

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Beau T. MARTIN  
Sergeant (E-5)  
United States Marine Corps,

Appellant

BRIEF ON BEHALF OF  
APPELLANT

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:

JACQUELINE M. LEONARD  
LT, JAGC, USN  
Appellate Defense Counsel  
Navy-Marine Corps Appellate  
Review Activity  
1254 Charles Morris St, SE  
Bldg 58, Suite 100  
Washington Navy Yard, D.C. 20374  
Tel: (202) 685-7052  
jacqueline.leonard@navy.mil  
Bar No. 36541

**Index of Brief**

Table of Cases, Statutes, and Other Authorities.....3

Issue Presented.....5

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

Statement of Statutory Jurisdiction.....5

Statement of the Case.....5

Statement of Facts.....6

Summary of Argument.....9

Argument.....11

**SERGEANT MARTIN SUFFERED MATERIAL PREJUDICE FROM  
THE ADMISSION OF HUMAN LIE DETECTOR TESTIMONY.  
THE COMPLAINING WITNESS'S HUSBAND TESTIFIED THAT  
SHE WAS TELLING THE TRUTH. THIS TESTIMONY  
IMPROPERLY BOLSTERED HER CREDIBILITY AND  
INTERFERED WITH THE MEMBERS' EXCLUSIVE FUNCTION  
TO DETERMINE WITNESS CREDIBILITY.....11**

A. The human lie detector testimony was  
materially prejudicial.....11

    1. Cpl AI's testimony went to the central issue .....12

        i. The Government's case was weak .....13

        ii. Sgt Martin suffered material prejudice as a  
result of the erroneous admission of human lie  
detector testimony and an improper instruction  
to the members on that testimony .....16

    2. The military judge failed to provide appropriate  
instruction to the members concerning the human lie  
detector testimony .....19

        i. The lower court erred when it found that the  
standard credibility instruction negated  
Kasper's specific instruction requirement in  
this case .....21

Conclusion.....23

Certificate of Filing and Service.....24  
Certificate of Compliance.....24

**Table of Cases, Statutes, and Other Authorities**

**United States Court of Appeals for the Armed Forces**

*United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008).....11  
*United States v. Armstrong*, 53 M.J. 76 (C.A.A.F. 2000).....20  
*United States v. Bean*, 62 M.J. 264 (C.A.A.F. 2005).....11  
*United States v. Birdsall*, 47 M.J. 404 (C.A.A.F. 1998)..13, 16-17  
*United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007)....13, 17-20  
*United States v. Eggen*, 51 M.J. 159 (C.A.A.F. 1999).....13  
*United States v. Gunkle*, 55 M.J. 26 (C.A.A.F. 2001).....11  
*United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003).....passim  
*United States v. Knapp*, 73 M.J. 33 (C.A.A.F. 2014).....passim  
*United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010).....13  
*United States v. Robbins*, 52 M.J. 455 (C.A.A.F. 2000).....17

**United States Court of Military Appeals**

*United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986).....11

**Military Courts of Criminal Appeals**

*United States v. Jackson*, 74 M.J. 710 (A. Ct. Crim. App.  
May 18, 2015) .....12, 19, 21-22  
*United States v. Martin*, No. 201400315, 2015 CCA Lexis 250  
(N-M. Ct. Crim. App. June 18, 2015).....passim  
*United States v. Smith*, 2014 CCA Lexis 602 (N-M. Ct. Crim.  
App. Aug. 21, 2014) .....12, 22-23  
*United States v. Williams*, 2007 CCA Lexis 548 (A.F. Ct.  
Crim. App. Dec. 12, 2007) .....12

**Statutory Provisions**

10 U.S.C. § 920(m) (2006).....5  
Article 66, 10 U.S.C. § 866(b)(1) (2012).....5  
Article 67, 10 U.S.C. § 867(a)(3).....5

## **Issue Presented**

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

## **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.<sup>1</sup> On August 14, 2015, Sgt Martin filed a petition for grant of review properly bringing his case within this Court's Article 67(a)(3), UCMJ, jurisdiction.<sup>2</sup>

## **Statement of the Case**

On April 17, 2014, sitting as a general court-martial, a panel of members with enlisted representation convicted Sgt Martin, contrary to his plea, of one specification of wrongful sexual contact, in violation of Article 120(m), UCMJ.<sup>3</sup> He was acquitted of the greater offense of aggravated sexual assault, as well as two specifications of wrongful sexual contact, in violation of Articles 120(c) and 120(m), UCMJ.<sup>4</sup> The members sentenced Sgt Martin to a reduction to pay-grade E-1 and a bad-

---

<sup>1</sup> 10 U.S.C. § 866(b)(1) (2012).

