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	)))))))))	REPLY 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
FOR THE ARMED FORCES:

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.

"[M]istaken 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).

Statement of the Case

On February 12, 2018, this Court granted appellant's petition for review. On March 14, 2018, appellant filed his final brief with this Court. The government responded on April 13, 2018. On April 17, 2018, this Court granted appellant's motion to extend time to reply. This is appellant's reply.

Argument

As the government does not even attempt to argue harmlessness, the only issue before this Court is the admissibility of the in-court identification. For this issue, the government's arguments are unavailing. In its attempt to defend the military judge's ruling, the government: (1) misstates several facts, (2) overstates the detail in SPC AM's pre-taint description, (3) understates the significance of the military judge being unable to review the unpreserved photo, and (4) provides inadequate responses to several deficiencies in the military judge's analysis.

1. The government misstates several facts.

In its brief, the government misstates or mischaracterizes several key facts. Appellant will clarify the record in the subsections below. As a preliminary matter, appellant questions the relevance of certain portions of the government's argument.

Several courts have held the admissibility of an in-court identification is exclusively based on whether the witness can reliably identify the defendant despite the suggestive pretrial identification. Any other potentially inculpatory evidence is not relevant to this analysis. *See United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995) (considering such evidence is "contrary to the Supreme Court's guidance in *Brathwaite* that other evidence indicating a defendant's guilt 'plays no part in our analysis' of reliability . . . . Independent evidence of

culpability will not cure a tainted identification procedure"); *United States v. Rogers*, 126 F.3d 655, 659 (5th Cir. 1997) (admissibility of an identification is "judged solely by the circumstances indicating whether it was likely to be a well-grounded identification, not whether it seems likely to have been correct in light of other available evidence"); *Abdur Raheem v. Kelly*, 257 F.3d 122 (2d Cir. 2001) (this evidence "is properly considered in harmless-error analysis, not in the due process inquiry of whether the identification has reliability"); *United States v. Greene*, 704 F.3d 298, 310 (4th Cir. 2013) ("extrinsic evidence . . . cannot be considered in assessing the reliability of [a witness's] identification testimony").[1]

a. Specialist Al-Shamesi did not – and could not – identify appellant as the man wearing a bandana at the party.

The government erroneously claims, "SPC Al-Shamesi witnessed appellant place a black and white bandana onto his head." (Gov't Br. 17). At trial, SPC Al-Shamesi could not identify appellant as the person wearing the bandana. The trial counsel even explained that SPC AM was the only witness who would provide an in-court identification, as "I don't believe [SPC] Al-Shamesi will be able to say, 'Yeah, I remember him.'" (JA 46). In line with this proffer, the trial counsel did not ask SPC Al-Shamesi whether he could identify appellant.

[1] While any such evidence is relevant to a prejudice analysis, the government did not even attempt to argue the in-court identification was harmless. On this issue, appellant notes the dissenting judge at the Army Court stated "the evidence is factually insufficient without SPC AM's in-court identification." (JA 17).

b. Appellant never told CID that SPC AM said she was with her boyfriend.

The government asserts appellant told CID that the short, skinny, white girl at the party said she was with her boyfriend. (Gov't Br. 8, 18). This is incorrect. During his CID interview, SPC Criswell *never* said this girl told him she had a boyfriend. (Pros. Ex. 3). Instead, the confusion over a potential boyfriend related to someone who texted SPC Criswell's friends and claimed that SPC Criswell touched "his girl" at the party. (*See* Appellant Br. 10; Pros. Ex. 3).

c. Specialist AM talked to other African American males at the party.

The government also states, "Specialist AM testified that she did not talk to any other African American men that night." (Gov't Br. 5). Again, this is incorrect. Specialist AM testified "a couple" of black men "stopped by" the wall, engaged in a short conversation with her, and then "walked away." (JA 76). Appellant similarly described having a short conversation at the wall with a female matching SPC AM's description, and then he "walked away." (Pros. Ex. 3).

