IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF APPELLANT (CORRECTED)
v.	
MARIO I. LOPEZ Sergeant (E-5) United States Army, Appellant	Crim. App. Dkt. No. 20140973 USCA Dkt. No. 16-0487 / AR

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

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ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING THE TESTIMONY OF APPELLANT'S WIFE, MRS. CL, WHO TESTIFIED THAT APPELLANT'S APOLOGY TO HIS STEPSON MEANT THAT APPELLANT WAS "LOOSELY ADMITTING GUILT" TO CRIMINAL CONDUCT, AND BY ALSO ADMITTING THE TESTIMONY OF MS. NM, WHO TESTIFIED THAT APPELLANT "HAD PROBABLY RAPED" HIS WIFE BECAUSE MRS. CL HAD RECENTLY RESEARCHED "SPOUSAL RAPE" ON THE INTERNET?

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. §

866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

On October 15, November 18, and December 18 to 19, 2014, Sergeant (SGT) Mario I. Lopez (appellant) was tried at Fort Hood, Texas, before an officer panel sitting as a general court-martial. Contrary to his pleas, the panel convicted SGT Lopez of rape and indecent liberties with a child in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2007). The panel sentenced SGT Lopez to reduction to E-1, forfeiture of all pay and allowances, confinement for five years and a dishonorable discharge. The convening authority approved the sentence as adjudged.

On April 5, 2016, the Army Court affirmed the findings of guilty and the sentence as adjudged. (JA 1). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellant petitioned this Court for review on April 27, 2016. On September 21, 2016, this Court granted review for the issue specified above.

STATEMENT OF FACTS

1. Circumstances Preceding the Court-Martial of SGT Lopez.

Sergeant Mario I. Lopez joined the Navy in 1999, served for four years, and later enlisted in the Army. (R. at 542). In 2001, he met CL and the two married shortly after. (JA 20). For the first seven years of their marriage, SGT Lopez and CL lived together when he was not deployed. (JA 36). CL had five children from a previous marriage that lived elsewhere, but in 2008, four of them came to live with her and SGT Lopez near Fort Lewis, Washington. (JA 36, 51, 68). Those children included her two older sons JDM and IM; her daughter NM; and her youngest son JM, who was ten years old at the time. They remained at Fort Lewis until 2009, when the family moved to Camp George, Korea.

The relationship between SGT Lopez and CL was sometimes "shaky" and "rocky" according to her. (JA 23, 57). According to her children, the relationship was "very distant" and even "horrific;" "they weren't very loving to each other . . . most of the time they were arguing." (JA 81-82, 130). Although they did not appear "physically affectionate towards one another," nothing indicates that, prior to April 17, 2011, they were violent or forceful towards one another either. (JA 82). In any event, CL was unhappy in Korea and she wanted to return to the United States; she was also suffering from "a heart issue," which was a "major problem" and "paramount" concern in her mind. (JA 45, 75, 79).

CL claimed that around July 2010, she stopped having sex with SGT Lopez. (JA 23). On April 17, 2011, however, SGT Lopez and CL had vaginal intercourse in their Camp George apartment. (JA 185). The next day, CL met with a chaplain on post, spoke with a victim advocate, and submitted to a sexual assault medical exam. (JA 38-40). CL made an unrestricted report on April 19, 2011, and agents from the Army's Criminal Investigation Division (CID) contacted her shortly thereafter. (JA 42, 99).

CL eventually "declined to continue" with the investigation. (JA 69-70). She and her children then left Korea in October 2011 and moved to Colorado (JA 45). SGT Lopez eventually transferred to Fort Hood, Texas. He then filed for divorce, which was finalized in January 2013. *Id.*

According to CL, roughly five or six months after she moved to Colorado, she discovered her youngest son JM looking at pornography. (JA 49). She did not make a statement to law enforcement about this until October 2012. (JA 49, 60). The government did not prefer charges against SGT Lopez until August 6, 2014. (JA 6). SGT Lopez's court-martial eventually convened on December 18, 2014, some three and a half years after the initial allegation was reported.

