IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **JASON A. KOHLBEK,** United States Army, Appellant	) BRIEF ON BEHALF OF APPELLEE)))) Crim. App. Dkt. No. 20160427)) USCA Dkt. No. 18-0267/AR))

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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-POLYGRAPHY STATEMENT.

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

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

Statement of Statutory Jurisdiction and the Case

The government adopts appellant's statement of statutory jurisdiction and statement of the case.

Statement of Facts

A. Appellant's sexual abuse of Miss AH.

On the evening of 19 September 2015, appellant hosted several friends at his house. (JA 168–69, 174). Appellant was thirty-five years old and had just successfully completed the Army's Warrior Leader Course. (JA 92–93). Also at

the house were appellant's teenage stepdaughter, Miss KG, and her fourteen year-old friend, Miss AH. (JA 170). The two girls spent the majority of their time that evening in Miss KG's room. (JA 268–70).

At approximately 2230, Miss AH fell asleep on the floor of Miss KG's room while Miss KG went to sleep in her own bed. (JA 205). Miss AH woke up at approximately 0110 on 20 September 2015 to the smell of alcohol emanating from appellant, who positioned himself behind Miss AH with his arm around her. (JA 208–09, 220). Appellant had one arm under the pillow and his other arm over Miss AH's body, but underneath the blanket. (JA 224). Appellant moved his hand under her shirt and bra and touched her breast. (JA 209–10). Miss AH testified her waistband was tied when she went to sleep but was untied when appellant woke her up. (JA 210–11). She further stated appellant placed his hand inside her pants, on her upper pelvic area, and then squeezed her buttocks. (JA 210–11). Miss AH tried to move his hands away. (JA 226). She was unable to get up because he was holding her back. (JA 212). Appellant then whispered "do you want me" into her ear and "nibbled" on her earlobe. (JA 212). The entire incident lasted approximately fifteen minutes. (JA 214).

When appellant left the room, Miss AH woke Miss KG and asked her if she could lock the bedroom door; she then locked the door. (JA 215–16). Miss AH later heard appellant "jiggle" the handle to come back into the room. (JA 216).

After appellant returned, unlocked, and opened Miss KG's bedroom door, Miss AH again woke Miss KG and told her that she wanted to go home. (JA 217).

Miss KG testified she fell asleep before Miss AH and did not see or hear appellant enter the room. (JA 271). However, Miss KG testified Miss AH woke her up three times: (i) to ask if she could sleep in the bed; (ii) then to ask if she could lock the bedroom door; and (iii) then later that evening to tell Miss KG that appellant had tried to rape her and she wanted to go home. (JA 270).

Prior to leaving appellant's residence, Miss AH called her father, Sergeant First Class (SFC) MP, and told him that she was almost raped and on her way home. (JA 217). As Miss AH left, appellant put his hand under his chin and waved goodbye with his fingers in a way Miss AH perceived as "flirty." (JA 218). When she returned home, Miss AH began crying and immediately told SFC MP about appellant's sexual abuse. Sergeant First Class MP then called the military police. (JA 239).

B. Initial law-enforcement response.

At approximately 0310 on 20 September 2015, Investigator CS, a military police officer, made initial contact with appellant at appellant's residence. (JA 282). Investigator CS recognized appellant's intoxication and conducted two breath-alcohol tests of appellant at 0350 that revealed breath-alcohol contents (BAC) of .165 and .163. (JA 286). Due to the nature of the misconduct, primary

investigative responsibility rested with the installation's criminal investigation command (CID) office. (JA 280–81).

The next day, 21 September 2015, appellant went to the installation CID office where he waived his rights and agreed to speak with Special Agent (SA) MT. (JA 291–92). During her questioning of appellant, SA MT relayed to appellant Miss AH's allegation that appellant came into Miss KG's bedroom, lay down next to Miss AH, and touched Miss AH's breast. (JA 301). Special Agent MT did not recall informing appellant of Miss AH's allegation that appellant also touched her buttocks and nibbled on her ear. (JA 301–02). Appellant told SA MT that he recalled consuming alcohol on the evening of 19 September 2015, but that he did not recall (i) entering Miss KG's bedroom, (ii) touching Miss AH, or (iii) asking Miss AH if she wanted him. (JA 417, 461).

