IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee v. Specialist (E-4) **ANDREW J. CRISWELL,** United States Army, Appellant	)))))))))	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150530 USCA Dkt. No. 18-0091/AR

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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE MOTION TO SUPPRESS THE ACCUSING WITNESS'S IN-COURT IDENTIFICATION OF APPELLANT.

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	)	APPELLANT
Appellee	)	
v.	)	
	)	
Specialist (E-4)	)	Crim. App. Dkt. No. 20150530
ANDREW J. CRISWELL,	)	
United States Army,	)	USCA Dkt. No. 18-0091/AR
Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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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 May 7 and August 4–5, 2015, a military judge sitting as a general court-martial convicted Specialist (SPC) Andrew J. Criswell, contrary to his pleas, of one specification of making a false official statement, two specifications of abusive sexual contact, one specification of assault consummated by battery, and one specification of indecent language in violation of Articles 107, 120, 128, and 134, UCMJ. (JA 28–29).

The military judge sentenced SPC Criswell to reduction to the grade of E-1, two-years of confinement, and a dishonorable discharge. (JA 261). The military judge credited SPC Criswell with one day of credit against the sentence to confinement. (JA 261). The convening authority approved the adjudged sentence and credited appellant with the one day of confinement credit. (JA 29).

On November 6, 2017, the Army Court affirmed the findings and sentence in a majority opinion. (JA 1–24). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on December 29, 2017. This Court granted appellant's petition for review on February 12, 2018.

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE MOTION TO SUPPRESS THE ACCUSING WITNESS'S IN-COURT IDENTIFICATION OF APPELLANT.

Statement of Facts

On November 7, 2014, SPC AM attended a party with SPC Nasser Al-Shamesi and two other male Soldiers in a convention center at Austin Peay State University. (JA 64). The party was "very crowded," and the majority of attendees were black. (JA 67, 97). One witness estimated between 200 and 300 people were at the party and almost all of them were black. (JA 216). Specialist AM provided the following description of the party:

> It was *very loud*, the music, because of the DJ stand and the music and it being kind of a small area. It was *very, very hot* as well, and it was *almost pitch black*, besides where the lights were by the DJ stand and the front entrance by the bathrooms, and where they were doing the photography—the photos, and they had another bar. Besides that, the main dance area was almost pitch black; *very hard to see*.

(JA 68) (emphasis added).

During the party, SPC AM consumed a mixed drink and half of a beer. (JA 68). Later in the evening, SPC AM became separated from her friends. (JA 70). Based on the noise and darkness, she had trouble finding them. (JA 70). After stepping outside to smoke a cigarette and cool off from the heat, SPC AM

walked along the back wall to continue looking for her friends. (JA 70). During this process, SPC AM "tried to use the lights from the DJ stand to try and find them," but she "still couldn't see any of them at all." (JA 70). The DJ lights were multi-colored, "constantly moving" at a "pretty rapid" pace, and went "back and forth, up and down, left/right." (JA 108–09, 151).

When SPC AM was approximately ten to twenty feet from the DJ stand, a black man approached her. (JA 70–71). Specialist AM had never met this man, and she did not know his name. (JA 79–80). The man asked why SPC AM was standing alone, and she told him she was looking for her boyfriend. (JA 70–71). The man said, "I bet your boyfriend can't fuck you the way I can," grabbed SPC AM's face, and kissed her. (JA 71). He then lowered his pants, took out his erect penis, and rubbed it against her thigh. (JA 71). The man also said he would "fuck the shit out of [her]" and forced her to touch his penis. (JA 71–73, 77). After this initial assault, the man grabbed SPC AM's wrists and pulled her toward what appeared to be a supply closet door. (JA 80). After talking to some people near the door, the man forcibly kissed SPC AM and walked away. (JA 80).

After the man left, SPC AM texted SPC Al-Shamesi to say she wanted to leave. (JA 83). A few minutes later, SPC AM found SPC Al-Shamesi and told him they needed to leave immediately, but he had to go to the bathroom. (JA 83). While SPC Al-Shamesi was using the bathroom, the same man came up to SPC

AM and again asked why she was standing alone. (JA 83). After SPC AM said her boyfriend was in the bathroom, the man replied, "How about I take you in there and [s]how you how a real man fucks you?" (JA 83). When SPC AM declined, the man left. (JA 83).

Specialist AM later described this man as wearing a black jacket, dark jeans, black and white bandana, and a grill piece. (JA 74). Notably, when she was "standing along the wall," SPC AM interacted with several other black males at the party. (JA 76). More specifically, SPC AM said "a couple" of black men "stopped by" at the wall, engaged in a brief conversation with her, and then "walked away and left [her] alone." (JA 76).

When SPC Al-Shamesi came out of the bathroom, SPC AM went outside to smoke and then left with him in his car. (JA 84). During their drive back to the barracks, SPC AM told SPC Al-Shamesi what happened. (JA 85, 126, 134). Based on her description of a black man wearing a black and white bandana, SPC Al-Shamesi "stopped her there" because "I probably know who this is." (JA 135). Specialist AM did not provide SPC Al-Shamesi with any further descriptions of her attacker after he "stopped her." (JA 135).

Specialist Al-Shamesi's recollection of the bandana was based on his conversation with SPC Christopher Stephens and SPC Joshua Connor during the party. During this conversation, SPC Al-Shamesi said another man was standing

"near" them and placed a black and white bandana on his head. (JA 121, 142). Specialist Al-Shamesi said SPC Stephens and SPC Connor "directly pointed at that person who put the black and white bandana on [his head]" to say he was "with them." (JA 121). In contrast, neither SPC Connor nor SPC Stephens saw SPC Criswell wearing a bandana that night, and a picture from earlier that night showed SPC Criswell wearing a dark knit cap, not a black and white bandana. (JA 222, 235–37, 268).

Based on SPC AM's description of a black man wearing a bandana, SPC Al-Shamesi said he texted SPC Stephens, "yo, who was your boy with the black and white bandana over his head," to which he replied, "my boy Drew."[1] (JA 135). As he thought SPC Stephens would not give him any more information, SPC Al-Shamesi contacted his NCO to get a name from SPC Stephens. (JA 137). The NCO contacted SPC Stephens and then texted back to SPC Al-Shamesi, "Criswell, that's all I got."[2] (JA 137).

The next evening, at SPC Al-Shamesi's urging, SPC AM went to CID to report the incident. (JA 96). Specialist Al-Shamesi gave Special Agent (SA) Jeremy Pflaume the names "Drew" and "Criswell." (JA 138, 162). Specialist

[1] The military judge sustained the defense's hearsay objection to the government's question eliciting this answer. (JA 135–36).

