



## **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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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

UNITED STATES,	)	BRIEF ON BEHALF OF APPELLEE
Appellee	)	
	)	
v.	)	
	)	Crim. App. Dkt. No. 20150530
Specialist (E-4)	)	
<b>ANDREW J. CRISWELL,</b>	)	USCA Dkt. No. 18-0091/AR
United States Army,	)	
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.

**Statement of Statutory Jurisdiction**

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

**Statement of the Case**

On 7 May and 4-5 August, 2015, a military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of false official statement, two specifications of abusive sexual contact, one specification

of assault consummated by a battery, and one specification of indecent language in violation of Articles 107, 120, 128, and 134, UCMJ. (JA 28-29). The military judge sentenced appellant to reduction to the grade of E-1, two years confinement, and a dishonorable discharge. (JA 29). The convening authority approved the adjudged sentence and credited appellant with one day of confinement credit. (JA 29).

On 6 November 2017, the Army Court affirmed the findings and sentence. (JA 1-24). On 29 December 2017, appellate defense counsel filed a Petition for Grant of Review. On 12 February 2018, this Honorable Court granted review.

### **Statement of Facts**

#### **I. The defense motion.**

On the morning of a contested trial, immediately prior to entering pleas, defense counsel objected under Military Rule of Evidence [hereinafter Mil. R. Evid.] 321 to Specialist (SPC) AM's out-of-court and in-court identification of appellant. (JA 36). Despite voicing displeasure at defense counsel for the late motion, the military judge allowed the defense motion. (JA 47).

The military judge deferred ruling on the motion until he heard evidence in the case. (JA 50). Prior to hearing evidence, the military judge succinctly outlined the correct two-part test the court would use to decide the motion: "was there a

pretrial identification [that was] unnecessarily suggestive and . . . if so, was there a substantial likelihood of misidentification later?” (JA 48).

## **II. The sexual assault and investigation.**

On 7 November 2014, SPC AM, a Caucasian female, attended a homecoming party hosted by Austin Peay State University at a convention center in Clarksville, Tennessee. (JA 65). At approximately 2200, she arrived at the party with SPC Nasser Al-Shamesi, an old friend from high school, and a few other friends. (JA 65). Inside the convention center there was a dance floor and a DJ booth. (JA 68). For the first part of the night, SPC AM and her group of friends enjoyed watching a dance team perform in the crowd. (JA 69-70). However, later on in the evening, SPC AM became separated from the rest of the group, including SPC Al-Shamesi. (JA 70).

Specialist AM testified that she walked along the back wall looking for her friends and ended up leaning up against a pillar, which was about ten to twenty feet from the DJ stand. (JA 70). From SPC AM’s left, she saw an African American male, whom she later identified as appellant, approaching her. (JA 70-71). He asked SPC AM what she was doing standing alone. (JA 71). In an attempt to make him leave, SPC AM responded that she was waiting for her boyfriend. (JA 71). The man then came up closer to her and said, “I bet your boyfriend can’t fuck you the way I can.” (JA 71). Then he grabbed her face with both of his hands,

kissed her, and forced his tongue into her mouth. (JA 71). Next, he lowered his pants, exposing his erect penis, rubbed it against her upper thigh, grabbed one of her butt cheeks, and said “he would fuck the shit out of [her] white ass.” (JA 72).

When the trial counsel asked SPC AM to describe the male who was assaulting her, she described him as 5’10 to 6 feet tall, and in his early twenties. (JA 74). Moreover, SPC AM further testified: “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). Additionally, SPC AM further described the bandana: “It was a black and white bandana. It wasn’t tied to his head or anything. It was just sitting on top. The base of it was black and the design pattern on it was white.” (JA 75). She testified that it stood out to her because she had never before “seen anybody at a bar or a club wear it like that.” (JA 75). When asked if it was too dark in the convention center to see her assailant’s face she said yes, but then clarified that she could see his face when the DJ stand lights came in her direction. (JA 76). She further testified that during this initial encounter with appellant, he was “just a few centimeters away from [her].” (JA 78).

Appellant then grabbed SPC AM by the wrists and pulled her towards what looked like a supply closet at the front entrance. (JA 80). Still holding onto her wrist with one hand, appellant began talking to three men by the entrance. (JA 80).