C. Appellant's polygraph and sworn statement to CID SA RR.

The following day, 22 September 2015, appellant returned to CID and met with the polygrapher, SA RR. (JA 13, 17, 94). Appellant consented to taking a polygraph, though he maintained to SA RR prior to the polygraph examination that he could not recall any of the details of the evening concerning Miss AH's allegations. (JA 80). Special Agent RR then did a "dry run" of the polygraph questions with appellant. (JA 81). During the actual polygraph examination, appellant responded in the negative to the three test questions. (JA 417). Special

Agent RR determined appellant's answers to the test questions indicated deception. (JA 22, 417).

After appellant's polygraph examination was completed, SA RR confronted appellant with the results and told appellant that he did not believe appellant's denials of touching Miss AH or asking her if she wanted him. (JA 22, 86). After the two discussed the allegations of sexual abuse against Miss AH, SA RR asked appellant to write a narrative of the night's events, which appellant agreed to do. (JA 23). Once the narrative was complete, SA RR returned to the interrogation room and asked appellant clarifying questions. (JA 23).

Appellant told SA RR both before and after the polygraph that he could not remember the details surrounding his alleged touching of Miss AH. Despite appellant's assertions to SA RR that he could not remember, appellant alleged SA RR required him to answer "yes or no," and that he was unable to answer "I don't remember" to the allegations of him touching Miss AH. (JA 81, 85–86). Even after being told he "failed the polygraph," appellant still "kept telling [SA RR] that [he] didn't remember." (JA 85–86). After twenty to twenty-five minutes, appellant changed his story, stating: "Fine. I did it. I will write whatever you want. I'll write a sworn statement to it. Just let me get out of here." (JA 86).

Appellant further testified he wrote his statement based on what CID told him regarding Miss AH's prior statements. (JA 88). Appellant reviewed his entire

statement, initialed each page, and even made a correction to the spelling of his name on the final page before signing it. (JA 399–401). In his sworn statement, appellant alleged Miss AH was flirting and giggling with all of the men while she was baking cookies in the kitchen. (JA 399). He stated he went outside to smoke a cigarette then came back inside and saw Miss AH go into Miss KG's room. (JA 399). Appellant followed her into the room, lay down on the floor, put his right arm around her, and fell asleep. (JA 399). Appellant then stated Miss AH woke him up and that was when he realized he had his hand under her shirt and he rubbed his hand along the side of her ribcage. (JA 400). Appellant also acknowledged that he stated, "Do you want me?" while he was touching Miss AH. (JA 400). He further stated his intent was "sexual" when he asked Miss AH if she wanted him. (JA 400). Appellant stated he wanted to apologize and let Miss AH know how horrible he felt about the situation. (JA 399).

D. Defense motion to suppress appellant's post-polygraph sworn statement and motion in limine to present polygraph evidence to the factfinder.

Defense filed a motion to suppress appellant's sworn statement on the basis that it was involuntarily obtained. (JA 121, 476). During an Article 39(a), UCMJ, session, SA RR and appellant testified concerning the factual circumstances surrounding appellant's polygraph and sworn statement. (JA 11–111). The military judge denied the motion, concluding appellant's sworn statement was

voluntarily obtained and that there was no evidence of law enforcement coercion, unlawful influence, or inducement. (JA 481). In his ruling, the military judge made over two pages of findings of fact prior to ruling on the voluntariness of appellant's post-polygraph statement. (JA 476–81). The military judge considered the characteristics of appellant and the actions of SA RR. (JA 480). He noted at the time of the interrogation, appellant was over thirty-five-years old, possessed above-average intelligence, and held a position of responsibility within his unit. (JA 480).

Since appellant's sworn statement was not suppressed, defense counsel sought approval to present polygraph evidence to the factfinder to explain why appellant would have given a false confession. (JA 447). The motion in limine asserted appellant's Sixth Amendment right to present a defense could not be limited by Mil. R. Evid. 707. (JA 447). Defense counsel argued appellant should be allowed to discuss the use of a polygraph, that appellant was told that he failed the polygraph, and that the interrogation was a means or method for a confession. (JA 443). During the Article 39(a), UCMJ, session, defense counsel argued the polygraph was needed to show that CID provided and suggested all substantive elements of appellant's confession. (JA 137). Defense counsel stated the polygraph evidence was needed to show how appellant's version of events changed over the course of twenty-four hours. (JA 139). The military judge asked if

defense counsel could make the same argument by talking about the second interrogation without reference to the polygraph. (JA 141–43). Defense counsel did not believe it was possible to explain the second interrogation without introducing polygraph evidence, arguing that (i) the polygraph evidence was needed to show why appellant would return for a second interview and (ii) SA RR's confrontation of appellant with the results was needed to show "how th[e] interrogation went down." (JA 141–42).