[2] The military judge stated he would consider this answer for purposes of the suppression motion but not on the merits. (JA 140).

Al-Shamesi also gave SA Pflaume his cell phone, which contained a Facebook photo of SPC Criswell. (JA 40, 96). Special Agent Pflaume showed this photo to SPC AM, who identified the person in the photo as her assailant.[3] (JA 106–07, 163–64). During his investigation, SA Pflaume did not show SPC AM any other photos or conduct any other lineup. (JA 179). Additionally, SA Pflaume did not ask SPC AM to describe her degree of confidence in identifying the one person from the one photo that he showed her.

Later that evening, SPC Criswell waived his rights and agreed to speak with SA Pflaume about a suspected sexual assault. (JA 169–73, 266). During the interview, SPC Criswell stated he attended a party at Austin Peay State University and had a brief conversation "along the wall" with a short, skinny, white female meeting SPC AM's description. (JA 174, 180, Pros. Ex. 3).[4] This "wasn't a long conversation," and then he "walked away." (JA 180; Pros Ex. 3). Specialist Criswell provided a basic description of the girl's height, weight, and outfit, but explained he could not provide further details because the party was "literally dark, like pitch black." (Pros. Ex. 3). Specialist Criswell said he was wearing a jacket, blue sweater, black jeans, skull cap, and gold grill. (Pros. Ex. 3).

[3] While she was at CID, SPC AM's father sent her the same photo, but she "didn't really even take a glance at it" until later. (JA 105–07).

[4] The statements from SPC Criswell about this encounter are primarily between 18:00-26:30 and 29:30-30:30 on Prosecution Exhibit 3.

Despite aggressive interrogation tactics by SA Pflaume, including lying about evidence and repeatedly denigrating his character, SPC Criswell vehemently maintained that he never touched this woman during their brief conversation along the wall. (JA 180–87; Pros. Ex. 3). In fact, after SA Pflaume mentioned the possibility of investigators finding "touch DNA" and "epithelial layers" through forensic testing, SPC Criswell continually expressed his willingness to participate and even pleaded for such testing to occur:[5]

> *If you want to do the DNA thing, do the DNA thing*, but nothing happened. I'm telling you.
>
> . . .
>
> I'm being honest with you. Nothing happened, Sir. Like, you can do the DNA thing. Nothing happened.
>
> . . .
>
> Q: *You understand we can pull fingerprints off her clothes?*
>
> A: Yes, I do. *Please do it*.
>
> . . .
>
> Do the fingerprint . . . I haven't done anything. I didn't do anything that night. If you want to do the fingerprints, do the fingerprints, hey, that's cool with me. I didn't do anything.
>
> . . .

[5] Each of these statements from SA Pflaume and SPC Criswell occur between 47:00-56:00 on Prosecution Exhibit 3.

Q: And what are they going to tell me?

A: What is who going to tell you?

Q: What's the DNA on her pants...

A: It's not going to tell you nothing because I didn't do nothing.

. . .

All I'm going to do is tell the truth. That's the only thing I can do is tell you what I said and what I did. I didn't do anything. I didn't touch this girl. *If you want to do the fingerprints, go ahead. You can take them right now*.

. . .

You can do DNA. You can do whatever you want to do.

. . .

Q. And when it comes back with your DNA, man . . .

A. It won't.

. . .

I positively did not touch that girl at all, Sir. *If you want to do fingerprints you can, Sir*.

. . .

Q: Did your penis touch her on her pants?

A: No. Never. *Do your DNA*. Now it's just getting ridiculous. *Go ahead and do your DNA*…

(Pros. Ex. 3) (emphasis added).

During the interview, SPC Criswell described his conversations with SPC Connor and SPC Stephens.[6] They told him someone texted them and said SPC Criswell touched "his girl" the night before. (Pros. Ex. 3). SPC Criswell reiterated this text message said something like, "[Y]our boy touched my girl." (Pros. Ex. 3).

Specialist Criswell did not know the name of the person who sent this text message about touching "his girl," but if that person had asked him about it, he would have explained "nothing like that happened." (Pros. Ex. 3). Then, "the next thing I know, they say 'his girl' wants to file charges now, [but] now 'his girl' turns into 'his friend' and now it's not 'his girl' no more, it's 'his friend.' I don't know." (Pros. Ex. 3). At another point, SPC Criswell said his group may have shook, "I guess, her boyfriend's hand" after arriving at the party. (Pros. Ex. 3).

Plain and simple, during the entire interview, SPC Criswell never told SA Pflaume that the girl told him she had a boyfriend. Instead, SPC Criswell's comments over a possible boyfriend related to someone claiming SPC Criswell touched "his girl," which then changed to "his friend." (Pros. Ex. 3).[7]

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[6] These statements occur between 15:00-26:00 on Prosecution Exhibit 3.

[7] The Army Court misinterpreted this interview in stating, "Appellant thought it was strange that the night before SPC AM referred to SPC Al-Shamesi as her boyfriend and now the CID agent was telling appellant that the two of them were only friends." (JA 5). To the extent this could be construed as a factual finding, it is clearly erroneous. Again, SPC Criswell *never said* SPC AM referred to anyone as her boyfriend, and his confusion over a boyfriend related to someone saying after the party that SPC Criswell touched "his girl" during the party. (Pros. Ex. 3).

Military Rule of Evidence 321 objection

At trial, the defense moved to suppress SPC AM's out-of-court identification of SPC Criswell and any subsequent identifications under Military Rule of Evidence [Mil. R. Evid.] 321. (JA 36). The government responded it did not intend to elicit the out-of-court identification and believed SPC AM could make an in-court identification based on her memory from nine months earlier. (JA 36–37).

The military judge asked the government whether it still possessed the photo. (JA 40). The trial counsel responded, "I don't know if we possess it or not," but reiterated the government was not going to ask SPC AM about the photo identification. (JA 40). The trial counsel thought the photo "might" be one of the pictures the government pulled from Facebook in preparation for trial, and "[w]e could be in possession of it but it was not through that process at CID." (JA 41). The trial counsel also did not confirm the photo with either SPC AM or SPC Al-Shamesi. (JA 41). Overall, the government could not explain: (1) which photo was used by CID, or (2) whether that photo was still in its possession.

