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) **JASON KOHLBEK**, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160427 USCA Dkt. No. 18-0267/AR

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY MISCONSTRUING MIL. R. EVID. 707 AND PROHIBITING APPELLANT FROM PRESENTING EVIDENCE RELEVANT TO APPELLANT'S POST-POLYGRAPH STATEMENT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [UCMJ]. This 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 March 24, April 13, and June 9-10, 2016, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of four specifications of sexual abuse of a child, in violation of Article 120b, UCMJ. For three of the four specifications of sexual abuse of a child, appellant pleaded guilty to the lesser included offense of assault consummated by battery upon a child under sixteen years, in violation of Article 128, UCMJ. (JA 153-55).

The military judge sentenced SPC Kohlbek to reduction to the grade of E-3, confinement for fifteen months, and a bad-conduct discharge. (JA 397). The convening authority approved the findings and the sentence as adjudged.

On April 12, 2018, the Army Court affirmed the findings and sentence. (JA 1-10). Appellant was notified of this decision and, in accordance with Rules 19 and 30 of this Court's Rules of Practice and Procedure, filed a Petition for Grant of Review on June 8, 2018. This Court granted appellant's petition for grant of review on July 24, 2018.

Statement of Facts

Specialist Jason Kohlbek was a medic at Fort Stewart, Georgia. (JA 167). He graduated from the Warrior Leader Course at his home installation on Friday, September 18, 2015. (JA 163). On the same day, his wife had an operation on her foot at a civilian hospital in Savannah; she went home that night on bed rest, taking pain medication. (JA 163-66).

On Saturday, September 19, 2015, three young, single friends came to SPC Kohlbek's on-post residence to celebrate his graduation, arriving around 1830 or 1845 that evening, (JA 168-69, 307); a fourth friend came over later, (JA 169-70). Specialist Kohlbek's step-daughter, KG, had a friend named AH also visiting that evening. (JA 170, 203). The girls made cookies, and SPC Kohlbek and his friends had drinks on the front porch and in the kitchen while having cookies with the girls. (JA 170-71, 204, 309).

Specialist Kohlbek had five or six drinks (one beer and four or five mixed drinks from a tall tumbler) that evening before his friends left around midnight.

(JA 158-60, 288, 297, 305, 308). Specialist Kohlbek recalled eating nothing that night except some of the cookies, (JA 173), but the friend who drank the least that night also recalled a pizza, (JA 326).

After eating cookies, SPC Kohlbek and his friends went back to the porch, where SPC Kohlbek believed he fell asleep, as that is where he remembered waking up. (JA 171). The more-sober friend testified that SPC Kohlbek was "a little shambly [sic] on his feet," and that he had walked beside SPC Kohlbek to "make sure he made it to his bed," where he left him awake. (JA 328-30).

In the guilty plea inquiry, SPC Kohlbek testified that his only memories from later that night were being awakened on the porch by his wife, and later being awakened in his bed, again by his wife, who told him that the police were there. (JA 173-74). The military judge, rather than asking SPC Kohlbek to affirm that he believed the evidence he had heard from others and had been provided in discovery as the basis of his knowledge, instead told appellant to testify as if from personal knowledge: "And so to make it a little bit easier, what I want you to do is assume that is your knowledge. Okay?" (JA 176).

The battery victim, AH, testified that after having cookies in the kitchen, she and KG went to KG's room to watch TV until they fell asleep around 2230. (JA 204-05). KG slept in the only bed, and AH slept on the floor. (JA 205, 270). When asked what awoke her, AH answered, "The smell of alcohol." (JA 208).

Specialist Kohlbek was lying behind her with his arm around her abdomen, (JA 229), and he touched her breast under her bra. (JA 209-10). He also squeezed her buttock under her draw-string pants and put his hand near but not on her vagina. (JA 220-21).

With his mouth close to her ear, SPC Kohlbek asked, "Do you want me?" and nibbled on her earlobe with his teeth. (JA 212-13).

When the trial counsel asked AH if SPC Kohlbek was awake when she woke up to the smell of alcohol, she answered, "kind of. He was *kind of conscious, kind of not* . . . . Like he seemed in and out of it." (JA 209, 225) (emphasis added). AH pushed SPC Kohlbek's hands away and got up. (JA 215, 230). Specialist Kohlbek got up and left the room, and AH woke up KG. (JA 215, 230, 270). After locking the door, AH got into bed with KG, who went back to sleep. (JA 216). AH heard the doorknob rattle, and later SPC Kohlbek came back to the room and looked to see if she was still on the floor. (JA 231). When he left the room, AH woke KG up and asked her to walk her home because SPC Kohlbek had tried to rape her. (JA 216-17, 270). Before leaving, AH called her father and told him that she had almost been raped. (JA 217). When AH got home, her father called the police, and a CID agent interviewed AH around 2:30 a.m. (JA 241).