<sup>2</sup> 10 U.S.C. § 867(a)(3).

<sup>3</sup> R. at 739; 10 U.S.C. § 920(m) (2006).

<sup>4</sup> 10 U.S.C. § 920(c)-(m) (2006).

conduct discharge.<sup>5</sup> The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the sentence executed.<sup>6</sup>

On appeal, the Navy-Marine Court of Criminal Appeals affirmed the findings and sentence on June 18, 2015.<sup>7</sup> On August 14, 2015, Appellant timely filed a Petition for Grant of Review with this Court, and following a twenty-day extension, filed the Supplement on September 2, 2015. This Court granted review of Sgt Martin's case on October 7, 2015.

#### **Statement of Facts**

Sgt Martin was Lance Corporal (LCpl) CI's platoon sergeant and direct supervisor.<sup>8</sup> On September 30, 2011, Sgt Martin attended a house party.<sup>9</sup> LCpl CI also attended the party with her husband, Corporal (Cpl) AI.<sup>10</sup>

Around midnight while still at the party, LCpl CI vomited and fell asleep in a spare bed.<sup>11</sup> Later that night, Cpl AI joined her in the bed.<sup>12</sup> Around two or three in the morning, Sgt

---

<sup>5</sup> R. at 772.

<sup>6</sup> General Court-Martial Order 04-2014, Aug. 6, 2014.

<sup>7</sup> *United States v. Martin*, No. 201400315, 2015 CCA Lexis 250, \*1 (N-M. Ct. Crim. App. June 18, 2015); JA at 001.

<sup>8</sup> Joint Appendix at 068.

<sup>9</sup> JA at 069.

<sup>10</sup> JA at 073.

<sup>11</sup> JA at 076-077.

<sup>12</sup> JA at 078.

Martin, Mr. DW, and Cpl L entered the bedroom and slept on the floor.<sup>13</sup>

According to LCpl CI, she awoke when she felt someone's hand in her underwear.<sup>14</sup> She claimed she looked up and saw Sgt Martin kneeling next to the bed and putting his fingers in her vagina.<sup>15</sup> LCpl CI testified that she lay still for three to five minutes while this touching took place, before she rolled over and shook her husband. She testified the touching stopped because Sgt Martin removed his hand and left the room.<sup>16</sup>

While LCpl CI claimed her husband was a deep sleeper, she also testified that when she shook Cpl AI, he woke up and told her to "[g]o back to sleep."<sup>17</sup> According to LCpl CI, she remained in the bed a few minutes, then got up to use the restroom. She did not go downstairs, where she still heard people awake.<sup>18</sup> Instead, she went back to the room--where her alleged attacker, Sgt Martin, was<sup>19</sup>--and fell asleep.<sup>20</sup>

---

<sup>13</sup> JA at 078-079.

<sup>14</sup> JA at 079-080.

<sup>15</sup> JA at 081.

<sup>16</sup> JA at 082-083.

<sup>17</sup> JA at 103.

<sup>18</sup> JA at 084, 103.

<sup>19</sup> The Government's case included several notable discrepancies between Mr. DW and LCpl CI's testimony. This issue is discussed in more detail below.

<sup>20</sup> JA at 084.

LCpl CI and Cpl AI left the house a few hours later.<sup>21</sup> After a week, LCpl CI told her husband about the incident, but chose not to report it.<sup>22</sup> About a month later, she had several discussions with another Marine about the incident. One year later, that friend reported the incident.<sup>23</sup>

When LCpl CI told her husband about the alleged incident, he initially doubted her.<sup>24</sup> On direct examination, the trial counsel addressed this with LCpl CI's husband. In response, he explained why he now believed her allegation was credible:

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 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.<sup>25</sup>

On re-direct, the trial counsel asked Cpl AI how he overcame his misgivings and he provided a similar, but more detailed response:

Q: You do believe your wife, though, correct?

---

<sup>21</sup> JA at 084-085.

<sup>22</sup> JA at 086.

<sup>23</sup> JA at 089-090.