The trial counsel told the military judge that SPC Al-Shamesi would also testify during trial, but he would not be providing an in-court identification because "I don't believe [he] will be able to say, 'Yeah, I remember him.' He remembers an aspect of him wearing the bandana and that is it." (JA 46). The military judge stated he would defer his ruling until hearing the evidence in the case. (JA 50–51).

Specialist AM's in-court identifications of SPC Criswell

During trial, SPC AM provided the following description of her assailant:

> He looked to be between 5'6"—I'm sorry 5'10 to 6 feet, early 20's. When he approached me, I saw that he was wearing what looked to be a black jacket, very dark jeans, and he had a black and white bandana on his head, with a grill piece on the top on his—in his mouth.

(JA 74).

The trial counsel asked SPC AM whether she recognized her assailant in the courtroom. (JA 75). Specialist AM pointed to SPC Criswell and said, "I recognize his facial features. I recognize, like, the—it's weird—like, the shape of his head. I recognize the size of his body. I am able to recognize, compared to when he was close to me." (JA 76). As such, SPC AM's in-court identification of SPC Criswell was based on three things: his facial features, head shape, and body size.

However, in her testimony, SPC AM did not describe *any* of the "facial features" that she allegedly recognized from nine months earlier. Specialist AM also did not explain how she recognized the "shape of his head" when her assailant was wearing a bandana on top of his head. Similarly, SPC AM did not explain how she recognized the "size of his body" when her assailant was wearing a jacket, nor did she explain what made SPC Criswell's body size unusual or recognizable. In fact, SPC AM even agreed that "the majority of the male African Americans at the party were between 5'10' and 6' tall and in their early 20's." (JA 100).

During her direct examination, the trial counsel and SPC AM also had the following exchange:

> Q. You said it was dark in the events center. *Was it so dark you couldn't see his face*?
>
> A. *Yes.* There [were] certain chances where I could get a glance from the lights at the DJ stand. They were moving around.

(JA 76) (emphasis added).

Specialist AM testified the man who re-approached her by the bathroom was also SPC Criswell. (JA 83, 110). In discussing this second incident, SPC AM said an inside light near the bathroom allowed her to see the man's face and clothing more clearly at that time. (JA 109–10). Specialist AM also testified that she interacted with several other black males at the party when she was "standing along the wall." (JA 76). In fact, "a couple" of black men "stopped by" where she was standing at the wall, engaged in a brief conversation with her, and then "walked away and left [her] alone." (JA 76).

During cross-examination, the defense counsel re-confirmed SPC AM's assailant was wearing "all black" clothes and a black and white bandana, then showed her a picture of SPC Criswell wearing a "dark blue" shirt with "bright and white" markings and a knit cap. (JA 99, 103–04, 268).

During recross examination, the defense counsel showed SPC AM the actual sweatshirt that SPC Criswell wore that night, which she described as "dark blue"

and “it’s got a design on the front as well that’s lighter colors and it [has] white writing on it.” (JA 111–12, 269–70). The defense counsel also asked about the bathroom and whether “there was enough light to both identify this person’s facial features as well as what they were wearing and the color of the articles that they were wearing.” (JA 112). Specialist AM responded, “Yes, Sir.” (JA 112).[8]

Remainder of Government Case-in-Chief

The government called three additional witnesses during its case-in-chief. First, the government called SPC Al-Shamesi. (JA 97). In line with the earlier proffer, the government did not ask SPC Al-Shamesi whether he could identify SPC Criswell as the person wearing the bandana. During his testimony, SPC Al-Shamesi said the party was “really packed,” “there [were] so many people there you’d try to squeeze through to get around,” and “[i]t was like so hot that whenever you walked outside and you looked at the door of the entrance way, you could see some steam coming out.” (JA 117, 152).

Next, the government called SA Pflaume to outline his investigation and interview of SPC Criswell. (JA 159). In testifying about the single photo lineup, SA Pflaume said he took the phone from SPC Al-Shamesi, showed the photo to SPC AM, and she quickly said it was the person who assaulted her. (JA 164–65).

[8] In a prior pleading, appellant referenced an additional portion of SPC AM’s cross-examination, but this testimony was clarified by the defense counsel during a subsequent Article 39(a) session. (JA 156–57).

The photo was "just a face, like a portrait, like a passport photo." (JA 178). After showing the photo to SPC AM, SA Pflaume returned the phone. (JA 166). The trial counsel acknowledged SA Pflaume "does not have that photograph. He didn't keep it." (JA 168).

The government's final witness was Staff Sergeant (SSG) Socorro Garcia, who testified that SPC Criswell was a "heavy sweater" who sometimes "wipes his face" with a "hand towel." (JA 199–200). The trial counsel outlined how this testimony related to its theory of the case, which was "that the room was so hot that [SPC Criswell] eventually did remove that beanie and was not wearing that beanie the entire night." (JA 195–96). On cross-examination, SSG Garcia said he had previously seen SPC Criswell wipe his head with a "washcloth," but he had never seen SPC Criswell with a bandana. (JA 201).

The military judge's rulings on SPC AM's identifications

After the government's case-in-chief, the military judge issued his ruling on the defense's motion to suppress. (JA 204–11). In his ruling, the military judge made findings of fact, then applied the two-part test from *Manson v. Brathwaite*, 432 U.S. 98 (1977). (JA 204–11).

Pursuant to his analysis, the military judge found SA Pflaume's showing SPC AM the single picture of SPC Criswell was unnecessarily suggestive, but noted the government did not seek to introduce this identification. (JA 207). The

military judge then considered the factors from *Neil v. Biggers*, 409 U.S. 188 (1972), in analyzing whether the government met its burden to show by clear and convincing evidence that the in-court identification was not the result of the inadmissible identification. (JA 208–10).

In his analysis, the military judge did not discuss the effect of the government failing to preserve and introduce the photo. Instead, based on his analysis of the *Biggers* factors,[9] the military judge found "by clear and convincing evidence that the in-court identification that Specialist AM made of the accused as her assailant in November 2014 is admissible . . . Insofar as the defense moves for the in-court identification made by Specialist AM of the accused as her alleged assailant, the defense motion is denied." (JA 208–10).

Following this ruling, the defense counsel asked, "Did you make findings of fact regarding the clothing the alleged assailant was wearing?" (JA 211). The military judge answered, "The Court did consider the description of the clothing that the alleged assailant was wearing . . . . While the defense questioned the witness using Defense Exhibit B for identification, that's not been admitted into evidence. It's not evidence before the Court." (JA 211).