When KG returned from walking AH home, she saw SPC Kohlbek slumped against the kitchen counter with his eyes half open. (JA 273-75). The first police

officer to arrive at the Kohlbek home, around 0300, "could tell right off the bat that he was intoxicated" because he was "leaning on the wall" and "slurring his speech" such that the investigator asked Mrs. Kohlbek about what happened that night because it was "harder to communicate with" SPC Kohlbek. (JA 283-84).

Specialist Kohlbek was then taken to the MP station, where he blew .165 and .163 blood alcohol content on the breathalyzer in the early morning hours of September 20, approximately four hours after the battery. (JA 286).

On September 21, 2015, SPC Kohlbek spoke to a CID agent, who told SPC Kohlbek about AH's account of what had happened on the night of September 19-20. (JA 292, 311). Specialist Kohlbek repeatedly told the CID agent that he did not remember the events. (JA 408, 417).

After his initial interview by CID, SPC Kohlbek agreed to take a polygraph examination. (JA 408, 417). The next morning, September 22, he was taken to the Fort Stewart CID office to undergo the polygraph examination process, which lasted from approximately 9:00 a.m. until around 1:00 p.m. (JA 25-26, 245).

The polygraph examination process had three phases: a discussion of the accusation and the questions that would be asked, the polygraph testing, and then "confrontation" with the results of the test, all in the same room. (JA 15-16, 21, 42-43). Specialist Kohlbek's "post-polygraph" statement – written during the third

phase of this process and signed at 1:09 p.m. – would later be admitted at trial as Prosecution Exhibit 5. (JA 255).

Before the polygraph examination began, SPC Kohlbek again explained that he did not remember the events of that night, (JA 80), but the polygrapher would not allow a response of "I don't know" or "I don't remember" (JA 13, 16).

The only part of this four-hour interview that was recorded was when SPC Kohlbek signed the statement, and the polygrapher kept no notes on the interview. (JA 45, 47).

The circumstances of SPC Kohlbek's September 22 polygraph-induced statement to CID were the subject of two pretrial motions filed by the defense on March 30, 2016. (JA 402, 443).

In a motion to suppress SPC Kohlbek's September 22, 2015 statement to CID, the defense argued that the statement was involuntary under Mil. R. Evid. 304, 403, and 602. (JA 402).

In a separate motion, the defense requested that if this polygraph statement were admitted, the defense be "permitted to introduce limited evidence, argument, or comments inferring or mentioning a polygraph, that SPC Kohlbek was told he failed, and arguing that the polygraph was used as a method in the interrogation as a means or method to get a confession." (JA 443).

The polygraph examiner testified that the test questions were based on a dichotomy between the test subject's version of the events and the accuser's version of the events. (JA 16).

Specifically, the polygraph questions asked were—

- Did you place your hand under that girl's shirt that day?
- Did you place your hand under that girl's shirt that day in that room?
- Did you ask that girl if she wanted you that day?

(JA 18, stipulating to the App. Ex. I enclosure at JA 417).

The polygrapher testified that the questions for a polygraph examination had to be yes or no questions that would elicit a "definitive" response:

> Witness: It's got to be some kind of definitive response. You can't have an *"I don't know."* I guess, how can you test if somebody's lying if they're telling you "I don't know?"
>
> Defense Counsel: Or "*I don't remember?*"
>
> Witness: Right. Definitely, sir.

(JA 39) (emphasis added).

Specialist Kohlbek testified at the motions hearing that he told the CID agent he did "not remember any of the events." (JA 80). In fact, during the phase before using the polygraph, SPC Kohlbek answered "I don't remember" to several questions, but the agent told him, "I need a yes or no answer." (JA 81).

The polygrapher testified that after an examination, he normally steps out of the room to examine the chart, then comes back in to "confront them with the results," meaning that "if they failed the test, I'll come in and I'll say there's no doubt in my mind that you did whatever is being alleged." (JA 21).

The polygrapher testified that in the post-polygraph phase that created SPC Kohlbek's statement, he got "some kind of affirmative response" when he confronted him. (JA 43).

This third phase of the polygraph process, the confrontation of SPC Kohlbek with the results of the test, lasted an hour and a half to two hours, during which the polygrapher insisted that they "hash it out" because "he [was] holding information back." (JA 42-44, 50). As related by SPC Kohlbek, "He said that he felt that I had done something wrong, and that I knew the truth. And *he kept going at it*, and *I kept telling him that I didn't remember*." (JA 86) (emphasis added). More specifically, the polygraph examiner offered suggestions of what might have happened: "He told me that he felt that maybe I'd seen her and followed her, or—he listed options, different options for what happened. I kept telling him, 'I don't remember any of that, sir.'" (JA 86).