2. The Court-Martial of SGT Mario Lopez.

The government alleged four crimes at trial: that on April 17, 2011 SGT Lopez raped his wife, digitally penetrated her vulva against her will, and

forcibly sodomized her; and that, over the course of two years, SGT Lopez exposed his minor stepson JM to pornography. (JA 6-7). The panel convicted SGT Lopez of the first and last offenses, and acquitted him of the remaining allegations. (JA 9).

a. Specification 3 of Charge I: indecent liberties with a child.

The only direct evidence that SGT Lopez exposed his stepson JM to pornography was JM's testimony. JM stated that he "walked by the door and saw [SGT Lopez] doing something, and I just went in there with him and I asked what it was." (JA 120). JM went on to say that SGT Lopez "described sex and pornography to me, and that was probably it." (JA 121). SGT Lopez never invited JM to watch pornography with him, however, and he would tell JM to leave at "random" times. (JA 124). JM testified that, nevertheless, he did not know "exactly how many times, but it was maybe at most once a week, maybe twice a month, three times a month" that he watched pornographic videos with SGT Lopez, for a total of "[m]aybe forty or fifty, maybe at most sixty times over the course I lived with him." (JA 123). The videos lasted "maybe an hour to at most an hour and twenty." (JA 124). From this, the government argued that SGT Lopez decided to "watch approximately a hundred hours of pornography" with JM. (JA 177, 181, 182).

JM never informed anyone of this until his mother CL caught him watching pornography a year or more after they had stopped living with SGT Lopez. (JA 130). JM claimed that this was the first time he had looked at pornography on his

own. *Id.* He was "scared," and "knew she was mad" and "pretty upset" that he had been looking at pornography. (JA 135). JM further averred that when he told his mother SGT Lopez "had showed it" to him, "she was less upset, because it involved Sergeant Lopez." *Id.*

The only other testimony the government offered on Specification 3 of Charge I came from CL. After discovering that JM had been watching pornography, she confronted him and telephoned SGT Lopez. (JA 50, 131). Responding to trial counsel's questions, CL further testified that:

> I put [JM] on the phone, on speaker. We were all there, and it took several minutes of [JM] insisting, recounting events of what had happened and saying you remember you did this with me, and so finally Sergeant Lopez started calming down and acting like he was going towards admission.
>
> Q. What does that mean to you, acting?
>
> A. Well, in the sense where it kind of ended with him saying [JM], if I did anything wrong, then I—you know, I apologize, and I knew from living with him, instead of coming out and saying yes, I did this and I was wrong—
>
> DC: Objection.
>
> MJ: Basis?
>
> DC: Human lie detector testimony.
>
> MJ: I'm going to overrule the objection based on the witness's interactions with the accused as husband and wife.
>
> Q. So ma'am, you said that Sergeant Lopez, the accused, said if I did anything—He was talking to [JM]?

A. Yes.

Q. If I did anything to you, [JM], then I'm sorry. Is that what you—

A. Yes.

Q. You testified before the objection.

A. Yes.

Q. *And to you after ten years of marriage, what did that mean*?

A. That meant that *he was loosely admitting guilt* without coming out and saying it, because he said things like that to me before.

Q. The accused has said things like that to you before?

A. Yes, so *I knew what that meant*, and that was the thing I needed to know, because *I really was trying to feel out who was telling the truth here*. I wanted to get to the bottom of it and resolve this with my son.

(JA 51-52)(emphasis added). The military judge did not give the members any curative or limiting instructions regarding the above testimony. Trial counsel later referenced this portion of CL's testimony at the end of the government's rebuttal argument:

> Moving on to indecent liberties with a child. Let's remember that [CL] testified that she confronted Sergeant Lopez about this, and he said on the phone if I did anything wrong, I'm sorry, and we asked her after your ten years of marriage, what does that mean to you, that Sergeant Lopez knew he did something wrong.

(JA 196). Beyond this, the government's argument on this specification was essentially a recitation of JM's testimony and a reiteration of its theme that SGT Lopez was "sexually dangerous." (R. at 186; JA at 176-78, 181-82). In response, defense counsel argued that JM was a teenager who got caught looking at pornography and realized the "easiest way out of trouble" was to blame his stepfather. (JA 189). The defense further emphasized the implausibility of SGT Lopez and JM watching "a hundred hours of pornography in a house . . . of like six, seven people" for two years without anyone else knowing about it. (JA 190).

b. Specification 1 of Charge I: rape by force.