The military judge denied appellant's motion in limine. (JA 482–86). In arriving at his decision, he applied Mil. R. Evid. 707 and *United States v. Scheffer*, 523 U.S. 303 (1998). (JA 485–86). He also distinguished the facts of appellant's case from the facts of the Navy case cited in appellant's motion, *United States v. Wheeler*, 66 M.J. 590 (N-M. Ct. Crim. App. 2008). (JA 485–86). In his written ruling, the military judge reiterated all of the facts he had previously found in the ruling on the motion to suppress and added one additional factual finding concerning the lack of coercion on 22 September 2015 when appellant swore to and signed his statement. (JA 485).

E. Defense's case focused entirely on appellant's voluntary intoxication.

Defense called three of appellant's friends who were present at his residence on 19–20 September 2015 to discuss appellant's level of intoxication. Corporal [CPL] KH recalled seeing appellant drink approximately three to four, eight- to

ten-inch glasses of Crown Royal alcohol and soda between the hours of 1700 and 2300. (JA 307–10). Specialist [SPC] JG was at appellant's house from 2100 to 0037 and observed appellant consume two beers and two mixed drinks. (JA 317). Specialist JG testified appellant did not appear overly intoxicated and that prior to him leaving appellant's house at 0037, appellant was able to engage in intelligent conversation regarding the state of medicine and provided in-depth answers when responding. (JA 321). When SPC JG left, appellant was able to stand and was not slurring his speech. (JA 319). Specialist SM observed appellant consume approximately five to six alcoholic beverages along with pizza and cookies that evening. (JA 325–27). At approximately 0100, SPC SM assisted appellant to his bed, and when SPC SM left, appellant was awake and using his phone. (JA 328–29).

Major ES, defense's expert in alcohol-related memory impairment and alcohol's effects on cognitive function, testified that alcohol impairs a person's judgment, ability to make decisions, and motor skills. (JA 340–44). Major ES testified that when a person has a BAC over .15, the person may experience blackouts. (JA 345). He also estimated that if at 0350 appellant had a BAC of 0.165 and did not drink after the sexual contact with Miss AH at 0115, then his BAC around the time of the offense would have been approximately 0.21. (JA 218, 350–51).

Standard of Review

This court reviews "a military judge's decision to admit or exclude evidence for abuse of discretion." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015)). "This standard requires more than just [this court's] disagreement with the military judge's decision." *Id.* (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)). "Instead, an abuse of discretion occurs when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (quoting *Stellato*, 74 M.J. at 480 (alterations in original)). This court's review for error "is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that *appellate* defense counsel now wishes *trial* defense counsel had submitted." *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (citing *United States v. Lloyd*, 69 M.J. 95, 100–01 (C.A.A.F. 2010)).

Summary of Argument

The military judge did not abuse his discretion by applying Mil. R. Evid. 707 as a rule of exclusion. His findings of fact are not clearly erroneous and his conclusions of law are consistent with the text of Mil. R. Evid. 707 and Supreme Court precedent. Based on his findings of fact and conclusions of law, the military

judge's ultimate decision was not outside the range of reasonable choices. Even if a reasonably military judge could have concluded otherwise on the facts of appellant's case, that does not make this particular military judge's ruling an abuse of discretion. Although a rule of evidence cannot supersede the United States Constitution to exclude constitutionally required evidence, appellant's case presents no constitutional concerns warranting a deviation from the plain text of Mil. R. Evid. 707. However, should this court determine the military judge abused his discretion, appellant still suffered no prejudice due to the strength of the government's evidence and the immateriality of the excluded evidence.

Argument

"[T]he right to present relevant testimony is not without limitation." *United States v. Gaddis*, 70 M.J. 248, 252 (C.A.A.F. 2011) (citing *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)). An accused's "interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock*, 483 U.S. at 55). "As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* (quoting *Rock*, 483 U.S. at 56). The Supreme Court has "found the exclusion of

evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.* (citing *Rock*, 483 U.S. at 58).