<sup>24</sup> JA at 063.

<sup>25</sup> JA at 51.



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 affected 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.<sup>26</sup>

Trial defense counsel did not object to this testimony and the military judge failed to issue the required cautionary instruction on human lie detector testimony. On appeal, the lower court correctly found admission of Cpl AI's testimony was clear and obvious error.<sup>27</sup> But it found that Cpl AI's testimony did not materially prejudice Sgt Martin.<sup>28</sup> Additional facts necessary to resolve the assigned error are included below.

#### **Summary of Argument**

Sgt Martin stood accused of touching LCpl CI's vagina while she was asleep at a party they both attended. At trial, on direct examination, the Government elicited testimony from LCpl CI's husband that suggested he believed her allegation was

---

<sup>26</sup> JA at 063.

<sup>27</sup> *Martin*, 2015 CCA Lexis 250 at \*10; JA at 008.

<sup>28</sup> *Martin*, 2015 CCA Lexis 250 at \*13; JA at 009.

credible. On cross-examination, in response to defense questions probing this belief, Cpl AI said he initially had doubts whether the alleged incident had even occurred.<sup>29</sup> On re-direct, the Government explicitly asked him whether his wife was telling the truth. Cpl AI testified that she was and then bolstered his opinion with the basis for his determination, echoing his direct examination testimony.

The defense did not object to this human lie detector testimony and the military judge did not give a required cautionary instruction. The lower court found plain error in the admission of the "human lie detector testimony."<sup>30</sup> But it failed to conduct a prejudice analysis based on this Court's precedent, and found no prejudice.

Cpl AI's testimony concerned the central issue in the trial against Sgt Martin. His human lie detector testimony stood as an impermissible guarantor of LCpl CI's credibility and infringed on the members' exclusive role to determine credibility. Without a proper cautionary instruction guiding members in the use of that testimony, Sgt Martin suffered material prejudice.

---

<sup>29</sup> JA at 057-058.

<sup>30</sup> *Martin*, 2015 CCA LEXIS 250 at \*12; JA at 007-008.

## Argument

SERGEANT MARTIN SUFFERED MATERIAL PREJUDICE FROM THE ADMISSION OF HUMAN LIE DETECTOR TESTIMONY. THE COMPLAINING WITNESS'S HUSBAND TESTIFIED THAT SHE WAS TELLING THE TRUTH. THIS TESTIMONY IMPROPERLY BOLSTERED HER CREDIBILITY AND INTERFERED WITH THE MEMBERS' EXCLUSIVE FUNCTION TO DETERMINE WITNESS CREDIBILITY.

### Standard of Review

A lower court's ruling on prejudice is a question of law that this Court reviews *de novo*.<sup>31</sup> The issue whether members were properly instructed is also a question of law this Court reviews *de novo*.<sup>32</sup>

### Discussion

**A. The human lie detector testimony was materially prejudicial.**

"An obvious error materially prejudices the substantial rights of the accused when it has an unfair prejudicial impact on the [court members'] deliberations."<sup>33</sup> Thus, in determining prejudice, this Court evaluates the error against the entire record.<sup>34</sup>

---

<sup>31</sup> *United States v. Allende*, 66 M.J. 142, 144-145 (C.A.A.F. 2008) (citing to *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001)).

<sup>32</sup> See *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003); see also *United States v. Bean*, 62 M.J. 264, 266 (C.A.A.F. 2005) ("We review allegations of error involving mandatory instructions *de novo*." (internal citations omitted)).

<sup>33</sup> *United States v. Knapp*, 73 M.J. 33, 37 (C.A.A.F. 2014) (internal quotations omitted).

<sup>34</sup> *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986).

In *United States v. Kasper*,<sup>35</sup> this Court established two factors to examine the prejudicial impact of impermissible human lie detector testimony. First, an appellate court must determine whether the testimony went to the central issue. Second, an appellate court must assess whether the military judge provided detailed guidance to the members about the human lie detector testimony.<sup>36</sup>

**1. Cpl AI's testimony went to the central issue.**

As noted by the lower court, "Cpl AI was asked specifically whether he believed his wife was lying - the central issue in this case . . . [.]"<sup>37</sup> His testimony went to the heart of the matter in a case built entirely on LCpl CI's credibility.