Sergeant Lopez had vaginal intercourse with his wife on April 17, 2011; the only contested issue was whether their encounter was consensual. CL testified that it was not, and she claimed that SGT Lopez held her down and forced her to submit to intercourse. According to CL, this happened as the couple laid in their marital bed, and SGT Lopez started pulling her towards him and trying to entice her to have sex. (JA 28). She testified that "we're not doing this, and I let him know that, and he wasn't listening, and he kept pulling me strongly toward him, touching me in places I was not comfortable with." *Id.* She stated that he then "went to the vaginal area and [digitally] penetrated there . . . and that's when I got really upset and I told him no, I'm blocking, I'm pushing him away and he would not let go." *Id.*

CL claimed that she was nevertheless able to break free and go to the bathroom. (JA 29). After this, she took off her bathrobe and got back in bed with SGT Lopez. *Id.* CL testified that SGT Lopez started pulling her to him again, and that she wrested free from him again. (JA 30). He went to her side of the bed and offered her a hug; she touched his face. But then, according to CL, SGT Lopez turned her around, put his hand on her shoulder, and pushed her down over the bed. (JA 30-31). She claimed that, using his penis, SGT Lopez "began to attempt to penetrate first anally, which he did slightly. It didn't work very well, so he went down to the vaginal area, and he did penetrate then." (JA 34). CL testified that she could not break free this time, and that SGT Lopez ultimately ejaculated inside her. (JA 35).

No other direct evidence was offered. Instead, the government presented circumstantial testimony from five other witnesses. The first of these was CL's daughter, NM, who claimed to have heard the words "get off of me" coming from her mother and stepfather's bedroom the night of the incident. (JA 82). Nevertheless, NM "just went to bed and . . . went straight to sleep." (JA 83). The following morning, CL asked her daughter if she had heard anything the night before. *Id.* NM then offered the following testimony:

> I got on the computer . . . I saw . . . that she [CL] had been looking up spousal rape sites, like how to deal with it, who to go to, and so I gathered that Mario [SGT Lopez] *had probably raped her* by the evidence that I found that day.

> Q. Do you remember anything specific about the websites you saw in the browsing history?
>
> A. Nothing real specific, it was just how to deal with it, and that's about it.
>
> Q. *What did you think when you saw that and you thought what may have happened*?
>
> A. I just thought about what my brother had asked me, and *just kind of put two and two together*. I kind of hoped that I was, you know, over thinking it, but I didn't think I was, because *there's no other reason for those websites to be up there.*

(JA 82-83) (emphasis added). After the government adduced this testimony, it questioned one of CL's older sons, who claimed to have heard "crying and moaning" and "sad noises" the night of the incident. (JA 82). A chaplain described CL's demeanor the day after the incident, and an investigating agent gave her observations of CL a few days later. (JA 96, 99, 100). Finally, a medical officer testified that she performed a sexual assault forensic exam on CL, but that the exam could not establish whether the sexual encounter was consensual or nonconsensual. (JA 114, 117).

The defense developed evidence through cross-examination and the four witnesses it called during its case in chief. Two witnesses testified that CL has an untruthful character, with one of them being her own son JM. (JA 139, 153). JM also indicated that his mother "did not want to live in Korea anymore, so she tried

her best to get away from Mario and Korea." (JA 133). The panel submitted two questions for JM that related to the credibility of CL; the first asked JM to give specific instances of untruthful conduct, and the second asked him "why do you think your mother would lie about something like this?" (JA 197, 199). The military judge disallowed both questions. (JA 141, 143).

The defense went on to establish that JM was staying the room right next to SGT Lopez and CL the night of the incident, and he didn't hear anything. (JA 132). Two other witnesses also testified to SGT Lopez's peaceful character, including his close cousin and his first wife, who stated that "[h]e has never had a bad attitude, and he's always been a good person to me since day one he was with me." (JA 146, 157). Finally, an expert in sexual assault forensic examination reiterated that CL's physical condition on April 18, 2011 was consistent with a consensual sexual encounter. (JA 161, 169).