In 1991, pursuant to Article 36(a), UCMJ, the President promulgated Mil. R. Evid. 707 in substantially similar form as it is today.[1] *See* Executive Order 12,767, 56 Fed. Reg. 30,284 (July 1, 1991). The non-exclusive policy reasons underpinning Mil. R. Evid. 707 include the risk that polygraph evidence would be "treated with 'near infallibility'" by the factfinder; present "'danger of confusion of the issues'"; and lead to "a waste of time on collateral matters." *United States v. Scheffer*, 44 M.J. 442, 451 (C.A.A.F. 1996) (Crawford, J., dissenting); *see Scheffer*, 523 U.S. at 309 & n.5 ("Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.").

"The Supreme Court has not been reluctant to strike down evidentiary rules that restrict an accused's ability to present favorable evidence at trial." *United*

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[1] Military Rule of Evidence 707 currently states: (a) Prohibitions. Notwithstanding any other provision of law, 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 is not admissible. (b) Statements Made During a Polygraph Examination. This rule does not prohibit admission of an otherwise admissible statement made during a polygraph examination.

States v. Williams, 39 M.J. 555, 558 (Army Ct. Crim. App. 1994). In *Scheffer*, the Court recited its holdings in three previous cases on this issue. 523 U.S. at 315–17. The Court noted its *Rock* decision declared unconstitutional a state statute excluding all hypnotically refreshed testimony because it prevented the defendant from "testifying in her own defense" in violation of the Sixth Amendment. *Id.* at 315–16 (citing *Rock*, 483 U.S. at 46–49, 52, 56–57). The Court noted its *Washington v. Texas* decision declared a state statute in violation of the Sixth Amendment because it arbitrarily precluded the defendant from "introducing his accomplice's testimony that the accomplice had in fact committed the crime." *Id.* at 316 (citing *Washington v. Texas*, 388 U.S. 14, 16–17 (1967)). Finally, the Court noted its *Chambers v. Mississippi* decision, although limited to the facts of that particular case, "found a due process violation in the combined application of Mississippi's common law 'voucher rule,' which prevented a party from impeaching his own witness, and its hearsay rule that excluded the testimony of three persons to whom that witness had confessed." *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973)). In these three cases, the Court found that the "exclusions of evidence . . . significantly undermined fundamental elements of the accused's defense." *Id.* at 315.

Conversely, in *Scheffer*, the Court found no such fundamental or significant interests of the accused were implicated when it specifically upheld the

constitutionality of Mil. R. Evid. 707. *See id.* at 315 ("The three of our precedents upon which the [Court of Appeals for the Armed Forces] principally relied, *Rock* . . . *Washington* . . . and *Chambers* . . ., do not support a right to introduce polygraph evidence, *even in very narrow circumstances*.") (emphasis added). At issue in *Scheffer* was the military judge's denial of the appellant's motion to introduce polygraph evidence in support of his testimony that he did not knowingly use drugs. *See id.* at 306. Specifically, the appellant sought to introduce evidence that his polygraph answers about his alleged illicit drug use "indicated no deception." *Id.* at 306.

Unlike *Chambers*, the Supreme Court's holding in *Scheffer* was not limited to the specific facts of the case. *See id.* at 305. Distinguishing *Rock* from the appellant's case in *Scheffer*, the Court concluded that the appellant "was barred merely from introducing expert opinion testimony to bolster his own credibility. Moreover, in contrast to the rule at issue in *Rock*, [Mil. Rule of Evid.] 707 did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts to the court-martial members." *Id.* at 317. Four different commanders-in-chief have had the opportunity to revise Mil. R. Evid. 707 in the wake of *Scheffer*, but it still exists largely as it was originally written almost thirty years ago.

In the twenty years since the Court's *Scheffer* decision, only one service court of appeals has squarely addressed a challenge to Mil. R. Evid. 707. As discussed in appellant's brief, in 2008, the Navy Court decided the case of *United States v. Wheeler*, 66 M.J. 590 (N.M. Ct. Crim. App. 2008). The appellant in *Wheeler* took four polygraph examinations over the course of a ten-hour interrogation. *See id.* at 591. The appellant was informed that the first three polygraph examinations were inconclusive but that the final polygraph examination indicated he was deceptive. *See id.* The appellant testified the Navy polygrapher led him to believe he "would be convicted based upon the evidence of the failed polygraph." *Id.* Additionally, the appellant contended the polygrapher "told him if he admitted guilt, things would be easier for him, and that [the polygrapher] would be able to assist him." *Id.* The appellant also believed that based on statements made to him by the polygrapher, "the results of the polygraph test would not be given to his command if he confessed to the crimes." *Id.* Under these beliefs and after the ten-hour interrogation that included four polygraph examinations, the appellant confessed to receiving stolen money. *See id.* at 591–92. The "appellant's confession was the only direct evidence of his guilt introduced by the Government at trial." *Id.* at 592.

