IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. MARIO I. LOPEZ Sergeant (E-5) United States Army, Appellant	REPLY BRIEF ON BEHALF OF 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?

SUMMARY OF REPLY ARGUMENT

The government's response goes astray on three major fronts. First, it attempts to remake the test for prejudice. The admission of improper opinion testimony is prejudicial if it could have unduly influenced the members' determination of a central issue at trial; the government's suggestion that an

improper opinion must be the central issue itself is simply unsupported. Second, the government's efforts to recast NM's improper opinions as admissible testimony fall short, just like its assessment of the evidence against SGT Lopez. Third, the government misconstrues the members' verdict, and it ignores the import of their questions entirely, both of which reflect the members' reliance on human lie detector testimony and conclusions that SGT Lopez was guilty. The government deliberately elicited improper opinions from CL and NM, and it thereby undermined SGT Lopez's right to a trial by members. This Court should reverse the lower court's decision and set aside the findings of guilty and sentence.

REPLY 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. Admission of Testimony that SGT Lopez Was "Loosely Admitting Guilt" Was Prejudicial.

Regarding Specification 3 of Charge I, CL's testimony came down to three things: she believed JM, she disbelieved SGT Lopez, and, as far as she was concerned, SGT Lopez was guilty of exposing her son to pornography. She made

this clear by asserting SGT Lopez "loosely admitted" guilt, by emphasizing that JM "reveal[ed] that had gone on," and by concluding JM "had been exposed to that, that [SGT Lopez] taught him these things . . . and that's what he was doing." (JA 52). The government used CL as both a human lie detector and a foil for the verdict it wanted the members to reach. While the government succeeded in presenting CL's improper opinions at trial, it now acknowledges on appeal that this testimony "should have been excluded." (Gov. Br. at 18-19).

The contest is therefore over prejudice, and SGT Lopez prevails. The government must prove CL's opinions did not harm appellant's right to a trial by members. *United States v. Byrd*, 60 M.J. 4, 10 (C.A.A.F. 2004). The government cannot meet its burden, as Specification 3 of Charge I depended entirely on JM's dubious credibility. Had the government not presented CL as a "thirteenth juror," the members would have had no other reason to believe JM—that alone establishes prejudice. *See United States v. Mullins*, 69 M.J. 113, 118 (C.A.A.F. 2010).

a. The test for prejudice is whether CL's testimony could have unduly influenced the members' assessment of JM's credibility.

"Prejudice results when there is undue influence on a jury's role in determining the ultimate facts in the case." *Mullins*, 69 M.J. at 117 (citations omitted). Testimony that "may have had particular impact" upon the credibility of a "pivotal" witness will unduly threaten the members' role and the appellant's

rights, and this Court will find its admission prejudicial error. *United States v. Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007). Furthermore, improper opinion testimony is prejudicial when there is "no way to determine whether the court members gave any or great weight to the inadmissible testimony." *United States v. Petersen*, 24 M.J. 283, 285 (C.M.A. 1987).

The government nevertheless invites this Court to adopt a new standard for prejudice, a more onerous one that would require CL's inadmissible opinions to have been "dispositive," "the central issue," or "a focal point of the case" in order to merit relief. (Gov. Br. at 14, 20). That suggestion misses the mark; the touchstone of this Court's inquiry is whether CL's testimony could have had an undue influence on the factfinder, not whether it was the only influence on the factfinder. *Mullins*, 69 M.J. at 117. Where an improper opinion "involves a central issue," it is certainly poised to cause prejudice, but nothing requires the testimony itself to be the central issue. *United States v. Kasper*, 58 M.J. 314, 320 (C.A.A.F. 2003). In this case, CL's testimony attacked SGT Lopez's credibility, aided JM's credibility, and aimed directly at the ultimate issue of guilt or innocence—it went to the heart of the trial, and this Court has good reason to believe it unduly influenced the members.

b. The absence of an immediate instruction and the weakness of the government's case demonstrate that CL's improper opinions may have unduly influenced the members.

The defense objected to CL's testimony, and the government must now prove that her improper opinions could not have swayed the members' assessment of SGT Lopez's credibility,[1] JM's credibility, or the evidence at large. *Byrd*, 60 M.J. at 10. That is a burden it cannot carry here. When this Court considers "such factors as the immediate instruction, the standard instruction . . . and the strength of the government's case," it will find that they all point towards prejudice. *Mullins*, 69 M.J. at 117.