He then grabbed her and pushed her up against the wall. (JA 80). She asked him to just let her go, and he said, “okay, give me a kiss and I’ll go.” (JA 80). He then forced her to kiss him again and walked away. (JA 80). While still in that same spot against the wall, SPC AM texted SPC Al-Shamesi that she wanted to leave. A couple minutes later SPC Al-Shamesi walked by her, and she told him “Hey, we need to go now.” (JA 83). Specialist Al-Shamesi agreed to do so but needed to use the restroom first. (JA 83). When SPC Al-Shamesi left for the bathroom, appellant approached SPC AM again and asked her why she was still standing by herself. (JA 83). Specialist AM told him that her boyfriend was just using the bathroom and they were about to leave. (JA 83). She asked him to please just leave her alone, and he looked at her and said, “How about I take you in there and show you how a real man fucks you?” Specialist AM told him no, and he left. (JA 83).

Specialist AM testified that when she and appellant were by the storage closet and bathroom, a light coming from the front entranceway lit up the area enough that she was able to see appellant’s face more clearly than when she was near the DJ booth. (JA 110). Specialist AM testified that she did not talk to any other African American men that night because the few others that approached, quickly left her alone. (JA 76). Based on her memory of appellant’s appearance at the convention center, SPC AM testified that in the courtroom she recognized his



facial features, the shape of his head, and the size of his body and was therefore able to identify appellant as her assailant. (JA 75, 76, 110).

Next, SPC Al-Shamesi testified that he and some friends, including SPC AM, arrived at the convention center at approximately 2200-2210. (JA 117). Specialist NA testified that in the convention center there were DJ lights from which one could see somebody's face, "but you would probably have to be like 5 feet to see clearly." (JA 118). Specialist NA testified that they danced and drank for some time, and then he left the group to go meet a girl by the fireplace. (JA 119). After being at the fireplace for a little while, he ran into SPC Joshua Connor and SPC Christopher Stephens. (JA 119). Specialist Connor and SPC Stephens pointed out their friend to SPC Al-Shamesi and said his name was "Drew." (JA 151). SPC Al-Shamesi noticed that the African American male identified as Drew "had pulled out a black and white bandana and laid it flat on [his] head . . . ." (JA 121). Specialist Al-Shamesi testified that at the moment he first saw this person, whose friends had described as Drew, the bandana was not on his head yet—SPC Al-Shamesi watched him lay it "flat on his head at that moment." (JA 142). Specialist Al-Shamesi testified that the unique way this person laid the bandana flat on his head stood out to him as being unusual. (JA 121). Specialist Al-Shamesi testified he did not see anyone else with a bandana draped on their head in

such a way, either than night or any other night, and that is why it stood out to him and he remembered it so clearly. (JA 155).

Specialist Al-Shamesi testified that after seeing his friends and the male with the bandana, he went back to conversing with a girl by the fireplace. (JA 123). After that, he went to use the restroom, and that is when SPC AM stopped him and told him she wanted to leave. (JA 123). After using the restroom, SPC AM and SPC Al-Shamesi went outside, and SPC AM told him what appellant had done. (JA 123). Approximately twenty minutes later, around 02:30 on 8 November, while they were driving home, SPC AM provided the following description of appellant to SPC Al-Shamesi: “it was a black male, who was wearing a black and white bandana flat on top of his head . . . .” (JA 85, 134). At that point SPC Al-Shamesi stopped her because he recognized her description as the guy he had seen earlier with SPC Connor and SPC Stephens “who put a black and white bandana over his head.” (JA 135-36). Specialist Al-Shamesi then contacted SPC Connor to find out the name of his friend, and SPC Connor told him the name was “Drew.” (JA 138). Then SPC Al-Shamesi contacted SPC Stephens’s supervisor to get the full name of the male, and he received the name “Criswell.” (JA 138).

Specialist Al-Shamesi provided the name “Drew Criswell” to the Criminal Investigation Command (CID) and showed a CID agent a Facebook image of

appellant. (JA 163).<sup>1</sup> Later that same day, the CID agent showed SPC AM the image and asked if she could identify the person,<sup>2</sup> and “[s]he made an instantaneous remark that this was the person that was in question . . . from the incident that occurred earlier.” (JA 164-65). Additionally, SPC AM’s father had sent her the same Facebook photo of appellant, but she only looked at that photo and the one CID showed her for less than two minutes total. (JA 108).

Based on the information SPC Al-Shamesi provided, CID brought appellant in for questioning. During the biographical portion at the beginning of the interview, appellant said “he liked to be called ‘Drew.’” (JA 174). Appellant told the CID agent that he had met a short, skinny, white girl along the back wall that evening and she had told him that she was there with her boyfriend. (JA 174; Pros. Ex. 3). Additionally, appellant confirmed that he was wearing a gold grill that night. (JA 175).