2. The government overstates the amount of detail in SPC AM's pre-taint description of her assailant.

The government characterizes SPC AM's pre-taint description of her assailant as being "accurate and specific." (Gov't Br. 16). It was not. Prior to the unlawful photo lineup, SPC AM only said her assailant was a black man wearing a bandana. (JA 134). As such, and as the dissenting judge at the Army Court correctly concluded, SPC AM's only pre-taint description was "extraordinarily not

detailed," and the majority of her "descriptions of her attacker appear to post-date the improper photo lineup." (JA 18).

3. The government understates the significance of the military judge being unable to review the photo.

The government mistakenly claims the military judge being unable to review the unpreserved photo is "irrelevant." (Gov't Br. 19). In light of the government's burden to prove by clear and convincing evidence that CID's unlawful photo lineup did not taint the in-court identification, the content of the photo is clearly "relevant" to this analysis. Mil. R. Evid. 321(d)(6)(B)(ii). The government held the burden to prove the photo did not affect the in-court identification, but did not preserve or produce it for review.

In seeking to explain how this omission is "irrelevant," the government posits the photo "did not add anything to [SPC AM's] description," "did not reflect what he wore on his head," and "did not depict the gold grill." (Gov't Br. 19). Without the photo itself, such claims are wholly speculative.

Notably, 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). One of these pictures is a headshot of SPC Criswell wearing a grill. (Pros. Ex. 4 for identification).

Even more fundamentally, by simply asserting that SPC AM's "description of him is from her memory of the assault, not from the Facebook photo," the government did not respond to appellant's primary arguments. (Gov't Br. 20).

Critically, SPC AM's in-court identification was based on "facial features" and "the shape of his head." (JA 76). In his brief, appellant pointed out that SPC AM: (1) did not describe any "facial features" prior to seeing the photo, (2) did not describe which "facial features" she allegedly recognized at trial, and (3) did not explain how she could recognize the "shape of his head" when her assailant was wearing a bandana. (Appellant Br. 31–34). As such, at the time of the assault, SPC AM could not have seen the very thing she claimed to independently recognize during the in-court identification. Even further, SPC AM did not provide *any* concrete, specific, or verifiable characteristics of SPC Criswell that would have been untainted by the unlawful lineup.

The government, given full opportunity to explain how it could still meet its burden without preserving or producing the photo, instead provides conclusory assertions based on faulty assumptions. Such a response is clearly insufficient. While appellant again acknowledges the government could overcome this hurdle under certain circumstances, such circumstances are not present in this case.[2]

[2] As before, appellant does not mean to imply any failures on SPC AM's part. This case instead demonstrates the fundamental importance of CID agents following proper procedures in conducting lineups or other identification procedures.

4. The government provides inadequate responses to several deficiencies in the military judge's analysis.

After describing the effect of the government's failure to preserve the photo, appellant detailed the deficiencies in the military judge's analysis of the *Biggers* factors. (*See* Appellant Br. 35–43). In response, the government joins the military judge in either completely ignoring or incorrectly analyzing several factors and circumstances. (Gov't Br. 14–18). While appellant primarily relies on his previous analysis, he highlights the following issues and concerns with the government's response.

a. Specialist AM was under a high level of stress.

For the second *Biggers* factor, appellant pointed to the evidence of SPC AM's understandably high level of stress during and after the assault. (Appellant Br. 41–42). Specialist Al-Shamesi even said SPC AM "had this fearful look in her eye . . . . I've never seen her like that in my life." (JA 123). In response, the government – like the military judge – did not address the impact of SPC AM's stress level. (Gov't Br. 15). This is a substantial omission.

"Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification." *State v. Henderson*, 27 A.3d 872, 904 (N.J. 2011). "There 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). In analyzing this *Biggers* factor, the Fourth Circuit has quoted the Fifth Circuit in explaining "a witness's reasonable fear 'does not change the fact that it weighs against the reliability of her identification by throwing some doubt on her ability to concentrate on and remember his face.'" *Greene*, 704 F.3d 298, 308 (quoting *Rogers*, 126 F.3d at 659). The exact same logic applies to this case, and SPC AM's stress level was highly relevant to the reliability analysis.

b. Specialist AM was making a cross-racial identification.