The government portrayed SGT Lopez again as a "dangerous" man when "his needs are not met," and that he "has a need for control." (JA 176). Trial counsel argued that there was "too much evidence in this case," and emphasized factors such as the redness observed on CL's arm and back, and the fact that two of her children heard something the night in question. (JA 179-80, 183). The government also asserted that there was no evidence of consent: "what words have we heard [as] evidence of consent? What overt acts . . . ?" (JA 180). The defense responded that

the allegations depended on CL, an untruthful witness "who did not want to be in Korea." (JA 185, 191). The defense further emphasized the physical implausibility of CL's account, her counter-intuitive behaviors, and that the testimony of NM and her older brother were influenced by the fact that they continued to live with CL. (JA 185-88).

SUMMARY OF ARGUMENT

Sergeant Lopez had a fundamental right to be tried by court-martial members and not prosecution witnesses. His right was undermined, however, when two witnesses gave their personal opinions that SGT Lopez was guilty. The first witness, CL, claimed a unique ability to assess SGT Lopez's credibility, which she then invoked to say he had admitted guilt and was, in essence, guilty. The second witness, NM, also told the members she thought SGT Lopez was guilty and that, by extension, she believed CL's story. In both instances, the government's questioning turned these witnesses into "thirteenth jurors" who usurped the fact-finding role of the members. The convictions in this case hung on the credibility of the complaining witnesses, and the repeated admission of human lie detector testimony and pseudo-verdicts fatally compromised the court-martial. These were plain and obvious errors that materially prejudiced SGT Lopez's right to a trial by members. The only way to rectify these errors now is to reverse the lower court's decision and set aside the findings of guilty and sentence.

ARGUMENT

THE MILITARY JUDGE ERRED BY ADMITTING THE TESTIMONY OF APPELLANT'S WIFE, MRS. CL, WHO TESTIFIED THAT APPELLANT'S APOLOGY TO HIS STEPSON MEANT THAT APPELLANT WAS "LOOSELY ADMITTING GUILT" TO CRIMINAL CONDUCT, AND BY ALSO ADMITTING THE TESTIMONY OF MS. NM, WHO TESTIFIED THAT APPELLANT "HAD PROBABLY RAPED" HIS WIFE BECAUSE MRS. CL HAD RECENTLY RESEARCHED "SPOUSAL RAPE" ON THE INTERNET.

1. SGT Lopez's Right to a Trial by Members was Undermined by Improper Opinion Testimony.

The right to a trial by members is a bedrock guarantee of military justice. *See* Article 16, UCMJ, 10 U.S.C. § 816 (2012). A trial by members means that the members, and only the members, weigh the evidence and determine the question of guilt or innocence. *See United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998). That is their realm, reserved to them alone—the integrity of the court-martial and its founding logic depend on this. *See United States v. Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007). It is therefore "extremely important that a trial be free from undue influence on a jury's role in determining the ultimate facts in the case." *Birdsall*, 47 M.J. at 410-11.

In this case, however, the government unduly influenced the members on two fronts. First, the government invaded the "exclusive province of the court members" by asking its witnesses to be human lie detectors. *United States v.*

Knapp, 73 M.J. 33, 34 (C.A.A.F. 2014). On the two occasions specified in this appeal, the government drew out opinions on who was telling the truth about facts at issue. Such testimony runs directly against the "fundamental premise of our criminal trial system that the panel is the lie detector," not the witnesses. *United States v. Martin*, 75 M.J. 321, 324-25 (C.A.A.F. 2016)(citations omitted). The government's reliance on human lie detector testimony "usurp[s] the exclusive function of the jury," and thereby casts "substantial doubt about the fairness of the proceeding." *Brooks*, 64 M.J. at 328, 330.

Lie detector testimony is lethal on its own right. But when the government marches further and presents testimonial opinions that the accused was not just untruthful but guilty too, it makes a legal conclusion as well as a factual one, invading the provinces of both the court and the members. *See United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003); *United States v. Benedict*, 27 M.J. 253, 259 (C.M.A. 1988); *see also United States v. Ahmed*, 472 F.3d 427, 434 (6th Cir. 2006). This Court has repeatedly rejected such incursions, and it should do it again here.