Before trial and after losing on a motion to suppress the confession, the appellant in *Wheeler* filed a motion in limine "to allow evidence of [the

appellant's] polygraph examinations focused on the circumstances surrounding the polygraph examinations and not on the specific results." *Id.* Citing Mil. R. Evid. 707, the military judge denied the motion. *See id.* The Navy Court determined that the military judge abused his discretion because his ruling unconstitutionally applied Mil. R. Evid. 707 "to the narrow circumstances presented in [the appellant's] case." *Id.* at 593. Specifically, the court determined that the military judge's ruling precluded the appellant's ability "to testify himself about all relevant factual matters related to the polygraphs that led to his confession." *Id.* at 595. Despite being a published case for over ten years, *Wheeler* has not been cited by a single military court except by the Army Court in its opinion on this case. The Army Court distinguished the facts of appellant's case from the appellant in *Wheeler* and made no conclusion as to the continued soundness of *Wheeler*'s holding. (JA 6–8).

In its *Wheeler* opinion, the Navy Court discussed the Air Force case of *United States v. Kawai*, 63 M.J. 591 (A.F. Ct. Crim. App. 2006). *Kawai*, also discussed in appellant's brief, dealt with a challenge to the military judge's partiality after the military judge heard evidence during a suppression hearing that the appellant had been deceptive on a polygraph examination. *See* 63 M.J. at 596–97. Prior to the suppression hearing, the appellant elected to be tried by a panel of officers. *See id.* at 596. The appellant claimed his confessions to law enforcement

warranted suppression because they were involuntarily obtained, which the government rebutted by calling the polygrapher to testify at the suppression hearing. *See id.* The military judge denied the motion to suppress and, after ruling on all other motions, the appellant changed his forum selection to trial by military judge alone. *See id.*

The Air Force Court denied the appellant's challenge to the military judge's impartiality, noting 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." *Id.* In support of its "well settled" proposition, the Air Force Court cited *United States v. Gaines*, 20 M.J. 668, 669 (A.F.C.M.R. 1985). The Air Force Court noted the significance of the fact that the polygraph testimony was elicited during an Article 39(a) session and not on the merits. *Id.* at 597. Despite the *Kawai* court's assertion that admission of polygraph evidence in this context is "well settled," not a single court—other than *Wheeler*—has cited it since. This is unsurprising considering the 1985 *Gaines* opinion upon which *Kawai* relied for its broad assertion was decided six years before the 1991 enactment of Mil. R. Evid. 707.

I. The military judge did not abuse his discretion when he applied the plain reading of Mil. R. Evid. 707 as a per se rule of exclusion.

A. The military judge's detailed factual findings are not clearly erroneous.

Appellant does not challenge with specificity any of the military judge's factual findings as clearly erroneous. Indeed, a review of the record indicates that the military judge's findings are well-supported from the evidence that was presented to him during the motions hearing, which included testimony from appellant and SA RR. His detailed, five-page ruling contains fifteen paragraphs of factual findings. (JA 484–85). Fourteen of the fifteen paragraphs were incorporated from the military judge's previous ruling on the motion to suppress, which is understandable given that the same evidence supporting the motion to suppress also supported the motion to admit polygraph evidence. (JA 478–79).

It is further apparent that the military judge did not find facts that favored only the government's position. For example, the military judge noted appellant's profile for "bilateral hip pain" as well as the fact that he "was told that he could only answer yes or no to the questions presented by SA [RR.]" (JA 483–84). On this record, there is no basis to fault the military judge's factual findings because they are supported by the record and therefore not clearly erroneous.

B. The military judge applied the correct law and arrived at a reasonable conclusion.

The military judge's discussion and application of the law to appellant's case was not outside of the range of choices reasonably arising from the applicable facts and law. After making his findings of fact, the military judge then discussed the

applicable law. Naturally, the military judge began with the text of Mil. R. Evid. 707. The military judge further discussed *Scheffer*, where he correctly noted its holding and recited the policy reasons supporting the rule as articulated by Associate Justice Thomas. (JA 485). Given that *Scheffer* interpreted the very rule being presented to the military judge and that its holding was not intended to be confined to the limited facts and circumstances of that particular case, it would have been unusual had the military judge not addressed the Supreme Court's opinion in his decision.