## **II. The military judge’s ruling.**

After a recess, the military judge made detailed findings of fact based on the testimony he had heard. (JA 204-07). These findings of fact include the following: SPC AM’s description of the male who allegedly assaulted her was

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<sup>1</sup> Defense counsel objected to this line of questioning on hearsay grounds; however, the military judge overruled the objection “for purposes of ruling on the defense motion before the end of this trial.” (JA 140).

<sup>2</sup> SPC AM testified that she cannot remember the specific words the CID agent used when asking her to identify the person in the photo.

“African American male approximately 5’10 to 6’ in height, early 20s, black jacket, dark jeans, black and white bandana laying on his head, grill piece in his mouth[.]” (JA 204). “If someone was in the room was within 5 feet of another person when the light from the DJ booth went across that other person’s face, they would be able to clearly see the other person’s face.” (JA 205). The first incident “occurred approximately 20 feet away from the DJ booth,” and SPC AM’s assailant was only centimeters away from her. (JA 205). When SPC AM and her assailant were by the bathroom, there was some light coming from the entrance. (JA 205). “The light coming from the entrance was on them and coming from behind the alleged assailant. This gave [SPC AM] the ability to see [appellant’s] face more clearly than she could earlier from the light coming from the DJ booth.” When SPC AM described her assailant to SPC Al-Shamesi, “he was reminded of a person he saw earlier in the evening that was there with his friends[.]” (JA 206).

In analyzing the admissibility of the identification, the military judge cited *Manson v. Brathwaite*, 432 U.S. 98 (1977) and “considered [whether] there [was] a pretrial [identification] that was unnecessarily suggestive and . . . if so[,] was there a substantial likelihood of that causing a misidentification.” (JA 207). The military judge concluded that the pretrial identification was unnecessarily suggestive and applied the *Biggers* factors to the facts of the case to answer the second question in the negative—there was not a substantial likelihood of the

pretrial identification causing a misidentification in court. *See Neil v. Biggers*, 409 U.S. 188 (1972); (JA 208).<sup>3</sup>

### **III. The defense case.**

After the military judge ruled on the motion, the defense presented its case in chief, which included the testimony of two of appellant's friends. (JA 214). SPC Connor testified that he went to the event with some friends and unintentionally ran into appellant while in line at the event. (JA 234). He testified that they arrived at the event at around 2300 and took a group picture with appellant shortly after entering the venue. (JA 223; JA 268). In the group picture, appellant appears to be wearing a dark colored beanie on his head. (JA 268).

After taking the picture, SPC Connor testified that "really didn't see [appellant] that much[.]" (JA 223). Other than when they took a picture, he saw appellant getting a beer and saw him for a brief moment on the dance floor. (JA 223). He testified that he remembered seeing SPC Al-Shamesi on the dance floor and it was possible appellant was behind him at the time, but he did not see appellant with a bandana. (JA 223). Specialist Connor testified that he did not see appellant with a bandana at any point during the evening. (JA 222). Additionally,

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<sup>3</sup> Additional facts related to the military judge's legal analysis are incorporated, as necessary, in the Argument section below.

SPC Connor testified that he did not see even one Caucasian person at the event. (JA 228).

Specialist Connor testified that on other occasions he has seen appellant with a towel laid on top of his head in a club and with a gold grill in his mouth. (JA 224, 229). On this evening, SPC Connor testified he remembered appellant wearing a grill, and did not remember seeing anybody else wearing a grill in their mouth. (JA 231). Specialist Connor testified he had never seen anyone wear a bandana flat on top of their head at the event. (JA 228).

After SPC Connor testified, SPC Stephens testified that appellant was wearing the clothing in the picture when he saw him the evening of 7 November and did not see him wear a bandana at any point in the evening. (JA 236). However, he also testified that he only saw appellant “briefly” that evening. (JA 237). Specialist Stephens remembers talking to SPC Al-Shamesi on the dance floor, but did not remember for sure if appellant was around at the time. (JA 238). Moreover, he testified that he did not see any Caucasian females at the event the entire evening. (JA 238).

After defense rested, the military judge clarified that although defense counsel did not ask that he consider the picture of appellant with his friends for purposes of the motion, he did consider the picture, along 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; JA 268. The military judge went on to state: “the admissibility of [SPC AM’s] in court identification of the accused is unchanged.” (JA 259).

### **Standard of Review**

This Court “review[s] a military judge’s ruling on a motion to suppress for abuse of discretion.” *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (quoting *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). “In reviewing a military judge’s ruling on a motion to suppress, [this Court] review[s] factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard.” *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). “Thus 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.” *Id.* (quoting *Ayala*, 43 M.J. at 298) (alterations in original). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be ‘arbitrary, fanciful, clearly unreasonable, or clearly erroneous.’” *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)). “In reviewing a ruling on a motion to suppress, [this Court] consider[s] the evidence in the light most favorable to the prevailing party.” *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F.