Ultimately, SPC Kohlbek wrote the narrative portion of his statement by himself, then he wrote the answers in the question and answer portion, as part of his discussion with the CID agent. (JA 24-25, 44, 88).

Asked about his answer on intent, SPC Kohlbek elaborated:

> Defense counsel: The "question, answer" part, the line he asked about your intent, do you recall that particular—being asked that particular question about what was your intent?
>
> Witness: Yes, sir.
>
> Defense Counsel: And you responded sexual. Was that what you actually conveyed to him?
>
> Witness: No.
>
> Defense Counsel: What did you actually convey to him?
>
> Witness: I conveyed that, "If that was my wife, then that would've been sexual." But what else would it have been if I was lying next to her?"
> . . .
> Defense Counsel: So why didn't you—given that, being it wasn't verbatim what you told him, how come you didn't correct it?
>
> Witness: I asked if—why he didn't write the rest of it, and he said that that was the question that he asked, "Was it sexual or not."

(JA 88; *compare* JA 257-58).

In disputing the suppression motion, the trial counsel argued the interview was "vanilla and mild" and that CID "used no form of deception." (JA 115-16). Defense counsel responded that deception is "the whole point of a polygraph test," as it is "an interrogation technique to induce confessions." (JA 121-22).

Defense also argued that "CID set Specialist Kohlbek up for failure with this test" by refusing to ask "do you remember?" questions, which also call for yes or no responses, but would have allowed him to answer truthfully. (JA 127).

Additional facts pertinent to the assignment of error are included below.

Summary of Argument

Military Rule of Evidence 707 was intended to bar admission of polygraph test results, which are not scientifically valid. Appellant did not ask to admit the result of a polygraph test; he asked to explain the singular circumstances under which he made a statement about things he did while he was drunk. He needed to explain that the polygraph examiner would not let him answer "I don't remember" as an answer to any question, compelling him to answer yes or no to questions about what happened the night he assaulted a girl while he was intoxicated.

Because of this peculiar procedure, appellant adopted as his own belief the version of events of the accusing witness. Fortunately, that version of events was largely accurate. Unfortunately, the prosecution was allowed to use this post-polygraph statement as proof that appellant knew right well what he was doing.

The ruling of the military judge, upheld by the Army Court, deprived appellant of Due Process and of his Sixth Amendment "right to present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. 51, 52 (1987).

Other courts would have allowed appellant to tell the trier of fact that the polygraph process created a corrupted statement by a witness (appellant) who lacked personal knowledge. In a federal district court, or an Air Force court-martial, the rule barring bad science would not have been applied in this situation. Appellant asks this Court to adopt this reading of Mil. R. Evid. 707.

If, however, this Court concludes that the broad language of the military rule encompasses more than the bad science of polygraph test results, that rule must yield to the right of the accused to present his defense. As the Navy-Marine Corps Court of Criminal Appeals held in *United States v. Wheeler*, 66 M.J. 590 (2008), "Even though the appellant was unsuccessful in suppressing his confession, he still had the right 'to present relevant evidence with respect to the voluntariness of the statement' during the trial on the merits." *Id*. at 595, quoting Mil. R. Evid. 304, and noting the concurring opinion in *United States v. Clark*, 53 M.J. 280, 284 (C.A.A.F. 2000).

Separated from its context, appellant's post-polygraph statement was misused by the prosecution to indicate mens rea and to obtain convictions on specific intent offenses.

Standard of Review

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236 (C.A.A.F. 2010).

"Where the error improperly limits an accused's opportunity to present exculpatory evidence through direct testimony and cross-examination, '[t]he burden is on the Government to show that there is no reasonable probability that the error contributed to the findings of guilty.'" *United States v. Jasper*, 72 M.J. 276, 282 (C.A.A.F. 2013), quoting *United States v. Collier*, 67 M.J. 347, 355 (C.A.A.F. 2013). "If the military judge commits constitutional error by depriving an accused of his right to present a defense, the test for prejudice on appellate review is whether the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996), quoting *Chapman v. California*, 386 U.S. 18, 24 (1967).

Law and Argument

A. Mil. R. Evid. 707 should not be interpreted as barring an accused from testifying that polygraph testing influenced his statement to law enforcement.