The court-martial of SGT Lopez was beset by both evils—human lie detector testimony and assertions that he was guilty. The government questioned CL and NM in a way that turned each witness into "a thirteenth juror," and used their testimony to succor an infirm, marginal case. *United States v. Anderskow*, 88

F.3d 245, 250 (3d Cir. 1996). The admission of such testimony was certainly prejudicial; the improper opinions "did not involve a stray remark on a secondary matter," but instead went to the "central," "outcome-determinative" issues at trial, namely the credibility of the complaining witnesses and the final issue of guilt or innocence itself. *United States v. Kasper*, 58 M.J. 314, 320 (C.A.A.F. 2003). This Court has "consistently found that opinion testimony validating that victim's testimony was prejudicial." *Martin*, (Stucky, J., dissenting) 75 M.J. at 324-25. The court-martial of SGT Lopez was such a case.

2. Admission of Testimony that SGT Lopez Was "Loosely Admitting Guilt" Was a Prejudicial Abuse of Discretion.

CL's assertion that SGT Lopez was "loosely admitting guilt" was inadmissible. It was a clear example of both human lie detector testimony and an opinion that the accused was guilty. The defense rightly objected, and the military judge's failure to exclude this testimony was an abuse of discretion. *United States v. Byrd*, 60 M.J. 4, 6 (C.A.A.F. 2004). The government must prove her opinions were harmless, and it cannot; the government deliberately introduced this testimony, the military judge gave no curative instruction, the evidence against SGT Lopez was fundamentally weak, and the government openly argued her opinions to the panel. The only way to remedy this error is to reverse the lower court's decision and set aside Specification 3 of Charge I.

a. The government elicited human lie detector testimony from CL.

When CL testified SGT Lopez was "loosely admitting guilt," she acted as a human lie detector and usurped the role of the members. *Knapp*, 73 M.J. at 36. That was clear error. *Id.* at 37. Now CL could certainly testify that SGT Lopez denied exposing JM to pornography. (JA 51). She could also testify that SGT Lopez offered a conciliatory statement such as "If I did anything wrong . . . I apologize." *Id.*[1] But under no circumstances could she go on and claim that, "after ten years of marriage," she "knew from living with him" that he was actually admitting guilt. (JA 52). That is the very hallmark of human lie detector testimony: the witness professes an "expertise in divining the truth from the demeanor of the suspect" and then tells the panel who to believe. *Knapp*, 73 M.J. at 37. CL acted exactly like the investigators in *Knapp* and *Kasper*, or the expert witnesses in *Diaz* and *Petersen*, and her own testimony makes that abundantly clear: "I knew what that meant . . . because I really was trying to feel out who was telling the truth here." (JA 52).

[1] The statement itself deserves little weight, given the fact that the government never corroborated it through JM, who was apparently there for the conversation. (JA 131).

b. The government elicited CL's opinion that SGT Lopez was guilty.

In highlighting CL's quest to "feel out who was telling the truth here," the government not only offered her as a lie detector, but as a judge and juror too. (JA 52). Her opinion that SGT Lopez admitted guilt was, in effect, a legal conclusion that he was also guilty. *See Brooks*, 64 M.J. at 330. This was clear both on its face and within the context of her testimony, where she described questioning her son JM, then questioning SGT Lopez, and then, as she tried to "get to the bottom of it," giving her conclusion that SGT Lopez admitted guilt. (JA 52). CL went on to share how this made her feel: "I was mortified. I was very angry . . . I could not believe that my son had been exposed to that, that *he taught him these things* . . . and that's what he was doing." *Id.* (emphasis added). CL's testimony here was really just a recitation of her personal proceedings against SGT Lopez: her investigation, her deliberations, and her findings. It could have hardly been clearer to the members what CL was trying to tell them: SGT Lopez committed the crime, and you must convict him. This was nothing less than a government witness trying to deliver the verdict.

c. The military judge had no grounds to admit CL's testimony.

The inadmissibility of CL's testimony was manifest. Defense counsel immediately objected, and the military judge's failure to sustain that objection was a clear abuse of discretion. *See Knapp*, 73 M.J. at 36. Indeed, this Court has

routinely found opinion testimony cut from the same cloth to be plain error, and there was no reason to think CL's improper testimony was an exception to this long-standing law. *Id.* The military judge's decision to "overrule the objection based on the witness's interactions with the accused as husband and wife" was unavailing, cursory, and at odds with Military Rules of Evidence 701, 608, and 403. (JA 51).

