IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	Crim. App. Dkt. No. 20160427
Specialist (E-4) **JASON A. KOHLBEK**, Appellant	USCA Dkt. No. 18-0267/AR

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

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.

Argument

1. At trial, as on appeal, appellant distinguished *Scheffer* and argued *Wheeler*.

The government argues that "any probative value of mentioning polygraph evidence was substantially outweighed by the same policy concerns noted in *Scheffer*." (Gov't Brief 19). Appellant's brief explained at length how *United States v. Scheffer*, 523 U.S. 303 (1998), addressed whether polygraph results should be admitted, and Mil R. Evid. 707 originated as a rule about scientific evidence. (Appellant's Brief 12-16).

Appellant's *trial* defense counsel also made this manifest, in a passage of motions argument that distinguished *Scheffer* and argued the issue and holding in *United States v. Wheeler*, 66 M.J. 590 (N-M. Ct. Crim. App. 2008):

> The defense would note that that defense is not interested in substantively putting on the outcome of the poly, vis-à-vis that he failed. For obvious reasons, we are not interested in that in terms of its results, so the idea behind this rule in and of itself is that polygraphs, as the government even acknowledged in its moving papers, is unreliable, therefore we have this rule that neither side gets to use it. If he had passed it we would be barred from using it ourselves. We are not looking to use it for that purpose.
>
> Instead, we have to be able to discuss the context, how did it come to be that Specialist Kohlbek, within 24 hours, goes from "I don't remember" to "yes, I did it." We have to be able to explain that, and we have to be able to explain to a fact finder, well, he went in for this interrogation for CID, this is the techniques that CID used. This is what they did. It is not video recorded, and you get this outcome. So we have to be able to explain where this statement came from, otherwise we cannot put on a defense.

(JA 135-36).

Appellant's trial defense attorney thusly closed his argument on this motion:

> So it is clear, Your Honor, that while there is the normal rule that polygraph information does not come in, there is, nonetheless, a constitutional exception, and under the facts presented before you by a preponderance of evidence, it would be impossible for the defense to make a fair defense without being able to raise the existence of this polygraph information to a fact finder.

(JA 144).

Despite these arguments at trial, and the language of the defense motion on the *Wheeler* issue, (JA 445), the government brief parrots the false assertion of the Army Court that appellant's argument at trial did not present the *Wheeler* question, whether the *circumstances* of a polygraph test may be admitted. (Gov't Brief 20).

2. The record shows that the polygraph testing was instrumental in causing appellant to adopt the entirety of the accusations against him.

The government brief also mischaracterizes the testimony at trial: "Although appellant cited *Wheeler* in the motion, the argument did not invoke its core holding. Nor did appellant's testimony at the motions hearing implicate the key points of the *Wheeler* decision." (Gov't Brief 23).

In fact, the trial testimony established that (1) the CID agent invoked the polygraph technique to compel appellant to answer whether he had done things, not whether he remembered having done things, and (2) appellant acquiesced in adopting the CID version of the facts to escape continued polygraph testing.

a. The polygraph examiner invoked the polygraph mechanism to compel appellant to stop answering that he did not remember what happened.

The polygraph examiner testified, illogically, that the polygraph questions had to be yes or no questions about what happened, not yes or no questions about whether the test subject remembered something:

> 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.

(R. at 43)

This invocation of the infernal machine's requirement that the test subject may only answer an historical question about the events under examination was disclosed in the trial counsel's direct examination of the polygraph examiner, immediately after the test questions had been identified:

> Q. Agent Remke, when you asked him the questions, did Specialist Kohlbek answer that he doesn't know or he didn't remember?
>
> A. No, sir.
>
> Q. How did he answer?
>
> A. He answered the questions—well, in this case, he *would've had to have* answered "No," sir.
>
> Q. So he answered in like an affirmative, either a yes or no?
>
> A. Correct, sir.

(JA 18-19) (emphasis added).

Appellant *would have had to* have answered yes or no to questions about what happened that night—because that was required by the polygraph procedure. Using the pseudo-scientific paraphernalia and mystique, the polygraph examiner compelled appellant to stop saying, "I don't remember."

b. Appellant adopted the statements of others to escape continued testing.

Contrary to another misstatement of the facts in the government's brief, (Gov't Brief 23), appellant testified that he adopted the accusations against him because of the polygraph testing:

> 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).