Although he was under no obligation to discuss or distinguish the non-binding *Wheeler* case, the military judge nonetheless distinguished the facts of *Wheeler* from the facts surrounding appellant's confession and correctly noted that the *Wheeler* decision was confined "to the narrow circumstances of [that appellant's] case." (JA 485). The military judge concluded the trier of fact could make its own assessment of appellant's state of mind and the voluntariness of his confession without the introduction of polygraph evidence. Although he did not directly cite Mil. R. Evid. 403, the military judge used the language from that rule, finding that any probative value of mentioning polygraph evidence was substantially outweighed by the same policy concerns noted in *Scheffer*. (JA 486).

Appellant presents no basis to fault the military judge's straightforward application of Mil. R. Evid. 707 as a per se rule of exclusion and his reliance on

Scheffer. This is not only a reasonable application of the rule, it is, in fact, the most objectively reasonable application of the rule as reinforced by the Supreme Court in *Scheffer*. Additionally, the military judge was not blind to the fact that on at least two occasions, military courts have determined the application of Mil. R. Evid. 707 to be unconstitutional—this court's decision in *Scheffer* that was reversed by the Supreme Court and the Navy Court's decision in *Wheeler*. Appellant's dissatisfaction with the military judge's adverse ruling is understandable; however, he has not articulated how the military judge abused his discretion by somehow misapplying or misinterpreting the applicable law and coming to a conclusion outside the range of reasonable options. To accept appellant's argument requires this court to conclude that the military judge abused his discretion by applying Mil. R. Evid. 707 as it is plainly written and has been interpreted by the Supreme Court. Moreover, assuming appellant's trial defense counsel had presented the same argument appellant defense counsel now presents on appeal—one more tethered to the argument in *Wheeler*—it would still be difficult to find that the military judge abused his discretion by excluding the polygraph evidence. Just because a different judge may have concluded such evidence could be admitted does not make this military judge's decision an abuse of discretion.

II. The facts of appellant's case and arguments made at trial are highly distinguishable from the facts and arguments in *Wheeler*.

In the instant case, appellant voluntarily submitted to one polygraph examination during a four-hour daytime interview that was free of law-enforcement misconduct or unlawful coercion. (JA 96–101). Twenty- to twenty-five minutes after being informed of his deceptive polygraph, appellant wrote the narrative portion of his statement alone in a room. (JA 86, 99–100). This was followed by a question-and-answer session where SA RR typed the questions and responses. (JA 89). At the end of the interview, appellant reviewed the entire statement, was told to make any changes he wanted to make, and initialed each page. (JA 99–100; 399–401). Appellant elected to make a written statement because he wanted to end the interview as soon as possible. (JA 7, 90, 94, 97). Appellant never stated his decision to write an allegedly false statement was directly related to being informed of the deceptive polygraph results, nor was appellant told that the polygraph would be provided to his command or used as evidence against in a court-martial. Instead, he claimed he told SA RR that he would write "whatever you want," and to "just let me get out of here." (JA 86). Additionally, upon hearing from SA RR that the polygraph indicated deception, appellant did not immediately adopt the inverse of his answers as the truth and confess accordingly. The results of the polygraph, or appellant's belief of its

potential use against him, did not change appellant's version of events. After being told the polygraph indicated deception, appellant maintained to SA RR that he could not remember any of the key details, which is precisely what he told SA RR prior to the polygraph. (JA 86).

Appellant's case is readily distinguishable from *Wheeler*, where the appellant's confession was a direct result of and inextricably linked with the polygraph. The appellant took four polygraph examinations over the course of ten hours, was misled by law enforcement about the use of the deceptive polygraph examination results, and made his confession based on the deceptive polygraph and his belief of its intended, adverse use against him.

Not only are the facts of appellant's case distinguishable from those in *Wheeler*, but so are the arguments. Appellant's argument at trial did not invoke the reasoning in the *Wheeler* decision, namely that the confession was entirely induced by the polygraph results and the appellant's belief of the intended, adverse use of the results. In appellant's case, the argument at trial was much more general in nature; appellant was unable to directly tie the polygraph to appellant's allegedly false confession. At the motions hearing, appellant argued that polygraph evidence was necessary to show that CID provided and suggested all of the substantive elements of appellant's confession. (JA 137). Appellant argued that it was also needed to show how appellant's version of events changed over the course of

twenty-four hours. Finally, appellant submitted polygraph evidence was necessary to show why he returned to CID for a second interview, and that SA RR's confrontation of appellant with the deceptive results was required to show "how th[e] interrogation went down." (JA 137–42).