First, CL's testimony was not "helpful" to determining a fact in issue, and it was thus inadmissible under Mil. R. Evid. 701(b). "If I did anything wrong . . . I apologize" is a coherent, understandable phrase; the members did not need to know what it meant to CL. *Byrd*, 60 M.J. at 7. The military judge's ruling disregarded the well-established wisdom that "lay witnesses are normally not permitted to testify about their subjective interpretations or conclusions as to what has been said," and it suggested instead that spouses have carte blanche to interpret the statements of their co-spouses. *Id.* That is certainly not the law, and *Byrd* made that clear years before. *Id.*; *see also Martin*, 75 M.J. at 324-25. Testimony that interprets or offers conclusions about coherent, ascertainable statements is improper, and the existence of a marital relationship does not change that. *Byrd*, 60 M.J. at 7. There was no "code or code-like language" to decrypt, and no fog to clear; the only thing CL's opinion helped do was undermine the members' duty to assess the evidence themselves. *Id.* That is an obvious error.

This testimony also ran afoul of Mil. R. Evid. 608(a) because it offered "an opinion as to the declarant's truthfulness on a specific occasion, rather than the knowledge of the witness as to the declarant's reputation for truthfulness in the community." *Kasper*, 58 M.J. at 315. Finally, the evidence should have been excluded under Mil. R. Evid. 403 as well. CL's assessments of credibility and findings of guilty were irrelevant and entirely outweighed by the unfair prejudice, confusion, and misdirection they introduced.

d. The government cannot prove CL's impermissible testimony was harmless, and this Court should set aside the finding of guilty under Specification 3 of Charge I.

Admission of CL's opinions was an abuse of discretion, and it significantly prejudiced SGT Lopez's right to a trial by members. "Prejudice results when there is undue influence on a jury's role in determining the ultimate facts in the case." *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010) (internal quotations omitted). In determining whether there was prejudice, the Court should consider the effectiveness of the military judge's instructions and the strength of the government's case. *Id.* Moreover, the "burden of demonstrating harmlessness rests with the Government," a burden the government cannot carry here. *Byrd*, 60 M.J. at 10; *see also Knapp*, 73 M.J. at 37.

i. The military judge failed to immediately instruct the members.

The military judge should have sustained defense's objection and immediately instructed the members to make their own conclusions about the evidence. *See Knapp*, 73 M.J. at 36; *Mullins*, 69 M.J. at 117. As in *Brooks*, this allegation hinged on the testimony of one witness, and the standard instruction on witness credibility and findings was too little too late. *Brooks*, 64 M.J. at 330. Immediate correction was needed, and the military judge's failure to instruct allowed the improper testimony to linger in the minds of the members. Rather than make their own determinations, "the court-martial members were left with the purported expertise" of CL, and that was plainly prejudicial. *Knapp*, 73 M.J. at 37.

ii. The government used CL's improper opinions to make up for a weak case.

The evidence that SGT Lopez exposed JM to pornography was weak, unsupported, and one-dimensional. The government's case depended on the testimony of JM, which strains credulity. JM claimed to have watched pornography with SGT Lopez "forty, fifty, maybe at most sixty times," for sixty to eighty minutes at a time in their Korean apartment, with no one else knowing a thing about it. (JA 123-24). This story was all the more doubtful in light of JM's motive to lie and deflect his mother's anger. Indeed, when CL caught JM and confronted him about watching pornography—apparently the first time he had

watched it on his own—JM was "scared" and he "knew she was mad." (JA 130, 135). But when he told her that appellant had showed it to him, "she was less upset, because it involved Sergeant Lopez." (JA 135). The uncertain delivery of JM's testimony mirrored its implausibility; trial counsel had to rely heavily on leading questions during direct and re-direct examination, and JM frequently responded that he didn't know or couldn't remember. (JA 119-29, 136-37). This was far from compelling testimony.