1996)). Under this standard of review, “even if reasonable minds could differ about application of the facts to the law, [this Court] cannot say that the military judge’s decision to [allow the in-court identification] was arbitrary or fanciful.” *Baker*, 70 M.J. at 292.

### **Summary of Argument**

The military judge did not abuse his discretion in allowing the in court identification of appellant because he properly applied the correct law to the facts of the case. Specifically, in analyzing the admissibility of the identification, the military judge and “considered [whether] there [was] a pretrial [identification] that was unnecessarily suggestive and . . . if so[,] was there a substantial likelihood of that causing a misidentification.” (JA 207). The military judge made detailed findings of fact, applied the *Biggers* factors to the facts of the case, and then correctly concluded: “the Court finds by clear and convincing evidence that the in court identification that [SPC AM] made of the accused as her assailant in November of 2014 is admissible evidence.” (JA 210).

### **Argument**

“Because the military judge provided a detailed ruling evidencing an accurate understanding of the *Biggers* factors and their application to the facts on the record, [this Court] give[s] deference to his ruling in [its] analysis.” *Baker*, 70 M.J. at 289. In this case, as explained below, the strength of the *Biggers* factors



cut against any corrupting effect of the suggestive identification. *See id.* at 291 (quoting *Brathwaite*, 432 U.S. at 114) (“Against these factors is to be weighed the corrupting effect of the suggestive identification itself.”)).

**I. Opportunity of the witness to view the criminal at the time of the crime**

This factor weighs in favor of the government because SPC AM testified that she could see appellant’s face at both locations where he assaulted her: when she was near the lights of the DJ stand and he was centimeters from her face and when she was by the storage closet and bathroom with the light from the entrance. (JA 76, 80, 83, 110). Moreover, SPC Al-Shamesi testified that there were DJ lights at the convention center from which you could see somebody’s face clearly within the range of five feet. (JA 118). *See Brathwaite*, 432 U.S. at 114 (witness looked at the suspect for “two to three minutes” while the crime occurred); *see also United States v. Rhodes*, 42 M.J. 287, 288 (C.A.A.F. 1995) (“The whole episode took about 20 minutes. There was no light in the room, but there was a light outside 50-100 feet from the trailer . . .”). Therefore, the military judge correctly concluded that SPC AM “was in the presence of her assailant for a significant amount of time. . . . [and had] opportunities . . . to see her assailant’s face clearly.” (JA 208-09).

## II. Degree of attention

This factor weighs in favor of the government because SPC AM “was not a casual or passing observer, as is so often the case in eyewitness identification.” *Brathwaite*, 432 U.S. at 115. Rather, she was observing appellant while he was assaulting her; therefore, she focused significantly on him. (JA 71-85). *See, e.g., Baker*, 70 M.J. at 291 (“Only in the last instance, when the assailant exposed himself to [the victim], would she have been focused on his face and features to any significant degree.”). This high degree of focus is demonstrated through SPC AM’s repeated recognition of appellant. For example, when SPC Al-Shamesi went into the bathroom and appellant re-approached SPC AM, she immediately recognized him as the same male who had assaulted her previously. (JA 83). Additionally, SPC AM’s degree of attention is demonstrated through her detailed memory and account of the assault. (JA 71-83). Therefore, the military judge did not abuse his discretion when he concluded that SPC AM “was extremely attentive to her assailant’s features, during the time she was in his presence.” (JA 209).

Appellant’s defense counsel places importance on appellant’s purported thirty-pound weight gain in the discussion of this factor. (Appellant’s Br. 34). However, defense never entered evidence of a weight gain into the trial. Defense counsel simply asked SPC AM the following question on cross-examination: “Are you aware that [appellant] gained 30 pounds since [the date of the assault]?” (JA

100). SPC AM responded: “No, sir. I am not.” (JA 100). Defense did not follow this question and answer with evidence, therefore any implications from defense counsel’s question is not evidence before this Court.

### **III. Accuracy of the witness’s prior description of the criminal**

This factor favors the government because SPC AM provided a description of appellant within minutes after he assaulted her. (JA 134). The description was so accurate and specific it enabled SPC Al-Shamesi to recognize the individual, identify him by name, and provide that information to law enforcement. (JA 135-36, 138, 163). *See Brathwaite*, 432 U.S. at 108 (the eyewitness “gave a detailed description [of the suspect to a law enforcement agent]. The reliability of this description was supported by the fact that it enabled [the law enforcement agent] to pick out a single photograph that was thereafter positively identified by [the eyewitness].”). Therefore, the military judge did not abuse his discretion when he concluded that SPC AM gave a very detailed description of her assailant and that “her description led to [SPC Al-Shamesi] realizing he thought he saw the same person and subsequently talking to his friends with whom he saw that person and that was based on the accuracy of SPC AM’s description.” (JA 210).