This Court determines whether a witness's opinion as to the credibility of another person amounts to prejudicial error by

---

<sup>35</sup> 58 M.J. 314 (C.A.A.F. 2003). While this Court has not distinctly identified *Kasper* as the test for assessing prejudice when human lie detector testimony is improperly admitted, it used the *Kasper* prejudice factors in its recent decision in *Knapp* to examine the prejudicial impact of such erroneously admitted evidence. Military courts of criminal appeals have followed suit. See *United States v. Jackson*, 74 M.J. 710 (A. Ct. Crim. App. May 18, 2015); *United States v. Smith*, 2014 CCA Lexis 602, \*9 (N-M. Ct. Crim. App. Aug. 21, 2014) ("Like in *Kasper* and *Knapp*, the improper testimony here was initiated by the prosecution, and went to a central issue in the case."); *United States v. Williams*, 2007 CCA Lexis 548, \*5 (A.F. Ct. Crim. App. Dec. 12, 2007) (finding that the testimony at issue did not qualify as human lie detector testimony, but that if such testimony were offered, "the military judge must issue prompt curative instructions") (citing *Kasper*, 58 M.J. at 315) (JA at 019).

<sup>36</sup> *Kasper*, 58 M.J. at 315.

<sup>37</sup> *Martin*, 2015 CCA Lexis 250 at \*12; JA at 009.

examining the erroneous testimony in context.<sup>38</sup> To do so, this Court considers "such factors as the immediate instruction, the standard instruction, the [counsel's] question, and the strength of the government's case."<sup>39</sup>

i. The Government's case was weak.

In *United States v. Knapp*, an Air Force Office of Special Investigations agent testified that through his special training, he was able to identify the appellant's deception when he provided an innocent account of the charged events to investigators. This Court found that by the time the members had the opportunity to assess the appellant's credibility for themselves (i.e., when he testified at trial), his credibility had already been tainted by the agent's human lie detector testimony.<sup>40</sup> Without proper instruction to the members to disregard impermissible testimony on the ultimate issue in the case, the agent's testimony constituted prejudicial error.<sup>41</sup>

Similar to *Knapp*, the weight of the Government's case rested on LCpl CI's credibility.<sup>42</sup> Absent the members' belief in

---

<sup>38</sup> *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010) (citing *United States v. Eggen*, 51 M.J. 159, 161 (C.A.A.F. 1999)).

<sup>39</sup> *Mullins*, 69 M.J. at 116; see also *United States v. Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007).

<sup>40</sup> *Knapp*, 73 M.J. at 37.

<sup>41</sup> *Knapp*, 73 M.J. at 37-38.

<sup>42</sup> See also *United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998) (finding prejudice where human lie detector testimony went

her account, the Government's case lacked any foundation. The defense centered its case on attacking the credibility of the Government's witnesses, half of which had significant credibility problems.<sup>43</sup> LCpl CI had a reputation among Marines as a liar.<sup>44</sup> After she repeatedly gave her command various pregnancy due dates spanning several weeks and did not report to work, her command investigated and learned LCpl CI was lying about her due date.<sup>45</sup> The command threatened her with non-judicial punishment, but dropped the matter because LCpl CI went into labor shortly thereafter, then transferred from the unit.<sup>46</sup>

The Government had no confession, or even an admission, from Sgt Martin to any sexual contact with LCpl CI.<sup>47</sup> Its only eyewitness to the incident, Mr. DW, had serious credibility problems. He had a Page 11 counseling entry for making a false official statement and malingering, a non-judicial punishment for an unauthorized absence, and the FBI investigated him for making a bomb threat.<sup>48</sup> Mr. DW was also biased against Sgt Martin, his former supervisor, because Sgt Martin recommended Mr. DW receive the maximum punishment for his non-judicial

---

to the key issue in the trial--the complaining witnesses' credibility).

<sup>43</sup> JA at 165-168.

<sup>44</sup> JA at 075, 228.

<sup>45</sup> JA at 126.

<sup>46</sup> JA at 213.

<sup>47</sup> See JA at 189, 191.