Appellant concurs in the judgment of the President and the Supreme Court that polygraph evidence (that is, the test results and expert opinion based on them) should not be admissible in court for either party. It may, however, be necessary for a factfinder to know that a polygraph test occurred to make clear the context in which a consequent statement was made. Neither party has a right to mislead the factfinder by action or omission. *See, e.g.*, Mil. R. Evid. 106 and 304(h); or the invited response doctrine, *United States v. Lewis*, 69 M.J. 379 (C.A.A.F. 2011).

Military Rule of Evidence 707 prohibits admission of "the result of a polygraph examination, the polygraph examiner's opinion, or any reference to an offer to take, failure to take, or taking of a polygraph examination." At trial, appellant's motion for leave to mention that "the polygraph was used as a method in the interrogation" noted the broad language of the rule, but also noted that "case law surrounding the admission or exclusion of polygraph evidence suggests that evidence that a polygraph was taken can sometimes be relevant to issues that make the reliability of polygraphs utterly immaterial." (JA 445).

In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), and in *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996), this Court and its predecessor considered the question of whether an accused had the right to offer polygraph test *results* after "passing" a polygraph examination. On the dubious basis that "[p]olygraph examinations were relatively crude when *Frye* [*v. United States*, 293 F. 1013 (D.C. Cir. 1923)] was decided," this Court in *Scheffer* decided that a blanket prohibition on polygraph results could not stand. 44 M.J. at 446. The Supreme Court reversed that decision, noting that "there is simply no consensus that polygraph evidence is reliable." *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

In *Gipson* and *Scheffer*, this Court did not address, and in the intervening years it has not settled, whether the *circumstance* of polygraph testing may in some cases be admissible by an accused to show the unreliability of a statement.

1. Mil. R. Evid. 707 originated as a rule about scientific evidence.

In 1991, Executive Order 12767 added Mil. R. Evid. 707 to the 1984 *Manual for Courts-Martial, United States* [*MCM*]. The Analysis in Appendix 22 refers the reader to the source of its language in California law, and explains that the rule "is based on several policy grounds." *MCM* at A22-60. All the policy grounds cited by the drafters address reasons not to admit the *results* of polygraph testing. The drafters feared that members might "accept polygraph evidence as unimpeachable or conclusive" even though the "reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system." *Id*. The drafters also feared "the court-martial degenerating into a trial of the polygraph machine." *Id*. The drafters stressed the rule's consonance with the existing "standard of admissibility of other scientific evidence" and "the continued vitality of *Frye*." *Id*.

In 1983, California had established by statute a rule of evidence that will sound familiar to any military practitioner—up to a point:

> **(a)** Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, *unless all parties stipulate to the admission of such results*.

> **(b)** Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Cal. Stats. 1983 ch. 202 § 1, codified at Cal. Evid. Code § 351.1 (emphasis added).

The state supreme court has upheld this provision—as a rule on scientific evidence. "In light of the continuing division of opinion regarding the reliability of polygraph evidence, as recognized by *Scheffer*, the California Legislature has not acted 'arbitrarily or disproportionately in promulgating [and retaining] a per se rule excluding all polygraph evidence.'" *People v. Wilkinson*, 94 P.3d 551, 569 (Cal. 2004), *cert. denied*, 543 U.S. 1064 (2005), quoting *Scheffer*, 523 U.S. at 312.

The *Wilkinson* court, in excluding polygraph *results*, noted the continuity of this statutory provision with California's prior adherence to the test in *Frye*: "Relying upon *Frye* and its progeny, a long line of California decisions has held or recognized that the results of a polygraph examination are inadmissible at trial absent a stipulation by the parties." 94 P.3d at 564. This description of rule's purpose accords with a reading of the rule as being a rule about scientific evidence, as does its allowance for the admission of polygraph results if the parties wish to stipulate their admission and avoid litigating their validity.

Despite the broad language of Cal. Evid. Code § 351.1, California law seems to distinguish between the admission of polygraph results and the mere fact that testing took place, when the latter is not an attempt to smuggle in the result. In

People v. Rich, 755 P.2d 960, 1002 (Cal. 1988), the state supreme court noted a reference to a polygraph test by a police witness: "Defendant objects to Detective Brewer's testimony concerning . . . the circumstances surrounding defendant's agreement to take a polygraph examination. The record reveals that the testimony simply traced the police investigation; it was entirely proper and relevant."

Similarly, in *People v. Morales*, 189 Cal. Rptr. 3d 650, 668 (Cal. App. 4th 2015), a California appellate court considered the coercive atmosphere of a polygraph examination as a factor in finding an interrogation to have been custodial. In *People v. Mays*, 95 Cal. Rptr. 3d 219, 226 (Cal. App. 4th 2009), the court noted that the defendant—though he was convicted—had been allowed to testify at trial that the circumstances under which he admitted his presence at the scene of the crime included a fake polygraph: "He claimed his inconsistent statements to the police were false admissions given only because he felt defeated after the fake lie detector test, which he did not know was fake, and he just said what the police wanted to hear."