The facts elicited from appellant and from the polygraph examiner in the motions hearing, and the arguments made by the trial defense counsel, presented the same question posed in *Wheeler*. Trial defense counsel explained, orally and in writing, how *Scheffer* had answered a different question, and how the particular and peculiar facts of the polygraph test were "inextricably linked," to borrow a phrase, to Specialist Kohlbek's unreliable statement.

2. The government's brief fails to distinguish *Kawai* or *Wheeler*.

Appellant's brief noted the divergent opinions of the service courts, with the Air Force Court apparently interpreting Mil. R. Evid. 707 as barring only the bad science of polygraph results, and the Navy Court having decided in *Wheeler* that Mil. R. Evid. 707 generally bars any reference to polygraph testing while acknowledging that such a blanket rule must sometimes yield to the Constitution. (Appellant's Brief 17, 19-24). The government's brief pooh-poohs the Air Force Court's decision in *United States v. Kawai*, 63 M.J. 591 (A.F. Ct. Crim. App. 2006), and purports to distinguish *Wheeler* on grounds that contradict its own argument on the prejudice caused by this error.

a. The Air Force Court decision would accord with federal civilian practice.

The Air Force Court's 2006 decision in *Kawai* seems to accord with federal practice, which disallows admission of polygraph results as unscientific under the standards in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), but—having no federal equivalent to Mil. R. Evid. 707—run the Fed. R. Evid. 403 risk of allowing reference to polygraph testing as a circumstance affecting a statement by a suspect. The government's brief implies that the paucity of cases on this issue shows that the *Kawai* court was wrong to call this practice "well settled," (Gov't Brief 17), but appellant submits that the judges of that service court are better situated to know what practices prevail in that service.

The government's brief also scoffs that the *Kawai* court cited *United States v. Gaines*, 20 M.J. 668 (A.F. Ct. Crim. App. 1985), a case from before enactment of Mil. R. Evid. 707, (Gov't Brief 17), without seeming to appreciate that if Mil. R. Evid. 707 is interpreted as a rule about scientific evidence, its enactment would not preclude continuing the rule in *Gaines*, which aligns with current federal civilian practice under *Daubert*.

b. The Navy Court decision in *Wheeler* addressed the question presented here.

The government's brief purports to distinguish the present case from *Wheeler* by describing how much more coercive Ship's Serviceman First Class (SH1) Wheeler's interrogation was. (Gov't Brief 21-22). Also, counsel for the government now generously concede that SH1 Wheeler "was misled by law enforcement about the use of the deceptive polygraph examination results," (Gov't Brief 22), even though the polygraph examiner in that case "testified that he did not tell the appellant he would be convicted at a court-martial based on the results of the polygraph." 66 M.J. at 591. In contrast, as discussed above, the nature of the manipulation in the present case was to use the polygraph process to disqualify appellant's honest answers to many questions (*i.e.*, "I don't remember.").

Like any decision, *Wheeler* was decided on its facts, in light of the Constitution—but it should be distinguished when there are material differences, not merely a different manipulation implicating the same constitutional principle.

3. This error was not harmless beyond a reasonable doubt.

The government notes that under *United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018), the standard is no "reasonable possibility that the error contributed to" the conviction. At trial, however, the government counsel argued on the merits that the "confession" was conclusive:

> And finally, Your Honor, for [the] defense, he is so intoxicated, he's in a blackout. Now, he also must be to the point where he can't form the specific intent. You'd have to ignore his whole confession.

(JA 393).

In its zeal to prevail on every factor under *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015), the government misstates law and fact on several points. In arguing that the government case was strong, the government wrongly asserts that "Miss AH never recanted or made statements substantially inconsistent with her initial version of events." (Gov't Brief 25). Actually, in AH's initial statement to the CID agent shortly after the events of that night, she 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).

Then, having argued on pages 21-22 that this case is distinguishable from *Wheeler* because Specialist Kohlbek had not been treated as harshly as SH1 Wheeler, the government on pages 27-29 turns on its proverbial heel to argue that

Specialist Kohlbek had no real need to mention the polygraph test because of the "myriad factual circumstances surrounding appellant's statement that could have been presented at trial to attack the voluntariness and reliability of the statement despite the military judge's reasonable application of Mil. R. Evid. 707."

These "myriad circumstances" amounted to little, apart from the central figure of a polygraph examiner who explained to appellant, as he later explained to the court, that "I don't remember" was not a valid answer in using his wires and buzzers to find the truth. Specialist Kohlbek was not allowed to answer in his own words, and he was hectored into adopting statements about which he did not have personal knowledge.

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 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 October 16, 2018.

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