<sup>48</sup> JA at 165, 168.

punishment.<sup>49</sup> The Marine Corps administratively separated Mr. DW for his misconduct.<sup>50</sup>

The Government's case was also compromised by major discrepancies in accounts of the incident. LCpl CI testified Sgt Martin left the room immediately after the alleged incident.<sup>51</sup> But Mr. DW testified that Sgt Martin lay back down on the floor and only left the room after the homeowner entered and told all unmarried people to sleep downstairs.<sup>52</sup> Furthermore, LCpl CI testified Sgt Martin never entered the bed.<sup>53</sup> But Mr. DW testified he saw Sgt Martin get *into the bed*, where he removed his shirt and got under the covers.<sup>54</sup>

The members' questions illustrate their awareness of these discrepancies. LCpl CI was the Government's final witness, so the members had already heard Mr. DW's description of the incident. Following LCpl CI's testimony, one member's question highlighted the inconsistencies between her account and Mr. DW's, asking LCpl CI whether Sgt Martin took off his clothes and got into the bed she and her husband were in.<sup>55</sup> These details directly contradict Mr. DW's testimony. No other Government witness provided any meaningful corroboration of LCpl CI's

---

<sup>49</sup> JA at 167.

<sup>50</sup> JA at 167-168.

<sup>51</sup> JA at 082-083.

<sup>52</sup> JA at 154.

<sup>53</sup> JA at 080.

<sup>54</sup> JA at 154.

<sup>55</sup> See JA at 125, 123.

allegations. Amidst an unstable case, the Government called Cpl AI. This active duty Marine had no obvious baggage and could repair the Government's credibility problems.

- ii. Sgt Martin suffered material prejudice as a result of the erroneous admission of human lie detector testimony and an improper instruction to the members on that testimony.

Cpl AI's testimony about his wife's credibility was highly damaging to the defense. Cpl AI shared his background with the members and explained that he had known his wife since his freshman year of high school, a total of eight years.<sup>56</sup> He testified to the radical changes he observed in LCpl CI since the alleged incident, and testified that only a serious event would cause such changes in her.<sup>57</sup> The members not only heard Cpl AI's firm belief that his wife was telling the truth, but also his detailed description of how and why she had changed so drastically.

In *United States v. Birdsall*, this Court found that human lie detector testimony from two doctors magnified the prejudicial impact of the inadmissible testimony because the doctors' position imparted an "undeserved stamp of approval on the credibility of the victims . . . [.]<sup>58</sup> Similarly, Cpl AI's

---

<sup>56</sup> JA at 034.

<sup>57</sup> JA at 063.

<sup>58</sup> *Birdsall*, 47 M.J. at 410.



relationship with his wife and his highly-personalized observations magnified the prejudicial impact of his testimony.<sup>59</sup>

The Government's order of witnesses even further added to the prejudicial impact of Cpl AI's testimony. In *United States v. Brooks*, an expert in clinical psychology provided human lie detector testimony on a child victim's credibility.<sup>60</sup> There, this Court found prejudicial error because the appellant had the "substantial right . . . to have the members decide the ultimate issue . . . without the members viewing [the victim's] credibility through the filter of' an expert's view of the victim's credibility."<sup>61</sup>

Here, the Government called Cpl AI as a witness immediately before his wife testified. Less than an hour passed between the end of his testimony and his wife taking the stand. Given the credibility concerns the defense would surely raise in its cross-examination of LCpl CI, the Government called Cpl AI to preemptively counter the members' disbelief of LCpl CI's account. In Cpl AI's direct examination, the Government highlighted his "expertise" in his wife's behavior and provided

---

<sup>59</sup> See also *United States v. Robbins*, 52 M.J. 455, 458 (C.A.A.F. 2000) (drawing distinction in the prejudicial impact of human lie detector testimony in a judge-alone trial versus "a court-martial panel, where the prejudicial impact of testimony that arguably usurped the panel's factfinding function would be at its greatest") (citing *Birdsall*, 47 M.J. at 410).

<sup>60</sup> *Brooks*, 64 M.J. 325.

<sup>61</sup> *Brooks*, 64 M.J. at 330 (citing *Kasper*, 58 M.J. at 319).

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.

The Government's closing argument focused on the importance of credibility and cited Cpl AI as a reason the members should believe LCpl CI.<sup>62</sup> Cpl AI's testimony on his wife's credibility on both direct and re-direct examination prejudiced Sgt Martin because it precluded the members from determining LCpl CI's credibility - the ultimate issue in the case - without the filter of impermissible human lie detector testimony.