The most the government can do is insist that its "case on this charge was strong," but that insistence must yield to the facts. (Gov. Br. at 19). Specification 3 of Charge I hung on JM's credibility, and there was little reason to believe him. JM testimony was facially implausible, uncertain, and buoyed by the government's

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[1] SGT Lopez did not testify at trial, and the Court should consider how CL's improper opinions undermined his right to do so. When a military judge admits human lie detector testimony because of the complaining witness's "interactions with the accused as husband and wife," the message to the accused is clear: testify in your own defense, and the government can recall your spouse and rely on her "ten years of marriage" to recast your testimony before the members. (JA 51). Such a ruling not only sanctions the government's incursion into the "exclusive province of the members," it casts a chilling effect over the accused's right to testify. *United States v. Knapp*, 73 M.J. 33, 34, 37 (C.A.A.F. 2014) (noting that appellant's "testimony had already been discredited" by an agent who "professed to have expertise in divining the truth from the demeanor of the suspect.").

litany of leading questions. (JA 119-29, 136-37). Moreover, JM had an obvious reason to lie: he was "scared" when his mother discovered him looking at pornography, but blaming his stepfather made her "less upset, because it involved Sergeant Lopez." (JA 135). The government suggests JM lost that reason to lie at trial because he had stopped living with his mother, (Gov. Br. at 19), but the reality is that JM had given an official statement to law enforcement while still under her care; in other words, he was locked in to accusing SGT Lopez well before. (JA 138-39, Def. Ex. C for Identification).

The government's last effort turns to SGT Lopez's purported statement "if I did anything wrong, then I—you know, I apologize."[2] (Gov. Br. at 20). That effort fails on two accounts. First, CL's human lie detector testimony corrupted whatever value the statement had on its own. When the military judge erroneously admitted CL's opinions and failed to instruct the members, this so called "apology" fused with CL's lie detector testimony. (JA 51-52). From that point on, the statement was colored as a "loose admission" of guilt, part and parcel of her lie detector testimony, and thus part and parcel of the harm that testimony caused.

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[2] The government refers to this statement as both an "admission" and an "apology." (Gov. Br. at 17). It is neither. The words only resemble an admission of guilt when alchemized by CL's inadmissible testimony; on their own they admit nothing. Nor can the government characterize them as an apology on appeal when trial counsel argued the opposite at sentencing: "Never did he [SGT Lopez] apologize to [JM] for what he did." (R. at 556).

Second, there was reason to doubt SGT Lopez even said the words at all. CL was a witness with a character for untruthfulness and a motive to fabricate. (JA 130-33, 139, 153). Given that, the government should have corroborated the statement through JM, as he was apparently present for that conversation. (JA 131). The government conspicuously failed to do this, however, and the statement deserved little credence even when left alone.

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

When a witness says the accused "probably raped" someone, the impropriety is as obvious and overpowering as "a five-week-old, unrefrigerated dead fish." *United States v. Byrd*, 60 M.J. 4, 12 (C.A.A.F. 2004). No argument, however well perfumed, can mask the fact that NM, a government witness, offered her personal opinion that SGT Lopez "had probably raped" CL, and that he was, by extension, "probably" guilty. (JA 82). Indeed, the government agrees that NM used "three clues to deduce what had occurred." (Gov. Br. at 12). Assessing clues and deducing what occurred is the sole domain of the members, not the witness. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). NM's testimony ran afoul of Mil. R. Evid. 701, and this Court need go no further than that to find a plain and obvious error.

If this Court does go further, however, it will find that NM's testimony also vouched for CL's credibility. NM's belief that SGT Lopez raped her mother inevitably directed the members to infer she believed her mother's story, and that is the definition of human lie detector testimony. *United States v. Martin*, 75 M.J. 321, 324 (C.A.A.F. 2016). Indeed, NM expressly stated she believed her mother: "[CL] told us after that, you know, what *really* happened." (JA 85)(emphasis added). Whether a witness-delivered verdict or human lie detector testimony, NM's opinion that SGT Lopez "had probably raped" CL was plainly improper. The military judge failed to exclude this testimony at trial, and it now falls to this Court to toss out the dead fish and cleanse the error, so to speak, on appeal.

a. NM's improper opinions were plain and obvious error.

The government's efforts to recast NM's opinions as admissible testimony fall flat. First, NM's conclusions differed significantly from the testimony described in *United States v. Martin.* (Gov. Br. at 12-13). Those statements did not rise to the level of human lie detector testimony because they focused on the witness's "own conduct, not on the truthfulness of his wife," and also on "how his wife's behavior had changed since the night of the incident." *Martin*, 75 M.J. at 326. Now contrast that with NM's testimony, where she claimed to have "put two and two together," and "gathered" from the "evidence that [she] found that day" that SGT Lopez "had probably raped" her mother, CL. (JA 82-83). Indeed, NM

believed that CL's account of events was "what really happened." (JA 85). The import of NM's testimony here was unmistakable: she was not simply sharing observations, she was telling the members who and what to believe. That is the hallmark of improper opinion evidence, and something the military judge should have immediately excluded. *See Kasper*, 58 M.J. at 319.

The government's second argument is that NM needed to say SGT Lopez "had probably raped" her mother in order to explain why she "confronted her mother." (Gov. Br. at 11). This too is inapposite; NM's reasons for confronting CL did not make any "fact that is of consequence to the determination of the action more probable or less probable." Mil. R. Evid. 401. Her conclusions were irrelevant and inadmissible. Likewise, CL's statements to her daughter were not a prior consistent statement under Mil. R. Evid. 801(d)(1)(B). *See Tome v. United States*, 513 U.S. 150, 167 (1995); *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998). Neither assertion was admissible evidence, and neither justified admitting NM's conclusion that SGT Lopez was guilty.