For this same factor, appellant cited several cases discussing the literature and studies related to cross-racial identification. (Appellant Br. 43). For example, the Second Circuit has noted, "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 v. Conway*, 698 F.3d 69, 81 (2d Cir. 2012) (citation omitted). As another example, the Ninth Circuit recently weighed "the inherent problems in cross-racial identifications" in analyzing the *Biggers* factors. *Swoopes v. Ryan*, 714 F. App'x 732 (9th Cir. 2018).

In response, the government again joins the military judge in failing to account for this critical circumstance. Simply put, the cross-racial nature of the identification is a key component of the required analysis in this case and cannot be ignored.

c. Specialist AM's assailant was wearing a bandana that covered his head.

For the first *Biggers* factor, appellant discussed the relevance of disguises. (Appellant Br. 40–41). For example, the Second Circuit has cited "illuminating" research showing how "even subtle disguises can . . . impair identification accuracy." *Young*, 698 F.3d at 80 (2d Cir. 2012) (citation omitted). The *Henderson* court similarly explained, "Disguises as simple as hats have been shown to reduce identification accuracy." 27 A.3d at 907 (citation omitted). In this case, SPC AM's assailant was wearing a bandana covering his head during the entire incident. In response to appellant's argument, the government did not analyze or discuss this issue for the first *Biggers* factor, nor explain why such logic is not highly relevant to a "totality of the circumstances" analysis.

d. Specialist AM's reaction was not certain.

For the fourth *Biggers* factor, appellant categorically addressed why the military judge erred in stating, "SPC AM's reaction, when seeing the photo, was immediate *and certain*." (*See* Appellant Br. 37–38). In response, the government doubles down on the military judge's clear error, which improperly intertwines immediacy with certainty. (Gov't Br. 17–18).

These are wholly separate concepts, and there is no evidence in the record that SPC AM provided her level of confidence when making the identification. Instead, Special Agent (SA) Pflaume only testified that SPC AM's reaction was

"instantaneous" and "she didn't look at it and take her time." (JA 164–65). Even if this Court disagrees with appellant's analysis, the Fourth Circuit has stated this factor "has come under withering attack as not relevant to the reliability analysis." *Greene*, 704 F.3d at 309 n.4. More specifically, "[w]hile acknowledging that under current law an eyewitness's level of certainty in his identification remains a relevant factor in assessing reliability, many courts question its usefulness in light of considerable research showing that an eyewitness's confidence and accuracy have little correlation." *Id*.

In sum, for this factor, the government both mischaracterizes SPC AM's reaction as being certain and places undue weight on its relevance to the required analysis.

e. <u>There are multiple discrepancies between SPC AM's description of her assailant and SPC Criswell.</u>

Appellant explained why the military judge's conclusion that "[SPC AM] gave a very detailed description of her assailant" was erroneous. (Appellant Br. 35–37). More specifically, appellant outlined how the military judge's conclusion: (1) failed to properly account for the multiple discrepancies between SPC AM's descriptions of her assailant and SPC Criswell, and (2) ignored that her only "pre-taint" description was "extraordinarily not detailed." (JA 18, 134).

In response, the government largely repeats the same mistakes as the military judge. (Gov't Br. 16–17). While the government did attempt to explain

away the clothing discrepancies, it primarily did so by: (1) mischaracterizing the testimony of SPC Al-Shamesi, who never actually identified appellant as the person with a bandana on his head, and (2) ignoring the bright white design pattern of SPC Criswell's sweatshirt, which would have been at SPC AM's eye level. (Gov't Br. 17).

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 in proving the unlawful single-photo lineup did not influence the in-court identification, particularly since he did not review the photo itself.

In conclusion, the government could not meet its burden to prove SPC AM's in-court identification was reliable, and it has not even attempted to prove the erroneous admission of this evidence was harmless beyond a reasonable doubt. This Honorable Court should set aside the findings and the sentence.

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 May 3, 2018.

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