IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. Dkt. No. 20140476
	)	USCA Dkt. No. 16-0731/AR
Specialist (E-4) **AUSTIN L. HENDRIX**, United States Army, Appellant	)	

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United States Army,	)	USCA Dkt. No. 16-0731/AR
Appellant	)	

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

Issues Presented

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A DEFENSE MOTION TO SUPPRESS RELATED TO THE IDENTIFICATION OF THE APPELLANT DURING A VOICE LINEUP.

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO COMPEL AN EXPERT CONSULTANT, EP, IN THE FIELD OF AUDIO FORENSIC SCIENCE AND VOICE IDENTIFICATION.

Statement of the Case

On December 12, 2016, this Honorable Court granted appellant's petition for review. On January 26, 2017, appellant filed his final brief with this Court. The government responded on February 16, 2017. This is appellant's reply.

Issue I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A DEFENSE MOTION TO SUPPRESS RELATED TO THE IDENTIFICATION OF THE APPELLANT DURING A VOICE LINEUP.

Argument

The government contends the voice lineup in this case was neither unnecessarily suggestive nor conducive to a substantial likelihood of misidentification. (Gov't. Br. 14–15). This is incorrect, particularly in light of the government's multiple concessions and failure to address several of appellant's key arguments.

Next, in arguing a lack of prejudice, the government claims the voice lineup in this case was both "low" quality and "immaterial" evidence. (Gov't. Br. 17). As such, the government is currently attempting to *preserve* a conviction by downplaying the same exact evidence it argued was both "crucial" and "important" when *seeking* a conviction. Under any standard, appellant was clearly prejudiced by the voice lineup evidence presented to the panel in this case.

a. In claiming the voice lineup was not unnecessarily suggestive, the government actually concedes several of its critical infirmities.

The government first claims "the lineup was not unnecessarily suggestive." (Gov't. Br. 14). For this claim, the government's arguments lack merit, especially since the government concedes several key infirmities within the voice lineup.

First, the government concedes "each male voice was distinctly different" within the voice lineup. (Gov't. Br. 14). This is a substantial concession. At trial, the trial counsel argued "[t]he voice exemplars were similar," "the voices sound much alike," and "*they had very similar voices, and that is what counts*." (JA 306) (emphasis added).[1]

Second, the government states "Miss JK was instructed to *identify the 'alleged offender'* and the person who 'touched her wrong,' thereby eliminating any indication that she was specifically told to identify appellant." (Gov't. Br. 14) (emphasis added). However, as SPC Hendrix explained in his initial brief, this actually highlights another problem with the voice lineup. At the time of the voice lineup, SPC Hendrix had already been charged—he *was* the alleged offender. (Appellant Br. 26–27, 34–35). Furthermore, in contrast to the government's position that the lineup "eliminat[ed] any indication that she was specifically told

[1] For this issue, appellant's position mirrors the defense argument at the motions hearing: "Agent Zurilgen is the only person in the lineup who sounds anything similar to the accused, and that's who she picked on the first iteration . . . Zurilgen and Specialist Hendrix." (JA 71) (*See also* Appellant Br. 24).

to identify appellant," Ms. JNK testified on multiple occasions that she was specifically listening for SPC Hendrix's voice. (JA 119–21, 138).

Third, the government asserts "the inclusion of SPC Wiegand could reasonably have been viewed as a measure to properly exclude him as the assailant." (Gov't. Br. 14). Critically, this exact same assertion was clearly and clinically rejected by Mr. EP during the motions hearing: "If those voices are very different, there should be two separate lineups . . . we would need two completely different voice lineups to work on both aspects." (JA 59).

For this case, even Ms. JNK said SPC Wiegand's voice is different from appellant's voice (JA 109), and the government has conceded "each male voice was distinctly different." (Gov't. Br. 14). Therefore, it was neither reasonable nor appropriate to use one singular voice lineup for these two distinct purposes.

Finally, the government does not address several of appellant's key points. (*See* Appellant Br. 21–28). As one example, the government does not explain why the voice exemplars included the varying voice levels, since "the only way that [JNK] had identified who allegedly did this was through a whisper that she heard that night when she thought she was dreaming." (JA 42) (*See also* Appellant Br. 25–26). Even further, as Ms. JNK already knew SPC Hendrix as a family friend, the only independent evidentiary value from a voice lineup would have been her ability to identify his whisper, not his normal speaking voice. There was no

rational reason to use any voice exemplars above a whisper, except to increase the likelihood Ms. JNK would be able to recognize appellant's normal voice. The government did not address this issue at trial, and they still have not addressed it on appeal.