2. In *Scheffer*, the Supreme Court upheld Mil. R. Evid. 707 as a rule on scientific evidence, barring polygraph test results.

When the United States Supreme Court upheld this rule in *Scheffer* in 1998, the accused had "sought to introduce the polygraph evidence in support of his testimony that he did not knowingly use drugs." 523 U.S. at 306. The Supreme Court upheld the rule on the grounds that results and expert opinion based on

polygraph testing are not scientifically reliable. *Id*. at 312. The reliability of the pseudo-scientific testing is irrelevant, however, to appellant's purpose in addressing the testing as a circumstance of his statement.

The military judge's ruling on the motion for leave to mention the polygraph cited *Scheffer* for the proposition that "Mil. R. Evid. 707 did not abridge the service member's right to present a defense." (JA 485). The question posed in *Scheffer*, however, was entirely different, so this reliance was misplaced. Airman Scheffer had asked to present evidence that he had "passed" a polygraph examination, which the Supreme Court found inadequate under either the Frye standard or that announced for federal practice in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). 523 U.S. at 310-12.

Neither the fact pattern presented in *Scheffer*, nor the rationale applied by the Supreme Court, answer the question presented by this case: "The approach taken by the President in adopting Rule 707—excluding polygraph evidence in all military trials—is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." *Id*. at 312.

3. Courts-martial tried by the U.S. Air Force bar polygraph results, but allow mention of the circumstances under which a statement is made.

The Air Force Court of Criminal Appeals has allowed the prosecution, for over thirty years, to admit evidence that polygraph testing occurred. In *United States v. Gaines*, 20 M.J. 668 (1985), the court held that "when the appellant chose

to challenge the voluntariness of his polygraph confession before the court members, the government then correctly perceived that it was essential for the court members to consider all relevant facts surrounding that confession." *Id*. at 669.

In 2006, the Air Force Court briefly and broadly stated:

> Concerning receipt of the polygraph evidence, which the appellant asserts was in violation of Mil. R. Evid. 707, it is well settled that there is an exception to the general exclusion of polygraph evidence. Where the accused challenges the voluntariness of his admissions to the investigators, military courts have permitted polygraph evidence.

United States v. Kawai, 63 M.J. 591, 596.

4. Federal district courts, applying the *Daubert* standard but having no rule with the language of the military rule, reach the same result as the U.S. Air Force courts.

The federal district courts do not apply Mil. R. Evid. 707, but encounter substantially the same question of law, in light of polygraph evidence's inadequacy under *Daubert*. The federal civilian courts do not obtusely fail to distinguish between polygraph test results and the circumstance of a polygraph test having been conducted. *United States v. Tenorio*, 809 F.3d 1126, 1131 (10th Cir. 2015); *United States v. Blake*, 571 F.3d 331, 346 (4th Cir. 2009); *United States v. Allard*, 464 F.3d 529, 535 (5th Cir. 2006); *Tyler v. United States*, 193 F.2d 24, 31 (D.C. Cir. 1951).

B. If the language of the military rule must be interpreted as an absolute bar on mentioning polygraph results, it must yield to a constitutional exception.

Judges are not mechanics, applying a wrench or a hammer in a prescribed fashion. There is an element of judgment required in their determinations on admissibility. The exercise of such judgment was warranted in this case and is conspicuously missing, to the severe detriment of appellant. To the extent that a rule of evidence appears to dictate the present result, that rule cannot withstand a constitutional challenge.

1. The issue in this case was addressed in *Wheeler*, not *Scheffer*.

The NMCCA, in *United States v. Wheeler*, distinguished between polygraph results and the fact that a polygraph had been administered. Unlike the AFCCA, the court in *Wheeler* did not resolve the issue by describing Mi. R. Evid. 707 as applying only to polygraph results, but instead found that its application to the fact that testing had been conducted would violate the right of the accused to present his defense: "the military judge erred in denying the appellant's motion in limine because Mil. R. Evid. 707 is unconstitutional as applied to the narrow circumstances presented in this case." *Id*. at 593.

Crucially, the *Wheeler* court understood that a ruling on admissibility does not preclude consideration of the weight a statement deserves. Citing Mil. R. Evid. 304, the *Wheeler* court found an abuse of discretion from a trial judge's denial of a defense motion to describe the testing, noting that "[e]ven though the appellant was

unsuccessful in suppressing his confession, he still had the right 'to present relevant evidence with respect to the voluntariness of the statement' during the trial on the merits." *Id*. at 595, quoting Mil. R. Evid. 304 (at that time, Mil. R. Evid. (e)(2), now at 304(g)), and noting the concurring opinion in *Clark*, 53 M.J. at 284.

