony had no prejudicial impact, as Government asserts.[61] Similarly, the lower court's doubt that Cpl AI's testimony had any significant impact on the members'

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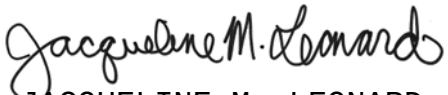
[56] *See* Government's Br. at 60-61.
[57] J.A. at 211.
[58] J.A. at 256.
[59] J.A. at 259-60.
[60] J.A. at 251-52.
[61] Government's Br. at 62 ("If Cpl AI's belief that his wife was telling the truth truly impacted the Members' deliberations, the Members would have surely convicted on the greater offense.").

perceptions of the evidence[62] ignores the critical and strategic role Cpl AI played in the Government's case and the weight of his testimony.

Conclusion

The Government's case against Sgt Martin rested on the credibility of its witnesses, primarily the complaining witness. With her credibility seriously called into question, the Government's likelihood of a conviction was minimal. The Government recognized this enough to feel compelled to address it with Cpl AI's lie detector testimony in both his direct and re-direct examinations. The prejudicial impact of Cpl AI's testimony that the woman he'd known for eight years and lived with at the time of the alleged offense was truthful and that he believed her allegation is highly damaging.

Wherefore, Sgt Martin respectfully requests that this Court reverse the decision of the lower court.



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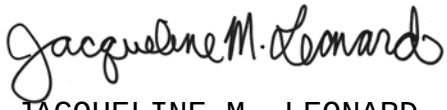
[62] *See Martin*, 2015 CCA Lexis 250 at *12-13.

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically filed with the Court, and copies were electronically delivered to the Appellate Government Division, and Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on January 20, 2016.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Rule 24(c) because it contains less than 9,000 words. Using Microsoft Word version 2010 with 12-point Courier-New font, this brief contains 6,600 words.



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