The government does not concede that *Wheeler* was correctly decided or well-reasoned. However, it is clear that the facts of appellant's case in comparison to *Wheeler* are far less compelling in terms of warranting a departure from the plain reading of Mil. R. Evid. 707. In addition to lacking compelling facts, appellant did not make a compelling argument 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. Despite the fact that appellant's argument on appeal is more in line with the *Wheeler* reasoning—asserting appellant's allegedly false confession directly resulted from the polygraph—this simply was not the set of facts and arguments presented to the military judge at trial. As the Army Court noted: "While appellant's post-hoc argument on appeal could implicate the reasoning in *Wheeler*, we are limited to the factual record developed at trial." (JA 7). Like the Army Court, this court's review for error is based on what was before the military judge at trial, not on what appellant now wishes defense counsel had put before the military judge. *See Carpenter*, 77 M.J. at 289 (citing *Lloyd*, 69 M.J. at 100–01).

III. Even if the military judge erred, appellant suffered no prejudice.

This court reviews "the prejudicial effect of an erroneous evidentiary ruling de novo." *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011). In determining whether prejudice resulted from an erroneous evidentiary ruling, this court weighs "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015) (quoting *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008)). "For constitutional errors, the Government must persuade [this court] that the error was harmless beyond a reasonable doubt." *Savala*, 70 M.J. at 77 (quoting *Hall*, 56 M.J. at 436). "In assessing harmlessness, [this court's] inquiry evaluates the entire record to determine whether there is a reasonable possibility that this evidentiary error contributed to [appellant's] conviction." *United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018) (citing *United States v. Ellerbrock*, 70 M.J. 314, 421 (C.A.A.F. 2011)).

A. The government presented a strong case.

The government presented strong evidence of appellant's guilt that was virtually unrefuted. At the heart of the government's case was a sober, unbiased juvenile victim, with no motive to fabricate, who immediately reported appellant's misconduct to her friend and then—after leaving appellant's house in the middle of

the night—to her father. Miss AH never recanted or made statements substantially inconsistent with her initial version of events. She did not struggle through her direct examination testimony, nor did she fold under the crucible of cross-examination. Miss AH's account was corroborated in part by the testimony of Miss KG as well as SFC MP. Additionally, the government's case was greatly strengthened by appellant's statement to CID that corroborated Miss AH's testimony. Although it is fair to assume that the government would have proceeded with the charges even without the statement, there is no question that it was a damning piece of evidence.

Concerning appellant's intent, as the Army Court noted, there was "overwhelming evidence that appellant formed the required intent" and that it "is hard to attribute appellant's actions to anything *other* than the specific intent to gratify his sexual desire." (JA 8) (emphasis added). Combining the physical acts of appellant nibbling on fourteen year-old Miss AH's ear and touching her breast, buttocks, and pelvic area along with his simultaneous statement of "do you want me?," leaves no reasonable doubt that appellant had a specific sexual intent.

B. The defense case was weak.

The defense case focused entirely on appellant's voluntary alcohol consumption on the night in question. Appellant's friends testified that they saw him consuming alcohol throughout the evening, but their testimony varied about

exactly how many drinks he consumed and what kinds of alcohol he consumed. Specialist JG maintained appellant was still engaging in intelligent conversation late into the evening. (JA 321). Specialist SM testified that he assisted appellant into his bed before leaving, but that once in bed, appellant was still utilizing his smart phone. (JA 328–29). Their varying testimony cut against the defense argument that appellant was too intoxicated to form specific sexual intent.

The defense expert opined that based on appellant's .165 BAC at 0350, appellant likely had a breath-alcohol level of around .21 at the time he committed the offenses roughly two hours prior. (JA 351). The defense expert also testified about black outs and confabulation—the substitution of blank periods of time with invalid memories—though he could not say definitively whether appellant was blacked out when he committed the offenses, and conceded that even people in a black-out state can still form specific intentions. (JA 355). Additionally, the expert could not say whether appellant actually experienced confabulation as opposed to feigning his lack of memory. (JA 355–56).