The prejudice concerns presented by Sgt Martin's case are identical to this Court's concerns in *Knapp*. Cpl AI's testimony impermissibly tainted the members' perception of LCpl CI. This bolstered the members' belief that something had actually happened to LCpl CI, and undermined the defense's central theory that she was lying. His testimony also undermined the defense attacks on LCpl CI's credibility generally and her character

---

<sup>62</sup> In its rebuttal, Government counsel stated Cpl AI "came back and he told you, verbatim, that he believed his wife, that he did think - - that he did think it happened, that he saw a remarkable change in his wife's affect right after this event, that this marked a turning point." JA at 336.

trait as a liar.<sup>63</sup> Finally, Cpl AI's close relationship with his wife increased the weight and magnitude of his testimony.

Like the agents in *Kasper* and *Knapp*, Cpl AI's opinion as to the truth of LCpl CI's allegation against Sgt Martin went to the central issue of the case. This improper testimony all but guaranteed LCpl CI's credibility.<sup>64</sup> The military judge's failure to properly guide the members on this testimony resulted in prejudicial error.<sup>65</sup> In other words, the inaction of the military judge in this case solidified the prejudice against Sgt Martin.

**2. The military judge failed to provide appropriate instruction to the members concerning the human lie detector testimony.**

---

<sup>63</sup> Trial defense counsel's primary strategy was to highlight LCpl CI's significant credibility issues. In addition to what's already been discussed, the defense also presented evidence of LCpl CI's motive to fabricate. LCpl CI was placed on limited duty shortly after reporting to Marine Corps Base Camp Pendleton, California in August 2011 due to gastroparesis, a condition that caused frequent vomiting. LCpl CI was originally notified that she would get a zero percent disability rating for the condition due to the fact that it pre-existed her service. More than two years later in July 2013, LCpl CI was medically discharged from the Marine Corps. She received a seventy-percent disability rating for post-traumatic stress disorder resulting from the alleged incident with Sgt Martin. At the time of Sgt Martin's court-martial, LCpl CI had been medically discharged from active duty. JA at 066-068, 106-109.

<sup>64</sup> See *Brooks*, 64 M.J. 325 at 329-30.

<sup>65</sup> This Court's rejection of human lie detector testimony is well-established. However, as noted by the Army Court of Criminal Appeals in *Jackson*, guidance from this Court on the appropriateness of the current Department of the Army Military Judge's Benchbook instruction on human lie detector testimony for circumstances in which the impermissible testimony is from a lay witness would be useful to the practice of military justice.

The second *Kasper* factor requires that an appellate court assess whether the military judge provided detailed guidance to the members about the human lie detector testimony.<sup>66</sup> "It is the exclusive province of the court members to determine the credibility of witnesses."<sup>67</sup> Therefore, it is a military judge's duty to ensure members are given "appropriate cautionary instructions" when human lie detector testimony is offered on the ultimate issue in a case.<sup>68</sup> If the military judge fails to uphold this duty, there is prejudice.<sup>69</sup> Here, the military judge did not give appropriate cautionary instructions to the members, and thus Sgt Martin meets the second *Kasper* factor.

"The Government can certainly rebut a defense counsel's argument . . . [but] it cannot do so by usurping the role of the jury in determining witness credibility."<sup>70</sup> Cpl AI's testimony ran afoul of this principle. Admission of impermissible human lie detector testimony and the military judge's failure to provide a curative instruction interfered with the province of the members to determine LCpl CI's credibility.

---

<sup>66</sup> *Kasper*, 58 M.J. at 315.

<sup>67</sup> *Knapp*, 73 M.J. at 34 (citing *Brooks*, 64 M.J. at 328 n.3).

<sup>68</sup> *Knapp*, 73 M.J. at 37.

<sup>69</sup> See *Knapp*, 73 M.J. at 36; see also *United States v. Armstrong*, 53 M.J. 76, 81-82 (C.A.A.F. 2000) (holding that a curative instruction can render an error harmless, but where a court is "left in grave doubt" as to whether the error had a substantial influence on the findings, there is prejudice).

<sup>70</sup> *Knapp*, 73 M.J. at 36 (citing *Kasper*, 58 M.J. at 315).

- i. The lower court erred when it found that the standard credibility instruction negated Kasper's specific instruction requirement in this case.