2. The military judge purported to distinguish *Wheeler* on the basis that appellant's interrogation was not very coercive.

The military judge's ruling on Mil. R. Evid. 707 was almost entirely a reiteration of his ruling on the motion to suppress. The ruling repeated verbatim all the findings of fact from the suppression ruling, added *one paragraph* with facts that were relevant to voluntariness but not germane to the motion in limine, and then concluded that the defense had "not satisfied its burden of proof." (JA 486).

The legal recitations in the military judge's ruling addressed how voluntariness affects admissibility, as though the import of this second defense motion were the admissibility of appellant's statement. (JA 485). This defense motion had, however, explicitly sought to address the weight the statement deserved, not its admission, noting that, "'[c]onfessions, even those that have been found voluntary, are not conclusive of guilt.' *Crane v. Kentucky*, 476 U.S. 683, 689 (1986)." (JA 446). Also, the ruling cited *Sheffner* [sic] for the constitutionality of Mil. R. Evid. 707, even though the defense motion unambiguously stated that the request was to address the weight of the statement, not to present the results of a polygraph test. (JA 485).

Ultimately, the military judge found this case "highly distinguishable" from Wheeler, because Ship's Serviceman First Class (SH1) Wheeler "underwent several interrogations over a considerable period of time … for over 10 hours and voluntarily submitted to 4 polygraph examinations [of which only] the last indicated deception." (JA 486). In contrast, appellant "went through 2 relatively short interrogations … [totaling] less than 10 hours, and his answers to the critical questions was [sic] found to be deceptive[1] on the only polygraph examination he undertook." (JA 486).

3. The Army Court purported to distinguish *Wheeler* on the basis that appellant's interrogation was plenty coercive.

The Army Court asserted that appellant had shown no need to mention the polygraph testing because he had the opportunity to cast other aspersions on the reliability of his statement to CID. (JA 6-7). The decision cataloged the various other ways appellant could undermine the weight of the statement without mentioning the polygraph test. (JA 6-7). The Army Court did not explain how this distinguished the present case from the trial in *Wheeler*, in which "[t]he military judge stated that he would not 'limit the accused's right to present relevant

[1] The military judge's reference to the findings of deception in the testing in these cases disturbingly suggests that he put credence in the polygraph results, contrary to law and science. He also asked the polygraph examiner procedural questions that would be irrelevant to someone who had no faith in polygraph technology. (JA 49, 64-66).

evidence pertaining to other circumstances' related to his statement to [law enforcement]." 66 M.J. at 593.

The Army Court found it determinative that appellant "never directly claimed that his decision to confess was related to being told the polygraph results." (JA 7). A nexus between "confessing" and being told the result of a polygraph test was *not* the basis of the Navy Court's ruling in *Wheeler*—though it was crucial part of the rationale of the trial judge who was overruled in that case:

> Contrary to the defense assertion that the polygraph's reliability or its test results are wholly irrelevant in this case, the accused's decision to provide a statement to explain adverse tests results is probative only if he honestly *believed* that the test results were reliable or that others would likewise believe so.

66 M.J. at 592 (quoting the ruling at trial; emphasis added).

The Army Court adopted this rationale, rejected in *Wheeler*, as its purported basis not to decide "whether or to what extent" to follow *Wheeler*:

> By contrast, the constitutional issue would be more squarely before us had appellant testified that he falsely confessed only because he *believed* the inculpatory polygraph result must be right when he gave his answer.

(JA 7, emphasis in original).

The Army Court also asserted that "appellant did not specifically explain during the suppression motion how the polygraph itself was the basis for his decision to falsely confess. (JA 7).

In reality, appellant testified at the motion hearing that after repeated insistence that he could not remember the events of that night, he told the CID agent otherwise, for precisely that reason:

> Q. So, now, at this point, why? Why, if you have no recollection, why would you say that?
>
> A. Because I felt that that's exactly what they wanted. It was, if I had to do—if I kept saying I didn't know, he was going to hook me back to the machine, and we were going to have to do more rounds of the polygraph.
>
> Q. Now, was that your thoughts, or did he convey that to you?
>
> A. He conveyed that to me.
>
> Q. Okay.
>
> A. He told me that if I continued to say that, that he would have to hook me back up to the machine, and we would have to go more rounds.

(JA 87) (no added emphasis needed).

According to the Army Court decision, notwithstanding this testimony and the litigated two pretrial motions about the role of the polygraph test, these issues are "post-hoc arguments on appeal." (JA 7).