[9] The military judge did not cite the additional language from *United States v. Rhodes* of the "likelihood of other individuals in the area at the time of the offense matching the description given by the victim." 42 M.J. 287, 291 (C.A.A.F. 1995).

Defense Case-in-Chief

During its case-in-chief, the defense called SPC Connor and SPC Stephens. They both identified a photo of their group from the party and SPC Criswell's actual sweatshirt that night, which had a "big white Y and R on it." (JA 217–22, 234–36, 268–70). In the photo of the group at the party, SPC Criswell is wearing a dark knit cap, not a black and white bandana. (JA 268). While at the party, neither SPC Connor nor SPC Stephens saw SPC Criswell wearing a bandana. (JA 222, 235–37). Specialist Connor testified there were potentially up to 300 people at the party and "almost all of them" were black. (JA 216).

On cross-examination, both witnesses acknowledged their limited interactions with SPC Criswell during the party. (JA 223–24, 237). They also remembered seeing SPC Al-Shamesi and said it was "possible" that SPC Criswell was "standing just behind" or "with" them. (JA 223–24, 237–38). In contrast to SPC Al-Shamesi's testimony, neither witness testified about "pointing" at SPC Criswell. (JA 121). While SPC Connor had previously seen SPC Criswell with "a towel" on his head at clubs, he had not seen him with a bandana. (JA 223–24).[10]

[10] The Army Court grossly mischaracterized this testimony in saying, "Appellant's friend from the party testified appellant had previously worn a bandana in the same manner as described by SPC AM." (JA 5). To the extent this language could be construed as a factual finding, it is clearly erroneous. Again, SPC Connor never testified that he saw SPC Criswell with a *bandana*. Instead, SPC Connor said he previously saw SPC Criswell with a *towel* at other clubs. (JA 224).

Closing Arguments

During closing argument, the trial counsel argued the potency of SPC AM's in-court identification: "SPC AM looked him in the eye, looked him in the face here today and said that's the man who sexually assaulted me." (JA 246).

In response, the defense counsel pointed out the various "inconsistencies that create reasonable doubt":

> Specialist AM also tells us that there was enough light to tell what color the items the perpetrator was wearing and at the time of her description and time after time her description of her perpetrator was all black, black jeans, black jacket, black shirt, black bandana. The only other details we have, Your Honor, is this person was between 5 foot 10 and 6 foot and was a black male in his early 20s. That description describes virtually everyone present, at that party that night.

(JA 249).

> [T]he problem with the government's case is that Specialist Criswell was wearing a blue jacket, and a blue sweatshirt, with bright bold graphics and lettering [holding up Def. Ex. B], and a blue hat. Your Honor, we have photographic evidence of Defense Exhibit A, as well as testimonial evidence from Specialist Connor and Stephens, of what Specialist Criswell was wearing that night and you also have the shirt itself. *Specialist Criswell was not a man wearing all black on the night in question, and that moves us to this improperly suggestive identification procedure.*

(JA 249–50) (emphasis added).

> Your Honor, as you view the photo, you can see he's wearing dark jeans, a dark blue jacket, and a blue hat and not only is his shirt not all black as was testified by Specialist Criswell—or [SPC AM], it has large readily observing--observable writing on it and that writing is bright white lettering. Now, Your Honor, I provided a second opportunity for Specialist AM and she again responded that there was enough lighting that she could see, during the incident, both the perpetrator make out his features and identify the clothing he was wearing.

(JA 251–52).

> Now, return to the other portion of the CID investigation. When you already have a flawed and improper identification procedure now we have an interview. Your Honor, weigh these facts in contrast with what happens, during the CID interview of Specialist Criswell. Even when he's pressed and lied to by the CID investigator that they have both video and security guards as evidence who witnessed the incident Specialist Criswell vigorously maintains he never touched Specialist AM. He goes further to freely offer to do DNA testing to corroborate his story and freely offers his fingerprints to clear his name.

(JA 252).

> . . . [T]o *find him guilty, you would have to make a finding that blue is black, that a black bandana is a blue hat, that a shirt with bright bold graphics on it would appear to anyone as being all black* . . . . Your Honor, you would also have to find that while on one hand there was not enough light to see the clothing there was enough light to identify the features of a dark black man. You cannot have it both ways and *Your Honor, I ask you what specific facial features did Specialist AM describe prior to viewing that photo at CID? And I would offer the answer is none. Not one specific facial feature describing this man.*

(JA 253) (emphasis added).

In rebuttal, the trial counsel reiterated his prior arguments, then argued SPC Criswell's coat "might cover up the white letters on the front." (JA 255).

Explanation of Ruling

Prior to announcing his findings, the military judge clarified an issue related to his ruling on the motion to suppress. (JA 259). Based on the additional evidence presented during the defense case-in-chief, the military judge stated "the Court now supplements its ruling" and "did consider that picture taken together with the testimony of the alleged victim, and compared the testimony with the items of clothing worn by the accused in the picture." (JA 259). Curiously, the military judge did not provide any further explanation or analysis over this key issue. (JA 259). Instead, the military judge simply stated his ruling was "unchanged." (JA 259).

The Army Court's Opinion

On appeal, the admissibility of the in-court identification sharply divided the Army Court, with the dissenting judge finding the military judge's ruling was an abuse of discretion. (JA 1–24). The Army Court used its Article 66, UCMJ, powers to make additional factual findings, including: (1) as many as 200 people attended the party and were predominantly black, and (2) SPC AM had three opportunities to view her assailant's face during the incidents. (JA 11–12).

The majority held, "After reviewing the evidence we find the military judge did not abuse his discretion and properly interpreted and applied Mil. R. Evid. 321 and the factors articulated by the Supreme Court in *Manson* and *Biggers* in allowing the in-court identification." (JA 13). The dissenting judge concluded, "[T]he military judge prejudicially erred in not suppressing SPC AM's in-court identification," "the evidence is factually insufficient without SPC AM's in-court identification," and "I cannot find the government to have met its burden of proving by clear and convincing evidence that SPC AM's in-court identification was untainted by the single photo lineup when the government did not introduce the photo." (JA 17, 20–21).

Furthermore, the dissenting judge outlined "several concerns with the military judge's analysis." (JA 18–22). These included: (1) the majority of SPC AM's descriptions of her assailant *post-dated* the unlawful photo lineup,[11] (2) the lack of support for the military judge's finding that "SPC AM's reaction when seeing the picture [of appellant] was immediate and certain," (3) SPC AM did not actually have a good opportunity to view her assailant, and (4) the government did not introduce the photo despite having the burden of proof. (JA 18–22).