Appellant also raised several other issues related to the selection, creation, and administration of the voice exemplars. (Appellant Br. 21–28). In response, the government merely acknowledges that "some evidence suggests the government could have taken further measures to find individuals with a voice similar in tonal quality to appellant's." (Gov't. Br. 14). Such a response is clearly insufficient, and appellant reiterates each of his prior arguments as to why the voice lineup in this case was unnecessarily suggestive. (*See* Appellant Br. 21-28).

b. Contrary to the government's position, Ms. JNK did not make an "in-court identification" of SPC Hendrix.

Next, the government argues "the in-court identification was reliable." (Gov't. Br. 14). There is one obvious flaw with such an argument: during Ms. JNK's testimony, SPC Hendrix was not in the courtroom. (JA 100–01).[2] Instead, prior to her testimony, the record reflects, "The accused withdrew from the

[2] Prior to trial, the military judge granted the government's motion to allow Ms. JNK to testify remotely. (JA 339). Following this ruling, the defense expressed SPC Hendrix's preference to instead absent himself from the courtroom during her testimony, which was approved by the military judge after multiple colloquies with SPC Hendrix. (JA 100-01) (*See also* R. at 130–33, 228–29).

courtroom and went to a separate conference room where a video teleconference was set up." (JA 100). Thus, Ms. JNK's testimony only constituted an in-court *accusation*, rather than an in-court identification.

Furthermore, by only assessing this alleged "in-court identification" (which, again, did not actually occur), the government has not squarely analyzed how the *Biggers* factors relate to the "pretrial identification" at issue: the voice lineup. More specifically, by primarily focusing on sight over sound, the analysis in the government's brief conducts a different analysis from the motions during trial.

For example, in regards to the first *Biggers* factor, the government's brief focuses on what Ms. JNK allegedly *saw* (Gov't. Br. 15), while the trial counsel's motion outlined what Ms. JNK *heard*. (JA 307). Similarly, for the third factor, the government's brief states "there was no discrepancy between [Ms. JNK's] descriptions" (Gov't. Br. 15), while the trial counsel wrote "this factor does not apply, because [Ms. JNK] did not provide a prior description of the accused's voice." (JA 308).[3] The trial counsel further explained "this motion is not about what she saw – it is about what she heard." (JA 307). To that extent, appellant stands by his previous assessment of how the *Biggers* factors relate to the pretrial identification in this case. (*See* Appellant's Br. 28–36).

[3] The identification process in this case was predicated on Ms. JNK being able to identify her alleged attacker's voice. (*See* Appellant Br. 29, 31) (*See also* JA 37, 42, 81, 96, 107–09, 176, 188–89, 293, 298, 300, 304, 307, 341).

c. The government has significantly changed its position regarding the materiality and quality of the voice lineup.

Most strikingly, the government has drastically altered its position related to the materiality and quality of the voice lineup. In fact, the government now claims "the quality of the evidence" is "low" and even declares the voice lineup identification to be "immaterial." (Gov't Br. 17). Appellant has two responses.

First, such a position remains in direct conflict with the government's position at trial. In his written motion, the trial counsel said the voice lineup was "crucial evidence" (JA 308), and he later argued "*this evidence is important, sir*. It's important that the victim identified the accused and excluded this other man very confidently several times. She nailed it, sir. *She nailed the lineup and that is important evidence at trial*." (JA 66) (emphasis added).

Then, during trial, the government thought this "immaterial evidence" was important enough to incorporate into each stage of the court-martial: opening statement, case-in-chief, closing argument, and rebuttal argument. (JA 89, 118–21, 158–59, 205–17, 247, 272–73). Notably, during his opening statement, the trial counsel even told the panel members "*the last important fact that you need to know* is that about nine months after the molestation [JNK] still remembers it and she still remembers the voice of the person who touched her, *CID ran a voice line up. [JNK] nailed it*." (JA 89) (emphasis added).

There is no difference in the quality or materiality of the voice lineup between the court-martial and this appeal. It remains the exact same evidence. However, on appeal, the government is now labeling as "immaterial" the same lineup it described as "crucial" and "important" during trial. Plain and simple, the government cannot attempt to *preserve* a conviction by downplaying the exact same evidence it argued was "important" when *seeking* a conviction.