4. The military judge and the Army Court imposed unmerited and undefined tests on appellant's right to present a defense.

Appellant was denied the right to discuss the circumstances of his statement by the military judge and then by the Army Court. The ruling at trial rested on

basis that his interrogation had been "very vanilla," (JA 115, 119, 132—the repeated characterization of the trial counsel arguing the motion), but the Army Court's ruling stressed that the other circumstances not excluded by the military judge were sufficient to show the scant weight deserved by appellant's post-polygraph statement. The centrality of the polygraph testing in this case will be addressed below, but appellant here notes that other courts have not imposed any such "needs-based" test on an accused's right to describe the circumstances under which a statement was given.

The Air Force courts, having no compunction on this subject, certainly apply no test. In *Gaines*, the AFCCA's two-page opinion (1) contained no recitation of facts surrounding the statement, other than the fact that polygraph testing had occurred; (2) made no assessment of the strength of the moving party's other evidence; and (3) concluded "it was essential for the court members to consider all relevant facts surrounding that confession." 20 M.J. at 669. Similarly, in *Kawai*, the AFCCA held *the government*, as moving party, can introduce the fact that the testing had occurred, *as a rule*, "where the accused challenges the voluntariness of his admissions to the investigators." 63 M.J. at 596.

Similarly, federal circuit courts have applied a Rule 403 balancing test to trial courts' decisions to allow *the prosecution* to invoke polygraph test circumstances to rebut a defense assertion of coercion or unreliability, but have

otherwise simply held that the accused "opens the door" to such evidence by attacking the voluntariness of a confession, or simply the quality of the police investigation. *See United States v. Tenorio*, 809 F.3d 1126, 1131 (10th Cir. 2015); *United States v. Blake*, 571 F.3d 331, 346 (4th Cir. 2009); *United States v. Allard*, 464 F.3d 529, 535 (5th Cir. 2006); *Tyler v. United States*, 193 F.2d 24, 31 (D.C. Cir. 1951).

C. The misapplication of Mil. R. Evid. 707 in appellant's case was not harmless beyond a reasonable doubt.

Due process of law is guaranteed by the Fifth Amendment, and the Sixth Amendment right to compulsory process and representation protects the right to be heard in one's own voice. "A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense* – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *Rock*, 483 U.S. at 51, quoting *In re Oliver*, 333 U.S. 257, 273 (1948) (emphasis original to *Rock*).

"Even more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the Amendment,' is an accused's right to present his own version of events in his own words." *Rock*, 483 U.S. at 52 (internal citation omitted), quoting *Faretta v. California*, 422 U.S. 806, 819 (1975).

1. The polygraph test was instrumental in causing appellant to adopt the accuser's account of events that he did not remember.

First the trial judge, then the Army Court, have failed, or pretended to fail, to understand the very concept of manipulation. The trial judge's description of the signing ceremony conflated coercion and manipulation:

> Before signing, SPC Kohlbek read aloud the affidavit on page 3 of his statement, received clarification regarding the meaning of the word coercion from SA Remke and revealed his clear understanding of what the word coercion meant by telling SA Remke in his own words, "you have not tricked me to be here."

(JA 486).

Coercion and manipulation are not synonymous, and, moreover, foremost among the characteristics of a person who has been manipulated is that he does not, at the time, understand that he has just been manipulated.

Simply put, SPC Kohlbek was convicted of a specific intent crime because the trial court admitted and considered his "post-polygraph" statement, but did not admit and consider the circumstances under which it was made. Astoundingly, the military judge found that "because the signing and swearing of SPC Kohlbek's statement dated September 22, 2015 was recorded, the trier of fact can conduct its own assessment of *the totality of the circumstances* regarding SPC Kohlbek's state of mind and voluntariness of his actions." (JA 486) (emphasis added).

Even on the matter of voluntariness, the recording of only the signing of the statement does not portray the totality of the circumstances, and in no way would have disclosed to the trier of fact that the statement resulted from SPC Kohlbek's being told that he could not answer the questions honestly by saying that he did not remember the events of that night.

2. Independent evidence showed appellant was so intoxicated that his adoption of the accuser's version of events was not competent evidence.

On that night, when appellant's stepdaughter KG returned from walking her friend AH home, she saw SPC Kohlbek slumped against the kitchen counter with his eyes half open. (JA 273-75). When the police officer arrived at the scene, he "could tell right off the bat that [appellant] was intoxicated" because he was "leaning on the wall" and "slurring his speech," and the investigator could not even communicate with him. (JA 283-84). When given the breathalyzer in the early morning hours, appellant blew .165 and .163 blood alcohol content hours after he had committed the battery. (JA 286).