[11] The dissenting judge added, "I don't think it proper to use the detail contained in the possibly tainted in-court testimony to determine whether that same testimony was tainted. In *Manson v. Brathwaite*, by contrast, the witness's detailed description of the suspect was made *before* he saw the one-photo lineup." (JA 18) (emphasis in original).

Based on the overall circumstances, the dissenting judge expressed his concern over "the *accuracy* of SPC AM's testimony, not her honesty," as "the danger is that the witness will honestly, *but incorrectly*, identify the accused because of the unlawful lineup." (JA 22) (emphasis in original). Put most simply, "a sincere but mistaken witness may be more dangerous to a just result than a dishonest witness." (JA 22).

As necessary, additional facts related to the issue presented are included in the relevant subsections below.

Summary of Argument

The military judge abused his discretion in denying the defense's motion to suppress SPC AM's in-court identification for several reasons.

First, contrary to the military judge's ruling, the government did not meet its burden to prove by clear and convincing evidence that the unlawful photo lineup did not influence the in-court identification, as it failed to preserve or produce the photo itself. Under the circumstances of this case, such an omission was fatal to the government's burden, as the only "pre-taint" description was "extraordinarily not detailed," as SPC AM only told SPC Al-Shamesi that her assailant was a black man wearing a black and white bandana. (JA 18, 134).

Furthermore, the military judge's analysis of the *Biggers* factors was deeply flawed and failed to account for several key considerations. Based on the "totality of the circumstances" – which included SPC AM's limited opportunities to view her partially obscured assailant during a highly stressful, violence threatening, and cross-racial crime – the military judge abused his discretion in concluding the government met its burden to prove the in-court identification was admissible.

Finally, as SPC AM's in-court identification was the government's only direct evidence that SPC Criswell was her assailant, the government cannot meet its additional burden to prove this error was harmless beyond a reasonable doubt. Based on this error, this Court should set aside the findings and the sentence.

Standard of Review

This Court reviews a military judge's denial of a motion to suppress for an abuse of discretion. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017) (citation omitted).

"A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013) (citations omitted). On a mixed question of law and fact, a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ramos*, 76 M.J. 372, 375 (C.A.A.F. 2017) (citation omitted).

An error where constitutional dimensions are at play is not harmless beyond a reasonable doubt when there is a reasonable possibility the error complained of might have contributed to the conviction. *United States v. Hukill*, 76 M.J. 219, 221 (C.A.A.F. 2017). The government bears the burden of establishing that a constitutional error had no causal effect upon the findings. *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007).

Law

"Eyewitness misidentification is the leading cause of wrongful convictions across the country." *State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011). "In fact, mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." *United States v. Brownlee*, 454 F.3d 131, 141 (3d Cir. 2006) (citation omitted) (internal quotation marks omitted).

"It is widely accepted by courts, psychologists and commentators that '[t]he identification of strangers is proverbially untrustworthy.'" *Id.* (citations omitted). However, "[a]ll the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352, (1981) (Brennan, J., dissenting) (internal quotation marks omitted) (emphasis in original) (citation omitted).

Military Rule of Evidence 321 outlines the admissibility of eyewitness identifications and codifies the two-part test established in *Biggers*. *United States v. Baker*, 70 M.J. 283, 288 (C.A.A.F. 2011). This test examines: (1) whether a pretrial identification was unnecessarily suggestive, and (2) if a pretrial identification was unnecessarily suggestive, whether it was conducive to a substantial likelihood of misidentification. *Id*. at 284 (citation omitted).

To that end, Mil. R. Evid. 321(b) states an identification of the accused as participating in an offense remains inadmissible if "[t]he identification is the result of an unlawful identification process" or "[e]xclusion of the evidence is required by the Due Process Clause of the Fifth Amendment to the Constitution of the United States as applied to members of the Armed Forces." Critically, the protections of Mil. R. Evid. 321(b) cover eyewitness identifications "made at the trial or otherwise." Military Rule of Evidence 321(c)(1) further clarifies "[a] lineup or other identification process is unreliable, and therefore unlawful, if the lineup or other identification process is so suggestive as to create a substantial likelihood of misidentification."

In outlining the required burdens and standards of proof for unreliable identifications, Mil. R. Evid. 321(d)(6)(B) separates the "initial unreliable identification" from any "identification[s] subsequent to an unreliable identification." For a subsequent identification, the prosecution must prove "by clear and convincing evidence that the later identification is not the result of the inadmissible identification." Mil. R. Evid. 321(d)(6)(B)(ii). "Clear and convincing evidence is that weight of proof which produces in the mind of the factfinder a firm belief or conviction that the allegations in question are true." *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001) (citations omitted).

The dangers in eyewitness identifications of strangers encountered under stressful conditions have received significant commentary. *United States v. McLaurin*, 22 M.J. 310, 312 (C.M.A. 1986) (citing *United States v. Wade*, 388 U.S. 218, 229 (1967)). Suggestive confrontations are disapproved because they increase the likelihood of misidentification and can violate a defendant's right to due process. *Biggers*, 409 U.S. at 198. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

"It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." *Simmons v. United States*, 390 U.S. 377, 383 (1968). The overall danger of misidentification "will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw." *Id*. "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Id*. (citation omitted).

For example, when a victim does not know her assailant and "remembers generic details about height, weight, and race, there is a risk that a photograph of a single individual bearing those characteristics will prompt a victim to 'identify' the

person in the photograph as the perpetrator based on generic, and thus unreliable, characteristics alone.'" *Baker*, 70 M.J. at 292 (Baker, J., with whom Ryan, J., joined, dissenting).

Overall, "[t]here is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement." *United States v. Russell*, 532 F.2d 1063, 1066 (6th Cir. 1976). "Since this danger is inherent in every identification of this kind, courts should be especially vigilant to make certain that there is no further distortion of the possibly incomplete or mistaken perception of a well-meaning witness by suggestive or other unfair investigatory techniques." *Id*. (citations omitted).