In *United States v. Knapp*,<sup>71</sup> this Court held that the standard credibility instruction is not an appropriate remedial action to mitigate the prejudicial impact of human lie detector testimony.<sup>72</sup> Reaffirming *Kasper's* mandate that a military judge "guide [members] with specificity as to how they should and should not consider the human lie detector testimony that had been placed before them,"<sup>73</sup> this Court made clear that when:

the human lie detector "testimony was not offered on a peripheral matter or even as a building block of circumstantial evidence," but "on the ultimate issue in this case - whether Appellant was truthful as to the charge" . . . the military judge's failure to appropriately instruct the members to disregard this testimony was prejudicial error.<sup>74</sup>

*Knapp* explained that when human lie detector testimony is erroneously admitted, a military judge must provide members prompt and specific guidance.<sup>75</sup> Failure to do so constitutes error.

The Army Court of Criminal Appeals recently recognized this in *United States v. Jackson*.<sup>76</sup> It found prejudicial error in a military judge's failure to provide a specific cautionary

---

<sup>71</sup> *Knapp*, 73 M.J. at 37.

<sup>72</sup> *Knapp*, 73 M.J. at 37-38.

<sup>73</sup> *Kasper*, 58 M.J. at 319.

<sup>74</sup> *Knapp*, 73 M.J. at 37-38 (internal citation omitted).

<sup>75</sup> See *Knapp*, 73 M.J. at 36 (quoting *Kasper*, 58 M.J. at 315).

<sup>76</sup> *Jackson*, 74 M.J. 710.

instruction to members, and did so based on *Kasper* and *Knapp*.<sup>77</sup> In Sgt Martin's case, however, the lower court disregarded precedent and ruled in opposition to it. Though it specifically cited *Knapp*, the lower court immediately thereafter concluded that despite the military judge's failure to "issue prompt cautionary instructions to ensure that the members do not make improper use of [human lie detector] testimony", any potential prejudice was negated by the standard credibility instruction.<sup>78</sup>

Moreover, the lower court did not just ignore precedent from this Court and its sister service court. It ignored its own precedent. In *United States v. Smith*, the lower court found prejudice in a nearly identical situation because it could not assess what weight the members gave to the human lie detector testimony without the required instruction.<sup>79</sup> The lower court

---

<sup>77</sup> See *Jackson*, 74 M.J. at 717 ("There was no follow-on prompt cautionary instruction about human lie detector testimony, as required by *Knapp* and *Kasper*.").

<sup>78</sup> *Martin*, 2015 CCA Lexis 250 at \*13 (citing *Knapp*, 73 M.J. at 36) (internal quotation omitted); JA at 009.

<sup>79</sup> In *United States v. Smith*, a special agent testified on direct examination and again in cross-examination that he believed the appellant's explanation of how he obtained a stolen laptop was a lie and that the appellant "was lying about a lot of other things." The defense did not object and the military judge only provided the standard instruction on witness credibility. The lower court found prejudice because "even though the military judge instructed the members that they were the sole determiners of witness credibility, we have no means to determine what weight the members gave to SA W's testimony. Accordingly, we cannot find that it did not prejudice a material right of the appellant." No. 201400106, 2014 CCA Lexis 602, \*10 (N-M Ct.

never explained why Sgt Martin did not deserve the same instruction as the appellant in *Smith*.

### **Conclusion**

Cpl AI's testimony transformed LCpl CI's testimony from questionable to believable and bolstered the overall credibility of the Government's otherwise weak case. This impermissible testimony materially prejudiced Sgt Martin. Sgt Martin respectfully requests this Court reverse the lower court's finding of no prejudice and set aside the findings and sentence.



JACQUELINE M. LEONARD  
LT, JAGC, USN  
Appellate Defense Counsel  
Navy-Marine Corps Appellate  
Review Activity  
1254 Charles Morris St, SE  
Bldg 58, Suite 100  
Washington Navy Yard, D.C. 20374  
Tel: (202) 685-7052  
jacqueline.leonard@navy.mil  
Bar No. 36541

**CERTIFICATE OF FILING AND SERVICE**

I certify on November 6, 2015 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.



JACQUELINE M. LEONARD  
LT, JAGC, USN  
Appellate Defense Counsel  
Navy-Marine Corps Appellate  
Review Activity  
1254 Charles Morris St, SE  
Bldg 58, Suite 100  
Washington Navy Yard, D.C. 20374  
Tel: (202) 685-7052  
jacqueline.leonard@navy.mil  
Bar No. 36541

**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 2003 with 12-point Courier-New font, this brief contains 5,003 words.