Second, during the motions hearing for the motion to suppress, the defense counsel referred to "a [Mil. R. Evid.] 403 issue . . . for this motion." (JA 48). If the evidence was "immaterial" and "low" quality, then it should have been excluded under the Mil. R. Evid. 403 balancing test. At a minimum, the substantial errors in the selection, creation, and administration of the voice lineup establish the danger of unfair prejudice and confusion of the issue of whether Ms. JNK was identifying the *whisper* of an assailant or the *voice* of a person she already knew. Again, Ms. JNK's ability to eventually identify the voice of SPC Hendrix – who she knew as a family friend – proves nothing.

d. The voice lineup prejudiced SPC Hendrix.

The improper admission of the voice lineup evidence prejudiced SPC Hendrix under any standard, but appellant does not agree with the government that this case involves a harmless error analysis. (Gov't. Br. 16–17). Instead, this court should test whether this error was harmless beyond a reasonable doubt.

In *Baker*, this Court described the test set forth by Mil. R. Evid. 321 as "the first and second prongs of the *constitutional test*." 70 M.J. 283, 292 n.7 (C.A.A.F. 2011) (emphasis added). Despite its recent revisions,[4] Mil. R. Evid. 321 still encompasses this constitutional test, as expounded on in the Analysis by reference to due process cases and their constitutional standards. *See Manual for Courts-Martial, United States*, App. 22, A22-36 (2012) [hereinafter MCM].

Additionally, both parties at trial argued over whether there was a due process violation. (JA 64–66, 292). The trial counsel even began his argument at the motions hearing by stating, "Your Honor, the question here is whether this lineup is so unreliable that it violates the due process clause." (JA 64).

Therefore, while appellant has demonstrated prejudice under either standard, the proper standard for this case is whether the error was harmless beyond a reasonable doubt. *See United States v. Jasper*, 72 M.J. 276, 282 (C.A.A.F. 2013).

For the reasons outlined in appellant's initial brief, the government cannot meet this standard. (*See* Appellant Br. 36–37). While the government places great weight on Ms. JNK's statements to her step-mother and SA Wiesner the day after the alleged incident, this grossly overstates the nature and certainty of these statements. (Gov't. Br. 17). Ms. SK testified that Ms. JNK did not identify SPC

[4] This rule was subsequently revised in 2013 "for stylistic reasons and to align it with the Federal Rules of Evidence." *Manual for Courts-Martial, United States,* App. 22, A22-36 (2012) [hereinafter MCM].

Hendrix, and "at first she said she didn't know who, but she knew it wasn't [SPC Wiegand] because she knew his voice." (JA 176). Special Agent Wiesner did state Ms. JNK said "she heard him," but she also said "[SPC Wiegand] didn't do it, and I know my dad wouldn't do it . . . [h]e was the only other one." (JA 188). In response to other questions, Ms. JNK said, "I'm pretty sure it wasn't [a dream]" and "I was really tired. I don't remember that much about it." (JA 187).

Issue V

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO COMPEL AN EXPERT CONSULTANT, EP, IN THE FIELD OF AUDIO FORENSIC SCIENCE AND VOICE IDENTIFICATION.

Argument

The government contends the defense did not adequately demonstrate why Mr. EP's assistance was necessary. This is incorrect. The government's contentions are based on understating Mr. EP's ability to assist the defense, overstating the defense counsel's ability to educate himself, and failing to properly account for the critical role of the voice lineup in the government's case.

a. The government erroneously claims the testimony of Mr. EP during the motions hearing did not provide any relevant information.

In arguing that an expert consultant was not necessary to the defense, the government claims the "testimony from [Mr.] EP did not provide any explanations

or information that was relevant to the case at issue." (Gov't. Br. 19). Appellant firmly disagrees.

In actuality, Mr. EP provided both information and explanations about the most relevant aspect of the voice lineup – whether any identification was actually reliable. (JA 53–56). Among other things, Mr. EP detailed the effect of the physical and background characteristics of personnel providing voice exemplars, when to conduct a separate voice lineup to exclude someone as a suspect, his initial concerns regarding the voice lineup in this case, and how whisper identifications are less reliable. (JA 51–63).