Even if an original confrontation is unnecessarily suggestive, courts must also determine whether an identification is reliable under the "totality of the circumstances." *Biggers*, 409 U.S. at 199. The factors to be considered include: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the witness's demonstrated level of certainty during the confrontation, and (5) the elapsed time between the criminal act and the confrontation. *Brathwaite*, 432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199). "Against these factors is to be weighed the corrupting effect of the suggestive

identification itself." *Id*. This Court has also weighed an additional factor in assessing the reliability of an in-court identification: the "likelihood of other individuals in the area at the time of the offense matching the description given by the victim." *Rhodes*, 42 M.J. at 291

The Supreme Court of New Jersey has recognized that since *Manson*, the body of scientific research about human memory has called into question the legal framework for analyzing the reliability of eyewitness identifications. *Henderson*, 27 A.3d at 877. In light of this research, the court established a "non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility." *Id.* at 921. These variables include stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of perpetrator, memory decay, race-bias, opportunity to view the criminal, degree of attention, accuracy of prior description, level of certainty, and the time between the crime and confrontation. *Id*. at 921–22. Several state courts have followed suit in various forms. *See, e.g., State v. Lawson*, 291 P.3d 673 (Or. 2012); *State v. Almaraz*, 301 P.3d 242 (Idaho 2013); *Young v. State*, 374 P.3d 395 (Alaska 2016).

As one example, the Supreme Court of Idaho explained the variables "serve to elaborate on this Court's five-factor test for reliability" – which was based on *Manson* and *Biggers* – as several of the estimator variables can be considered under the existing factors. *Almaraz*, 301 P.3d at 253. "For example, under the first

factor courts may consider the lighting at the time the crime was committed, whether the perpetrator was wearing a disguise, and the length of time taken to commit the crime, among other variables." *Id*. Similarly, "[u]nder the second factor courts may consider the amount of stress the witness was under, whether a weapon was present, or the witness's level of intoxication." *Id*.

In its opinion, the court firmly reiterated, "[W]e are not changing the two-part test . . . . Rather, by outlining the system and estimator variables that research has convincingly shown to impact the reliability of eye-witness identification, we hope to provide guidance to lower courts." *Id*.

As necessary, additional legal principles, cases, and authorities are included in the relevant subsections below.

Argument

1. The military judge did not review the photo shown to SPC AM, yet still found the government met its burden of proving by clear and convincing evidence that this photo did not taint the in-court identification.

In his ruling, the military judge correctly found SA Pflaume's actions were unnecessarily suggestive and "there may be a substantial likelihood it led to a misidentification that extended to court today," but then erroneously concluded the government met its burden in proving the in-court identification of SPC Criswell was admissible despite the unlawful photo lineup. (JA 208–11).

Remarkably, the military judge concluded the government met its burden in proving the photo that SA Pflaume showed to SPC AM did not influence the in-court identification *without ever viewing the photo*. (JA 208–11). Again, the government had the burden to prove the photo did not affect the identification, but did not preserve or produce it.

The dissenting judge at the Army Court emphasized this point: "I cannot find the government to have met its burden of proving by clear and convincing evidence that SPC AM's in-court identification was untainted by the single photo line-up when the government did not introduce the photo." (JA 20–21). "A key question in this case is whether, *after* being shown the photo of appellant, SPC AM was describing her attacker or was she describing the photo of appellant. Without the photo, that is a hard question to answer." (JA 21) (emphasis in original).

This is especially true based on the facts of this case. As outlined above, SPC AM's in-court identification of SPC Criswell was based on three things: "his facial features," "the shape of his head," and "the size of his body." (JA 76). Without the photo, each of these categories fail to meet the government's burden of proving in-court identification was untainted by the unlawful lineup.

First, SPC AM did not describe or recollect any "facial features" of her assailant before SA Pflaume showed her the single photo of SPC Criswell. The defense counsel made this exact point in his closing argument: "Your Honor, I ask you what specific facial features did Specialist AM describe prior to viewing that photo at CID? And I would offer the answer is none. Not one specific facial feature describing this man." (JA 253).

To be clear, the initial absence of details does not automatically preclude an in-court identification. For example, a witness could subsequently describe several recognizable features that were not contained in the unlawful photo lineup. Such a scenario would likely satisfy a "totality of the circumstances" analysis regarding the admissibility of an in-court identification.

However, in this case, SPC AM: (1) did not describe any recognizable "facial features" prior to seeing the photo, and (2) did not provide any testimony during her in-court identification over which "facial features" she recognized from nine months earlier. In such circumstances, where "the police display to the

witness only the picture of a single individual who generally resembles the person he saw . . . . the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen." *Simmons*, 390 U.S. at 383 (citation omitted). This concern is magnified by not knowing the quality and focus of the photo. Such issues remained the *government's* burden, not SPC Criswell's.

Second, SPC AM did not explain how she recognized the "shape of his head" when her assailant was wearing a bandana. This is a critical point. As a matter of common sense, at the time of SPC AM's assault, a bandana cloaked the shape of her assailant's head. Therefore, at the time of the assault, SPC AM would not have been able to view the very thing she claimed to independently recognize during the in-court identification. The only logical time that SPC AM could have seen the "shape of [SPC Criswell's] head" was from the unlawful photo lineup. This basis for SPC AM's recognition of SPC Criswell raises grave concerns about the in-court identification, but this issue went unaddressed by the military judge.

Third, SPC AM did not explain how she recognized the "size of his body" when her assailant was wearing a jacket. In fact, the government's entire theory of the case was that SPC Criswell's jacket covered up the bright white letters on his sweatshirt. (JA 255). This creates a separate issue. If SPC Criswell's jacket *was* covering his sweatshirt, then SPC AM would not have been able to view – much less recognize nine months later – the actual "size of his body."

While the size of SPC Criswell's body likely would not have been visible in "a passport photo" (JA 178), SPC AM never actually explained how or why his body size was distinguishable. Overall, SPC AM did not provide *any* concrete, specific, and easily verifiable characteristics of SPC Criswell that would have been untainted by the unlawful single photo lineup.

Furthermore, in making the in-court identification, SPC AM would have been comparing the "body size" of her physically active, standing, and heavily clothed assailant with the "body size" of the stationary, seated, and uniformed SPC Criswell. This again raises serious concerns regarding the reliability of the in-court identification, which become even further amplified by the references to SPC Criswell's thirty-pound weight gain since the party. (JA 100, 196–97).

In sum, the military judge abused his discretion in determining the government met its burden in proving the photo that SA Pflaume showed to SPC AM did not influence the in-court identification, when the government did not preserve or produce this photo. While appellant acknowledges the government could overcome this hurdle under certain circumstances, such circumstances are not present in this case.[12]

[12] Appellant does not mean to imply any failures on SPC AM's part. Instead, this case firmly demonstrates the importance of CID agents using proper procedures. *See Perry v. New Hampshire*, 565 U.S. 228 (2012) ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement use of improper procedures in the first place.").