Appellant incorrectly argues that the picture of appellant earlier in the evening is fatal to the government’s case. The picture was taken as soon as appellant arrived at the venue with his friends. (JA 223). At some point after that,

SPC Al-Shamesi witnessed appellant place a black and white bandana onto his head. (JA 119, 121). Then, based on testimony of the timeline of events, it was after SPC Al-Shamesi saw appellant place the bandana on his head that appellant assaulted SPC AM. (JA 119, 123). Moreover, based on the testimony of SPC Connor and SPC Stephens that they did not see any Caucasian people there, neither of them were in the vicinity of appellant while he was assaulting SPC AM, a Caucasian female. (JA 228, 238). Therefore, viewing the evidence in the light most favorable to the government, finding appellant was not wearing the beanie but was wearing the bandana is a fair assessment of the evidence. (JA 5-6).

Additionally, contrary to appellant's assertion, even in the picture appellant's clothes look black, he is wearing a dark jacket, and there is a gold grill visible on appellant's upper set of teeth. Therefore, SPC AM's description of appellant's appearance, as it relates to these items, is accurate. (Appellant's Br. 35; JA 268).

#### **IV. Level of certainty demonstrated by the witness at the confrontation**

This factor weighs in favor of the government because when the CID agent showed SPC AM the photo of appellant at the confrontation "[s]he made an instantaneous remark that this was the person that was in question." (JA 165). The special agent further explained that it took SPC AM "mere seconds" to identify her assailant as the man in the photo. (JA 165). SPC AM's lack of equivocation or

deliberation when identifying appellant demonstrates certainty that she remembered his face from the previous night. Therefore, it was not an abuse of discretion for the military judge to determine that SPC AM's "reaction, when seeing the picture, was immediate and certain." (JA 210).

#### **V. Length of time between the crime and the confrontation**

This factor weighs in favor of the government because SPC AM made the identification of appellant on 8 November, just hours after he assaulted her. Therefore, it is unlikely that she forgot her assailant's face prior to making the identification. (JA 107). This short passage of time is less than cases in which the United States Supreme Court has held that the suggestive confrontation did not preclude a reliable in-court identification. *See Biggers*, 409 U.S. at 201 (seven months between the crime and confrontation); *see also Brathwaite*, 432 U.S. at 100-01) (eyewitness identified the suspect two days after observing him).

#### **VI. Additional considerations**

In its totality of the circumstances analysis, this Court should consider that appellant corroborated critical facts: his attendance at the party, talking to SPC AM, and wearing a gold grill piece that evening. Moreover, he confirmed that the short, skinny, white girl he talked to told him that she was waiting for her boyfriend, and SPC AM testified she did not mention her boyfriend to anybody other than the male who assaulted her. (JA 174-75; Pros. Ex. 3). *See also*

*Brathwaite*, 431 U.S. at 116. (“Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.”).

Relying on the dissenting opinion of the Army Court, appellant incorrectly argues that the government cannot have met its burden without introducing the Facebook photo shown to SPC AM. (Appellant’s Br. 31; JA 20-21). However, this additional factor is not supported by case law. It is not listed as one of the *Biggers* factors, nor has this Court or the United States Supreme Court considered it in the analysis. Additionally, such a consideration is irrelevant in this case. The CID agent testified that the picture was a portrait photo. “It was just a face, like a portrait, like a passport photo. Like, an ID photograph style, just the upper part of his face.” (JA 178). Moreover, SPC AM only looked at the photograph briefly. The photograph of appellant’s face did not add anything to her description and did not reflect what he wore on his head, his height or build, and did not depict the gold grill. (JA 178). Furthermore, SPC AM testified in court that “[w]hen 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) (emphasis added). Specialist AM’s

description of appellant clarifies that her description of him is from her memory of the assault, not from the Facebook photo.

Therefore, the military judge did not abuse his discretion in allowing the in court identification because “under the totality of the circumstances the [in court] identification was reliable even though the confrontation procedure was suggestive.” *Baker*, 70 M.J. at 291 (citing *Biggers* 409 U.S. at 199).

**Conclusion**

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original was filed electronically with the Court at [efiling@armfor.uscourts.gov](mailto:efiling@armfor.uscourts.gov) on this 13th day of April, 2018 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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