Without CL's inadmissible opinions, the members had no other reason to believe JM. *See Mullins*, 69 M.J. at 118. The government offered no eyewitnesses, no physical evidence, no circumstantial corroboration, and not even an identifiable motive for why SGT Lopez would expose his stepson to pornography. Unsurprising, then, the government relied on CL's opinions to make its final pitch to the panel:

> Moving on to indecent liberties with a child. Let's remember that [CL] testified that she confronted Sergeant Lopez about this, and he said on the phone if I did anything wrong, I'm sorry, and we asked her after your ten years of marriage, what does that mean to you, that Sergeant Lopez knew he did something wrong."

(JA 196). If the government's attorneys thought this was relevant evidence, the uninstructed members may have thought so too. In fact, at least one question from the members shows that they wanted witnesses to speculate on the truthfulness of other witnesses. (JA 199). The admission of CL's opinions was a critical failure

in a case that was all about credibility. Just as in *Knapp* and *Kasper*, CL's testimony "was not offered on a peripheral matter or even as a building block of circumstantial evidence, but on the ultimate issue in the case—whether Appellant was truthful as to the charge." *Knapp*, 73 M.J. at 37 (citations omitted). The prejudicial effect of this testimony was immediate and unmitigated. The government introduced CL's opinions and relied on them to convict SGT Lopez, it cannot say now that it did no harm. Such conditions require setting aside the findings of guilty for Specification 3 of Charge I. *See, e.g.*, *United States v. Petersen*, 24 M.J. 283, 285 (C.M.A. 1987).

3. Admission of Testimony that SGT Lopez "Had Probably Raped" CL Was Plainly Erroneous and Materially Prejudicial.

CL was not the only prosecution witness to try and do the members' job for them; the government also presented the testimony of her daughter NM, who opined that SGT Lopez "had probably raped" CL. (JA 83). Although the defense did not object to her opinion or the government's effort to reiterate and reinforce it, the testimony was still obviously inadmissible, and the military judge's failure to exclude it was plain and prejudicial error. *See Kasper*, 58 M.J. at 319. "The plain error standard is met when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Mullins*, 69 M.J. at 116 (citations omitted). That standard is met here. As with

CL, NM's improper opinion was both a pseudo-verdict and an example of human lie detector testimony, and it warrants relief from this Court.

a. Admission of NM's improper opinion was plain and obvious error.

This Court's case law has been clear that witnesses cannot give their opinions on the guilt or innocence of the accused. *See, e.g., Diaz*, 59 M.J. at 90. NM's conclusion that SGT Lopez "had probably raped" her mother was an unmistakable assertion that, in her view, SGT Lopez was guilty of the crime. It is self-evident that "the term 'rape' designates the total legal offense charged, involves elements of determination reserved for the jury, and thus represents an improper conclusion of fact and law on the part of the witness." *United States v. Marshall*, 6 C.M.R. 54, 58 (C.M.A. 1952). NM's conclusion thereby disrupted the members' duty to determine the facts, as well as the military judge's duty to define the offense. The military judge's failure to exclude this testimony sua sponte was an error so plain and obvious the analysis for Mil. R. Evid. 704 addresses it specifically, noting that the rule "does not permit the witness to testify as to his or her opinion as to the guilt or innocence of the accused." Mil. R. Evid. 704 analysis at A22-59 (2012 ed.).

Moreover, NM's testimony implicitly vouched for her mother's account of events—it was another form of human lie detector testimony. "Testimony is the functional equivalent of human lie detector testimony when . . . the substance of

the testimony leads the members to infer that the witness believes the victim is truthful or deceitful with respect to an issue at trial." *Martin*, 75 M.J. at 324. By saying SGT Lopez "had probably raped" CL, NM was necessarily saying her mother "had probably" told the truth. The inference was unmissable; her conclusion was human lie detector testimony, plain and simple, and its admission was error, plain and simple. *See, e.g., Birdsall*, 47 M.J. at 409-10.

b. NM's improper opinions materially prejudiced SGT Lopez's right to a trial by members, and this Court should set aside the finding of guilty for Specification 1 of Charge I.