The government seeks to minimize Mr. EP's importance by stating he "testified that the identification in this case came down to an issue of memory, and there is no indication in the record that [Mr.] EP was qualified in this area of expertise." (Gov't. Br. 19). This ignores that Mr. EP was accepted as an "expert witness in voice identification" (JA 51), and his testimony over the unreliability of the voice lineup – including how memory impacts voice identification – clearly fell within this realm. (JA 51–63). The government did not offer a single objection during his testimony. Furthermore, several of Mr. EP's concerns about the lineup extended beyond memory, such as, "I'm also concerned about the environment and the methodology that was used to playback the samples." (JA 55).

b. The government erroneously claims Mr. EP would not have added anything that could not be expected of an experienced defense counsel.

The government next argues "evaluating and arguing the strength or reliability of the [voice] lineup was not tied to any scientific or forensic principles, but rather . . . came down to common sense." (Gov't. Br. 20). Again, appellant firmly disagrees.

Within his requests for an expert consultant in this unique field, the defense counsel explained what an expert would accomplish and why he was unable to adequately educate himself. (JA 321–30) (*See also* Appellant Br. 41–43). The defense counsel cut to the heart of the issue in explaining:

> While Defense has been able to learn about the general principles of sound, and the technology associated with audiology, the Defense has also learned that it lacks the expertise to *apply* those principles adequately in this case. Audio Forensics and Voice Identification is a complex area of science . . . Mr. [EP] has the training and experience to know the questions that need to be asked in this particular case.

(JA 324, 329–30) (emphasis added).

Essentially, the defense counsel learned enough about these fields to assess multiple areas where questions needed to be developed. (JA 324, 329). However, as he explained, the defense counsel still lacked the necessary expertise to *apply* the relevant principles to this case. This is especially true when the local CID office was operating without "any type of protocols for how to conduct a voice

lineup." (JA 16). Even further, Mr. EP testified "there are different scenarios coming into play with voice identification that are different today [than there] were in 2009." (JA 61).

Under such circumstances, an expert consultant was needed to do exactly what Mr. EP testified: "reverse engineer what has been done so far" and "help guide a process to solve the complications that we currently have in this case." (JA 55). Such a process is far from "common sense."

The government's position appears to be that the lineup was so poorly executed that no expert was necessary: i.e. "[o]ne does not need an expert consultant to identify that an individual has a noticeable speech impediment and another individual has a Jamaican accent." (Gov't. Br. 20). This fails to account for the deeper complexities in these fields, such as Mr. EP's broader concerns about "the environment and the methodology [used] to playback the samples," after he reviewed a synopsis of how the lineup was conducted. (JA 53, 55).

c. The lack of expert assistance led to a fundamentally unfair trial.

Finally, the government erroneously asserts "the defense adequately attacked the reliability of the voice identification through cross-examination" and "[t]he voice lineup was not central to the government's case." (Gov't. Br. 20–21).

First, despite the government's claim, the defense spent approximately two transcript pages questioning Ms. JNK about the voice lineup, a similar amount

questioning SA Hughes, and did not ask a single question to SPC PK about the voice lineup. (JA 137–38, 218–21). In conjunction, these cross-examinations did not "adequately [attack] the reliability of the voice identification." Instead, the military judge's ruling deprived the appellant of the expert assistance necessary to develop cross-examination and potential expert testimony towards undermining the illusory strength of the voice identification. (*See* Appellant Br. 43–44).

Second, the government again attempts to downplay the importance of the voice lineup by stating "it did not contribute to the conviction because Miss JK identified appellant as her assailant the day after the assault." (Gov't. Br. 21). Again, this grossly overstates the nature and certainty of these identifications. Ms. SK testified Ms. JNK "said she didn't know who [it was], but she knew it wasn't [SPC Wiegand]." (JA 176). Ms. JNK did tell SA Wiesner "she heard him," but she also said "[SPC Wiegand] didn't do it, and I know my dad wouldn't do it . . . [h]e was the only other one." (JA 188). Ms. JNK also told SA Wiesner, "I'm pretty sure it wasn't [a dream]" and "I was really tired. I don't remember that much about it." (JA 187).

In conclusion, after denying the defense motion to suppress the voice lineup, the military judge also denied their ability to properly attack its use by the government. For the reasons outlined above and in appellant's initial brief, this ruling constituted an abuse of discretion. (*See* Appellant Br. 39–44).

Conclusion

Wherefore, SPC Hendrix requests this Honorable Court set aside and dismiss The Specification of The Charge.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hendrix*, Crim. App. Dkt. No. 20140476, USCA Dkt. No. 16-0731/AR, was delivered to the Court and Government Appellate Division on February 27, 2017.

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