Most tellingly in this "he doesn't remember – she said" case, the accusing witness testified that appellant was "kind of conscious, kind of not" and "seemed in and out of it" at the time of the battery (JA 209, 225).

Although SPC Kohlbek explained he had no independent memory, he was forced by the polygrapher, as the polygrapher admitted, to provide yes or no answers to questions about events he did not remember. As a result, appellant's

polygraph statement represented a confused hodgepodge of what he remembered, what he had been told, and what he assumed.

3. Expert testimony in this case explains how appellant would conflate what he remembered, what he had been told, and what he assumed.

A military psychiatrist testified at trial that "above .15 [BAC] we could see blackouts. They don't always occur. They don't always occur in every person every time they drink, but above .15 we have the potential to see them." (JA 345). Because of his alcohol intoxication, SPC Kohlbek was unable to form specific intent at the time of the offense, nor could he form memories susceptible to later recall. In the words of the forensic psychiatrist: "You are not making those new memories, so you have nothing to recall later. You could actually have short term memories, so I could ask you 30 seconds ago what you said, and you would remember, but ask you 30 minutes later, no memory." (JA 333).

Also, as the military psychiatrist explained, "[t]he brain wants to fill gaps." (JA 348). Confronted with the accusations against him, which SPC Kohlbek realized were substantially true, he accepted responsibility and his mind assimilated the evidence supplied by others. (JA 349).

The military judge compounded the confusion by instructing SPC Kohlbek to answer his questions as though he had personal knowledge, even when he was merely accepting as true the statements of others. (JA 176). This instruction to the accused – unnecessary under *United States v. Luebs*, 43 C.M.R. 315 (C.M.A.

1971) – muddled the distinctions between what SPC Kohlbek remembered, what he had been told, and what he assumed.

Specialist Kohlbek's difficulty in trying to comply with this instruction demonstrated how little independent memory of the events he actually had. For example, SPC Kohlbek knew that AH was clothed, but he did not know if she had a blanket over her. (JA 180; *cf*. JA 224). He also did not know if the contact was over the clothes or under,[2] or what he was wearing. (JA 180-81). He testified that the contact "would have been" with his palm. (JA 186-87). Asked whether he went to KG's room before or after his wife woke him on the porch, he did not know. (JA 182). When the judge asked SPC Kohlbek how AH responded to the battery, he answered based on his understanding of what happened; when asked if he remembered that, he said he did not. (JA 183-84).

4. Without the pseudo-scientific manipulation of the polygraph process, appellant's explanation would have sounded feeble and poltroonish.

By repeatedly asking appellant if he did something he did not remember, the polygrapher induced anxiety and feelings of guilt in a person who believed that he had done something wrong, but did not remember doing it. The pseudo-scientific

[2] In AH's initial statement to the CID agent shortly after the events of that night, AH said that SPC Kohlbek's hand did not go under her bra, and she did not say that he touched her anywhere else. (JA 302-03). In her trial testimony, she said his hand did go under her bra and that he touched her in other places on her body (JA 210), raising the question of whether the victim of the battery really remembered exactly what happened as she woke up in the middle of the night.

rigmarole of the polygraph testing caused him to state, as if he did remember, what he had been told by others. Without being able to explain why "I don't remember" became an invalid answer, disallowed by the authority figure and his "lie detector" machine, SPC Kohlbek would only have been able to explain the change in his story by reference to the circumstances of a "very vanilla" interrogation.

As his guilty pleas indicated, SPC Kohlbek felt guilty and remorseful for his drunken acts on that Saturday night, even though he did not remember doing them:

> Your Honor, I want to say that I'm not guilty, but at the same time, I was highly intoxicated, and I'm not aware of what I did or what I could have done or what I couldn't have done. And I'd rather take the stand and say I possibly did it and I believe that I did something. I would rather make sure I stood up for the right thing and done the right thing.

(JA 191).

Specialist Kohlbek was not, however, guilty of the specific-intent offenses, and the military judge failed to properly consider how the polygraph examination manipulated his sense of remorse to create what falsely appeared to be independent evidence.

The military judge misconstrued the purpose and meaning of Mil. R. Evid. 707, applying it differently than it has been understood by other courts, including other services' Courts of Criminal Appeals. In so doing, he violated appellant's right to due process and his right to be heard in his own defense.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings of guilt to the greater offense of sexual abuse of a child, and remand this case to the Army Court.

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CERTIFICATE OF COMPLIANCE WITH RULES 24 and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 7,419 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Kohlbek*, Crim. App. Dkt. No. 20160427, USCA Dkt. No. 18-0267/AR, was delivered to the Court and Government Appellate Division on September 6, 2018.

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