Other evidence rebutted appellant's claim of confabulation. For example, appellant claimed that he simply adopted the version of events as provided to him by law enforcement; however, SA MT testified she did not believe she mentioned to appellant Ms. AH's allegations that appellant nibbled her ear or touched her buttocks. (JA 301). Even assuming appellant was blacked out, this does not

automatically mean he was too intoxicated to form specific intent. As the Army Court concluded, the fact that a person is blacked out is certainly evidence that the person is highly intoxicated but does not mean that the person is *per se* too intoxicated to form specific intent. (JA 8). On the whole, and especially when compared to the government case, the defense case was weak.

C. The excluded evidence was immaterial because appellant could have, but chose not to, present substantial factual evidence challenging the voluntariness and reliability of his statement.

Appellant was denied the ability to talk about the polygraph examination and what effect the polygraph had on his decision to make a statement to law enforcement. Although appellant elected not to testify and challenge the voluntariness and reliability of his written statement or to aggressively cross-examine SA RR on the facts and circumstances surrounding the statement, this was a tactical decision entirely independent from the military judge's denial of the motion in limine. (JA 259–62). The Army Court discussed 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. As the Army Court noted:

> Military Rule of Evidence 707 did not prohibit appellant from attempting to undermine the reliability of his statement by telling the court-martial about his age, education, intelligence, or life experience. The rule did not prohibit appellant from explaining the length of his

> interview, his amount of sleep, or whether he was provided adequate food and rest breaks. Nor did the rule prohibit him from testifying (as he did in the suppression motion) that he was in severe pain during the interrogation. Military Rule of Evidence 707 did not prohibit appellant from telling the court-martial that: his interrogator told him that he was lying; he was told he was prohibited from claiming a lack of memory; or he must answer questions "yes" or "no." Finally, the rule did not prohibit appellant from testifying, consistent with his suppression motion testimony, that he confessed because he wanted to end the interrogation and did not think he would be allowed to leave until he gave law enforcement what they wanted.

(JA 7). To the extent appellant believed Mil. R. Evid. 707 or the military judge's decision excluded more evidence than it did, that is not error attributable to the military judge. All of this evidence could have been admitted at the court-martial to refute the voluntariness and reliability of his statement. Appellant would have been required to testify about this evidence, but he elected not to. Although SA RR did testify, defense elected not to bring up any of this evidence to discredit him on cross-examination. (JA 259–62). Rather than attacking the statement, the defense strategy instead focused exclusively on countering the element of specific intent based on appellant's voluntary intoxication. Relative to all of this other factual evidence that could have been presented, the polygraph evidence was fairly immaterial.

The immateriality of the polygraph evidence in appellant's case is especially pronounced when compared to *Wheeler*. In *Wheeler*, the appellant's confession

was the only direct evidence the government had to prove its case. Recognizing this, the defense had to use every avenue possible to try to attack its reliability, which included a Sixth Amendment challenge to Mil. R. Evid. 707.

In the instant case, the government still had the eyewitness testimony of Ms. AH as direct evidence of appellant's misconduct. Moreover, the military judge's denial of the motion did not prevent appellant's defense team from pursuing what apparently was their strategy all along, namely countering specific intent with the defense of voluntary intoxication.

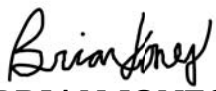
D. The quality of the excluded evidence was not superior to the other admissible evidence available to appellant.

Finally, the quality of the excluded evidence was, at best, equal to the quality of the other wide range of admissible evidence available to appellant. For example, appellant could have testified in his own words about the physical pain he was suffering, the mental fatigue he was experiencing, and how after several hours of law enforcement not accepting his answer that he could not remember anything, he finally gave in and just told them what they wanted to hear so he could leave. Appellant could have portrayed SA RR as a bully who overbore his will. This could have come from appellant's own words and a more thorough cross-examination of SA RR. The quality of this kind of evidence, which was readily available to appellant notwithstanding the military judge's ruling, was as

good as and likely better than evidence about appellant's polygraph. Accordingly, because all four prejudice factors weigh in the government's favor, the government has met its burden by showing that any error by the military judge was harmless beyond a reasonable doubt.

Conclusion

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



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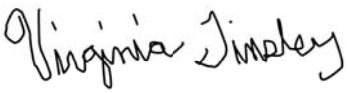

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2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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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 on this 6th day of October, 2018 and contemporaneously served electronically on appellate defense counsel.

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