2. The military judge conducted a flawed analysis of the *Biggers* factors, failed to account for key considerations, and reached the wrong conclusion.

A. There are multiple discrepancies between SPC AM's description of her assailant and SPC Criswell.

The third *Biggers* factor is the accuracy of the witness's prior description of the perpetrator. 409 U.S. at 199. In *Rhodes*, this Court described this factor as "no discrepancy between the offender's description and appellant." 42 M.J. at 291. When analyzing this factor, the military judge erroneously concluded, "[SPC AM] gave a very detailed description of her assailant." (JA 209–10). More specifically, this conclusion: (1) fails to properly account for the multiple discrepancies between SPC AM's descriptions of her assailant and SPC Criswell, and (2) ignores that the only "pre-taint" description was "extraordinarily not detailed," as SPC AM only said her assailant was a black man wearing a bandana. (JA 18, 134).

First, in contrast to SPC AM's description of her assailant wearing a bandana and "all black" clothes, SPC Criswell was wearing a knit cap and dark blue sweater with large, bright lettering at SPC AM's eye level.[13] (JA 74, 220–21, 268–70). The defense raised this very point: "[Y]ou would have to make a finding that blue is black, that a black [and white] bandana is a blue hat, that a shirt with bright bold graphics on it would appear to anyone as being all black." (JA 253).

[13] Specialist AM testified she was "5 feet" tall, and SPC Criswell's ERB listed him as being ten inches taller. (JA 64, 254, 267). This would have put her face directly in front of the bright lettering on SPC Criswell's sweatshirt.

The military judge did not analyze these discrepancies in his initial ruling, as the photo and sweatshirt were not in evidence. (JA 211). After this evidence was admitted, the military judge did not provide any further explanation or analysis over this key issue. (JA 259). Instead, he just said his ruling was "unchanged." (JA 259). Due to his lack of analysis, it is unclear whether or how the military judge considered the "no discrepancy" language from *Rhodes*.

At the Army Court, the majority discounted this discrepancy, stating "the logo design . . . would have been under appellant's jacket" and "the photograph does not establish that he could not have replaced his skull cap with a bandana later in the evening." (JA 5–6). Such an analysis is not only incompatible with the language from *Rhodes*, but also seems to improperly shift the burden to the defense to prove SPC Criswell could not have changed into clothes matching the description of SPC AM's assailant. This analysis also ignores the testimony from two witnesses who did not see SPC Criswell wearing a bandana at the party, while SPC Al-Shamesi – the only other witness who saw a bandana – could not identify SPC Criswell as the person wearing it. (JA 28, 222, 236).[14]

[14] Such an analysis also ignores that the government presented evidence and argued that SPC Criswell sweats a lot and would have reason to remove his beanie cap and place a bandana on his head because it was so hot at the party. (JA 196, 226). As such, the government's own argument at trial contradicts the theory that SPC Criswell would have kept his jacket on over his sweatshirt.

Second, and as the dissenting judge concluded, the majority of SPC AM's descriptions "appear to post-date the improper photo lineup." (JA 18). To that extent, SPC AM's only "pre-taint" description was "extraordinarily *not* detailed," as she only told SPC Al-Shamesi that her assailant was a black man wearing a black and white bandana before he cut her off. (JA 18, 134).

Critically, it is possible the picture that SA Pflaume showed to SPC AM involved SPC Criswell wearing a grill. The trial counsel stated the photo "might" be one of the pictures the government pulled from Facebook in preparation for trial. (JA 41). One of these photos involved a headshot of SPC Criswell wearing a grill. (JA 190–94). This is highly relevant based on the circumstances of this case, as SPC AM's initial description to SPC Al-Shamesi *did not* include a grill.

In sum, the military judge's conclusion for this factor was erroneous, as SPC AM's description of her assailant contained numerous discrepancies from SPC Criswell, and the only "pre-taint" description of her assailant was "extraordinarily not detailed." (JA 18).

B. Specialist AM's reaction was not certain.

The fourth *Biggers* factor is the witness's demonstrated level of certainty during the confrontation. 409 U.S. at 199. In analyzing this factor, the military judge concluded, "SPC AM's reaction, when seeing the picture, was immediate *and certain*." (JA 210) (emphasis added). This conclusion of certainty is incorrect.

As the dissenting judge at the Army Court accurately stated, "SPC AM's description of her identification of appellant consisted of one-word answers to leading questions," and none of these questions actually related to her level of certainty. (JA 19–20). Special Agent Pflaume's testimony similarly failed to support the military judge's conclusion: "While the CID agent testified to the speed of her identification, he did not testify about her degree of confidence." (JA 20). In fact, there is no evidence in the record that SA Pflaume asked SPC AM to provide her level of confidence or certainty when making the identification.[15]

Furthermore, accuracy and confidence "may not be related to one another at all." *Henderson*, 27 A.3d at 891. "Scholars have cautioned most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and because the eyewitness is testifying honestly (i.e. sincerely), he or she will not display the demeanor of a dishonest or biased witness." *Id*. at 889 (internal quotation marks omitted) (citation omitted).

In sum, the military judge's conclusion that SPC AM's reaction upon seeing SPC Criswell's picture was "immediate *and certain*" is erroneous. (JA 210) (emphasis added). However, even if this Court concludes otherwise, this factor should be given little weight under the "totality of the circumstances."

[15] All law enforcement components under the U.S. Department of Justice are required to document a statement of confidence by a witness after a photo identification. (JA 271–82).

C. Specialist AM viewed her assailant in a dark club with minimal lighting while he was wearing a bandana that covered his head.

The first *Biggers* factor is the opportunity of the witness to view the perpetrator at the time of the crime. 409 U.S. at 199. In analyzing this factor, the military judge concluded, "SPC AM could see her assailant's face clearly, when she was approximately 20 feet away from the DJ booth in the light coming from the DJ booth shown directly on his face," and she also saw his face a second time from the light near the bathroom. (JA 208–09). The Army Court's majority found an additional opportunity for SPC AM to view her assailant when he was pulling her towards a closet. (JA 13).

There is some support in the record for the findings associated with these conclusions. However, to the extent these findings are not clearly erroneous, their impact is greatly mitigated by SPC AM's additional testimony the party was "almost pitch black," "very hard to see," and she "tried to use the lights from the DJ stand to try and find [her friends] and [she] still couldn't see any of them at all." (JA 68, 70). Specialist AM also did not provide *any* non-generic or otherwise verifiable descriptions of her assailant's facial features.