NM's opinions undercut SGT Lopez's right to a trial by members—it was plain and prejudicial error. *Kasper*, 58 M.J. at 320; *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). The government elicited this testimony during its direct examination of NM, the military judge failed to intervene, and the improper opinions were offered to shore up an unsteady case. As it has done in other cases such as *Knapp* and *Kasper*, *supra*, this Court should set aside the findings of guilt relating to Specification 1 of Charge I.

i. The government deliberately elicited NM's belief that SGT Lopez "had probably raped" CL.

Once NM stated that she thought SGT Lopez was guilty, trial counsel deliberately emphasized and explored her opinion by asking "[w]hat did you think when you saw that and you thought what may have happened?" (JA 83). The

government must have known this testimony would foment the panel's passions. Indeed, the members previously agreed that "the word rape evokes a strong, emotional reaction," and at least one member equated the word "rape" with "an intense description of violence." (JA 14-15). Having the daughter of the alleged victim draw that conclusion for the panel could certainly provoke a strong, emotional reaction, and it appears that is what the government wanted.

ii. The military judge failed to exclude NM's improper opinion and issue an immediate curative instruction.

"Regardless of whether there was a defense objection during the prosecution's direct examination" of NM, "the military judge was responsible for making sure such testimony was not admitted." *Kasper*, 58 M.J. at 319. The military judge failed to carry out that responsibility, and the members never received the immediate corrective instructions such testimony demands. *See Knapp*, 73 M.J. at 36. This would generally leave "no way to determine whether the court members gave any or great weight to the inadmissible testimony," which would justify reversal on its own right. *Petersen*, 24 M.J. at 285. Yet in this case questions from the panel show they actually were relying on improper opinions.

iii. The evidence that SGT Lopez raped his wife was weak, and the members' questions show they were relying on improper credibility assessments.

This allegation turned on the credibility of the complaining witness, CL. The members, not properly instructed and unsure about their role as factfinders,

certainly could have deferred to NM's conclusions. She was, after all, a witness who had lived with CL and SGT Lopez for some time and knew both individuals better than the panel. When a witness that familiar with both the accuser and the accused says she believes the former and thinks the latter must be guilty, there is a heightened risk that the members will abdicate their responsibility and simply adopt the witness's verdict.

The panel's questions bear this out. Take the question a field grade member wanted to ask JM: "why do you think your mother would lie about something like this?" (JA 199). Although the military judge disallowed the question, it shows that at least one member was relying on the witnesses' speculations and personal opinions to make credibility assessments central to this case. (JA 143). Likewise, the president of the panel wanted JM to detail specific instances of CL not being truthful. (JA 197). That question was rejected too, but the Court should consider it next to NM's testimony, where she was able to say, in essence, that she believed her mother's story and why she did believed it. The members wanted improper credibility evidence, and they got it—but only when it helped the government's case.

This is all the more disturbing given the paucity of evidence against SGT Lopez. The rape allegations rested on the words of a witness whose credibility was in question. Two witnesses impugned CL's character for truthfulness, one being

her own son JM, and the government made no effort to rebut this. (JA 139, 153). CL also had a motive to fabricate, as accusing her husband of rape could secure an early return to the United States. CL's "horrific" relationship with her husband and the fact that she "did not want to live in Korea anymore" offer more support to the defense's theory. (JA 130-33).

CL's story suffered internal inconsistencies as well. Despite feeling "really upset" by SGT Lopez's initial advances, CL did not avoid him; instead, she took off her bathrobe and got back in bed with him. (JA 28, 29). Her claim that SGT Lopez bent her over their bed and forced himself upon her is also hard to reconcile with the fact that the bed was particularly high—up to about chest level. (R. at 292). Those mechanics are doubtful. Furthermore, CL's decision to "not continue with the case" coincided with her early return to the United States, and she only presented the additional allegations after SGT Lopez had filed for divorce and signaled an end to the financial support he had been providing. (JA 45, 69-70). All of these facts support the defense's theory that CL fabricated her accusations—a theory which the members might have adopted had NM's improper conclusions not tainted their deliberations. The prejudice her opinions introduced was palpable, and it warrants dismissal of Specification 1 of Charge I.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings of guilty and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) it contains 6,559 words.

2. This brief complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Lopez*, Crim. App. Dkt. No. 20140973, USCA Dkt. No. 16-0487/AR, was delivered to the Court and Government Appellate Division on October 20, 2016.

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