The government's final argument is that NM could not give human lie detector testimony because she was a "lay witness" without "special training or experience in determining truthfulness." (Gov. Br. at 14-15). This Court has already dispelled that notion in full: "Neither a lay nor an expert witness has the

foundation or expertise to opine that an individual is or is not telling the truth." *Brooks*, 64 M.J. at 328; *see also Martin*, 75 M.J. at 324-2; *Byrd*, 60 M.J. at 7.

b. NM's improper opinions materially prejudiced SGT Lopez's right to a trial by members.

The question, then, is if NM's testimony could have influenced the members' evaluation of a witness central to the government's case, and the answer is yes. There was no curative instruction, and the case against SGT Lopez rested on the word of one witness, CL, who had an unrebutted character for untruthfulness and an identified motive to lie. (JA 133, 139, 153). The government offered NM's improper opinions to buttress CL's credibility, and her credibility was the crux of the charge. *Kasper*, 58 M.J. at 320. The government stresses that her accusations were otherwise corroborated, (Gov. Br. at 14), but a closer look says otherwise.

First, SGT Lopez never contested that he and CL had sex on April 17, 2011; the only question at trial was whether the sex was consensual, and the presence of his DNA in her vagina says nothing about consent. The fact that CL contacted a chaplain, a medical examiner, and an investigator about her allegations also corroborates nothing—a false accuser is just as likely to contact authorities as a true accuser. *See United States v. McPartlin*, 595 F.2d 1321, 1351 (7th Cir. 1979) ("mere repetition does not imply veracity"). Likewise, observations of CL's

demeanor add nothing substantive to the facts, as an anxious, nervous accuser is no more likely to be truthful than a somber, impassive one.

The government's reliance on MAJ Williams's testimony is also misplaced. By her own admission, the red marks MAJ Williams observed on CL were just as consistent with a consensual sexual encounter, a fact also established by Sheila Priory, the only witness actually tendered and accepted as an expert in this court-martial. (JA 114, 117; 161, 169). At most, MAJ Williams's observations show that SGT Lopez touched his wife when he had sex with her—an uncontroversial fact that does not corroborate rape.

The so called "sounds of struggle" deserve little weight. (Gov. Br. at 14). NM and JDM both had a bias towards their mother, and a motive to lie after CL suggested to them that something happened the night before. (JA 83). Despite their mother's lengthy description of events, their testimony provided little detail beyond hearing "moaning," "sad noises," and "get off me." (JA 28-35; 82, 102). This Court should also note that a child less biased towards his mother, JM, heard none of these sounds, and he was right next to the bedroom of SGT Lopez and CL. (JA 132). Finally, whether CL searched for information about "spousal rape" on the internet is of no consequence. Someone who wants to make a false accusation is just as likely as a true victim to research the subject.

The government points to these considerations as corroboration, but they hardly fit the bill when measured against CL's character for untruthfulness, her motives to fabricate, her story's implausibility, and the absence of any independent and unbiased evidence. This case "hinged on the victim's credibility . . . [a]ny impermissible evidence reflecting that the victim was truthful may have had particular impact upon the pivotal credibility issue and ultimately the question of guilt." *Brooks*, 64 M.J. at 330. This Court should find prejudice and set aside Specification 1 of Charge I.

3. The Members' Questions and Their Verdict Show They Relied on the Inadmissible Opinions of CL and NM.

The foregoing gives reason enough to set aside SGT Lopez's convictions. But this case offers further insight into how the improper opinions of CL and NM unduly influenced the members, and that insight comes from the members' own actions.

First consider the members' questions. The government has not disputed that at least two questions indicate the panel's desire for government witnesses to make credibility assessments. (JA 197, 199). One question wanted JM to say why he thought his "mother would lie about something like this?" and the other wanted him to detail specific instances of CL's truthful conduct. *Id.* Both questions illustrate "the manner in which the members might affirmatively use human lie

detector testimony to weigh credibility on an outcome-determinative issue," and the military judge's "failure to provide appropriate guidance . . . constituted plain error." *Kasper*, 58 M.J. at 319-20.

Second, this Court should consider the verdict itself. Contrary to the government's interpretation, the verdict further proves that the opinions of CL and NM unduly influenced the members. (Gov. Br. at 13-14). CL believed SGT Lopez exposed JM to pornography, and the members convicted him of exposing JM to pornography. (JA 9, 51-52). NM believed that SGT Lopez probably raped CL, and the members convicted him of raping CL. (JA 9, 83). The two offenses for which the government offered no opinions of guilt—forcible sodomy and sexual assault by digital penetration—were the two offenses on which the members acquitted him. (JA 9). The government considers this a sign that the members only convicted where there was "direct corroboration," (Gov. Br. at 14), but the flaw there is that *none* of the charges against SGT Lopez were directly corroborated, they all rose or fell on the credibility of a single witness. Only when a witness found SGT Lopez guilty of an offense was he actually found guilty. If the verdict tells us anything, it is that the government's questioning of CL and NM unduly influenced the members and fatally undermined SGT Lopez's right to a fair court-martial. His convictions should be dismissed.

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)(2) as it contains 3,595 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 November 28, 2016.

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