More fundamentally, to the extent SPC AM was potentially able to clearly view her assailant's face in a crowded and poorly lit area, this increases the importance of the discrepancies between the descriptions of her assailant and SPC Criswell. The defense counsel made this exact point during trial: "[Y]ou would

also have to find that while on one hand there was not enough light to see the clothing there was enough light to identify the features of a dark black man. *You cannot have it both ways*." (JA 253) (emphasis added).

The same logic also applies to the military judge's related conclusion that SPC AM was "in the presence of her assailant for a significant amount of time." (JA 209). Simply put, if SPC AM was able to both "clearly" view her assailant and was around him for "a significant amount of time," then such discrepancies between her descriptions of the assailant and SPC Criswell should not exist. As mentioned earlier, this is especially true based on the bright white design pattern of SPC Criswell's sweatshirt being at SPC AM's approximate eye level. Such interplay is critical within a "totality of the circumstances" analysis, but this issue was not properly addressed by the military judge in his ruling.

The military judge also erred by failing to analyze additional considerations for this factor, such as "whether the perpetrator was wearing a disguise." *Almaraz*, 301 P.3d at 253. The Second Circuit has cited "illuminating" social science research related to how "even subtle disguises can . . . impair identification accuracy." *Young v. Conway*, 698 F.3d 69, 80 (2d Cir. 2012) (citations omitted) (internal quotation marks omitted). For example, one research project even reported an 18% reduction in the accuracy of identifications when the "perpetrator" wore a hat. *Id*.

In sum, SPC AM viewed her assailant in a dark club with minimal lighting while he was wearing a bandana covering his head. However, to the extent this factor is supported by the record, it weighs equally against a different factor.

D. Specialist AM viewed her assailant's features during a highly stressful, violence-threatening, and cross-racial crime.

The second *Biggers* factor is the witness's degree of attention. 409 U.S. at 199. In analyzing this factor, the military judge concluded, "SPC AM's testimony demonstrates that she was extremely attentive to her assailant's features during the time that she was in his presence." (JA 209). This is incorrect, for several reasons.

First, as mentioned above, SPC AM's only "pre-taint" description of her assailant's features was "extraordinarily *not* detailed," as SPC AM only told SPC Al-Shamesi that she was assaulted by a black man wearing a black and white bandana. (JA 18, 134) (emphasis added).

Second, SPC AM did not provide any testimony during her in-court identification over which specific "features" she recognized from nine months earlier. In fact, SPC AM did not provide *any* concrete or specific characteristics of SPC Criswell that would both support the military judge's conclusion and remain untainted by the unlawful lineup.

Third, SPC AM testified she was completely unaware of SPC Criswell's thirty-pound weight gain since the party, which she specifically agreed would change his appearance. (JA 100, 196–97).

The military judge also failed to analyze several additional considerations. For example, under this factor, courts may consider "the amount of stress the witness was under." *Almaraz*, 301 P.3d at 253. "Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification." *Henderson*, 27 A.3d at 904; *See also McLaurin*, 22 M.J. at 312.

Both SPC AM and SPC Al-Shamesi extensively testified about her level of stress during and after the alleged assault. During the assault, SPC AM testified she was thinking, "Just let me go, I want to go, *I'm scared, I thought I was going to get raped* at that point, I didn't know where we were going." (R. at 63) (emphasis added). Specialist Al-Shamesi said that when he saw SPC AM after the incident, "She had this fearful look in her eye. I can't even explain it. *I've never seen her like that in my life*." (R. at 105) (emphasis added).

As part of a "totality of the circumstances" analysis, the fact that SPC AM was actively resisting her assailant's physical advances in a stressful situation makes it less likely that her in-court identification was unaffected by the unlawful photo lineup. While this is completely understandable for anyone involved in such a horrific assault, this again demonstrates the fundamental importance of CID agents using proper procedures. Overall, the issue of SPC AM's stress level during the assault went completely unaddressed by the military judge in his ruling.

Finally, the military judge did not analyze the cross-racial nature of the identification. The *Henderson* court cited multiple scientific sources in recognizing that a witness may have more difficulty making a cross-racial identification. 27 A.3d at 904 (citations omitted). "Scholarly literature attacking the trustworthiness of cross-racial identification is now legion." *United States v. Stevens*, 935 F.2d 1380, 1392 (3d Cir. 1991).

This Court itself has recognized that cross-racial bias is an issue that can allow a special jury instruction and expert testimony in appropriate cases. *See United States v. Thompson*, 31 M.J. 125, 128 (C.M.A. 1990). The Second Circuit has further explained, "Studies suggest that own-race bias is especially pronounced where, as here, the person making the identification is Caucasian and the person being identified is African-American." *Young*, 698 F.3d at 81 (citation omitted).

In sum, under the "totality of the circumstances" in this case – which involved a highly stressful, violence-threatening, and cross-racial crime occurring in minimal lighting with a partially disguised assailant – the military judge abused his discretion in concluding the government met its burden by clear and convincing evidence that the unlawful single-photo lineup did not influence the in-court identification.

3. The military judge's erroneous admission of SPC AM's identification was not harmless beyond a reasonable doubt.

The government cannot meet its burden to prove this error was harmless beyond a reasonable doubt. The in-court identification was the government's only direct evidence that SPC Criswell was SPC AM's assailant. Specialist Al-Shamesi was the only other witness who saw someone wearing a bandana, but he could not identify SPC Criswell as the person wearing it. (JA 28). There was no other corroborating evidence such as videotapes or other eyewitnesses to the assaults, and SPC Criswell steadfastly maintained his innocence and repeatedly offered to provide his DNA and fingerprints.

Even further, the evidence shows SPC Criswell's account is entirely consistent with SPC AM's, and she may have remembered SPC Criswell's face from a separate encounter. Specialist AM testified "a couple" of black men "stopped by" the wall, engaged in a brief conversation with her, and then "walked away." (JA 76). Specialist Criswell similarly described a brief conversation at the wall with a short, skinny, white female, and then he "walked away." (Pros Ex. 3).

Just as the government cannot meet its burden to prove SPC AM's in-court identification was reliable, it cannot prove this tainted identification did not have a causal effect upon the findings.[16]

[16] Indeed, the dissenting judge at the Army Court stated "the evidence is factually insufficient without SPC AM's in-court identification." (JA 17).

Conclusion

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Criswell*, Crim. App. Dkt. No. 20150530, USCA Dkt. No. 18-0091/AR, was delivered to the Court and Government Appellate Division on March 14, 2018.

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