IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. JUSTIN D. STEEN Boatswain's Mate Third Class U.S. Coast Guard, Appellant	APPELLEE'S BRIEF Crim. App. Dkt. No. 1464 USCA Dkt. No. 20-0206/CG

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

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Issue Presented

MRE 404(b) PROTECTS THE ACCUSED'S RIGHT TO A FAIR TRIAL BY EXCLUDING PREJUDICIAL PROPENSITY EVIDENCE. THE MILITARY JUDGE ERRONEOUSLY ADMITTED PROPENSITY EVIDENCE AND INSTRUCTED THE MEMBERS TO CONSIDER EVIDENCE FOR AN IMPROPER PURPOSE. DID THIS ERROR PREJUDICE THE APPELLANT?

Statement of Statutory Jurisdiction

This Court has jurisdiction over this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

Contrary to his pleas, a special court-martial composed of members with enlisted representation, convicted Appellant of wrongful introduction and wrongful distribution of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2016) . Appellant was sentenced to 15 days confinement, reduction to E-1, and a bad conduct discharge. J.A. at 12. The Coast Guard Court of Criminal Appeals (CGCCA) affirmed the findings and sentence. *United States v. Steen*, No. 1464, 2020 WL 808380, at *5 (C.G. Ct. Crim. App. Jan. 15, 2020); J.A. at 9.

Statement of Facts

On November 6, 2017, two days after the charged acts, Appellant began a text message exchange with his friend Ishiah and sister Brittany about obtaining and using marijuana. J.A. at 264-65, 456. Appellant sent text messages acknowledging he still needed "green," stating "Shit I need to stop but I truly enjoy it," in reference to marijuana, stating "I want to smoke!!!!", asking "who got the bud though?", and acknowledging he needed marijuana "Shit asap!!! Lol." J.A. at 456-60. The text messages were admitted during the Government's rebuttal case. J.A. at 301-02.

1. Appellant's introduction and distribution of marijuana

Appellant's case began with another member being caught with marijuana. J.A. at 50. On November 8, 2017, the Virginia Beach police department stopped then Seaman Apprentice (SA) Darren Harris and found marijuana in his vehicle. J.A. at 50. SA Harris informed the police that Appellant sold him the marijuana. J.A. 77-78. That day, the Virginia Beach police informed Coast Guard authorities about their stop of SA Harris. J.A. at 49-50. The next day, Coast Guard Investigative Service (CGIS) Special Agents interviewed SA Harris. J.A. at 79. SA Harris told the CGIS agents that Appellant had sold him the marijuana. J.A. at 79.

SA Harris testified that in early November 2017, he was attempting to separate from the Coast Guard by failing a drug test. J.A. at 82-83. SA Harris talked to different crew members aboard his assigned cutter, the Coast Guard Cutter FORWARD (FORWARD), about where he could obtain marijuana, and Appellant was the only person who knew where to obtain it in Virginia. J.A. at 83. On November 3, 2017, SA Harris texted Appellant, asking where he could obtain marijuana. J.A. at 83. At that time, Appellant was on terminal leave, and about to execute his PCS move back home to Florida. J.A. at 205-07, 280.

SA Harris testified that on November 4, 2017, Appellant, who had been SA Harris' previous supervisor aboard FORWARD, sent him a text message stating Appellant had marijuana he could provide to SA Harris. J.A. at 88-89. When he received the text message, SA Harris on-duty was aboard FORWARD, which was moored at Coast Guard Base Portsmouth. J.A. at 88. Over the span of multiple phone calls, Appellant instructed SA Harris to walk to a parking lot onboard Base Portsmouth, where Appellant was waiting in his car. J.A. at 89, 137-38, 145. Following Appellant's instructions, SA Harris disembarked the cutter, walked down the pier, and got in Appellant's car. J.A. at 90. CGIS Special Agent Denise Andersen testified that she conducted a logical extraction of Appellant's phone

pursuant to a search authorization, and discovered four phone calls between Appellant and SA Harris on November 4, 2017. J.A. at 137-38, 145.

Once in the car, SA Harris testified that he told Appellant he did not have any cash to pay for the marijuana. J.A. at 93. Appellant then drove SA Harris to the Base Portsmouth exchange so he could extract money from the ATM. J.A. at 93-95. Appellant testified SA Harris was only in the exchange two or three minutes before returning to the car. J.A. at 229. SA Harris removed $80, went back to Appellant's car, and gave Appellant $65 to pay for approximately four grams of marijuana. J.A. at 95, 125. Appellant then drove SA Harris to his truck, which was parked in a parking lot on base, and SA Harris placed the marijuana in the center console, and returned to FORWARD. J.A. at 96, 100. Video surveillance verified SA Harris's testimonial account of his movements throughout Base Portsmouth. J.A. 88-101. SA Harris was charged with possession of marijuana, but entered into a pretrial agreement with the Convening Authority where he received testimonial immunity and his offense was sent to nonjudicial punishment. J.A. at 118.

Appellant testified that instead of providing SA Harris marijuana, he had planned to give SA Harris hair care products to give to another Coast Guard member stationed aboard FORWARD, Seaman (SN) Stephen Hind. J.A. at 216-17, 221. Appellant received the package of hair care products in the mail for SN Hind

in October 2017, while SN Hind was deployed aboard FORWARD.[1] J.A. at 215. Appellant testified that he attempted to deliver the package to SN Hind multiple times but they were unable to find a time to meet. J.A. at 215. However, SA Harris testified he never discussed hair care products with Appellant. J.A. at 111. Appellant testified he had no personal relationship with SA Harris, and that he never gave SA Harris his personal cellular phone number, or that if he did it was when he was providing his number to multiple non-rates. J.A. at 201-03, 220-21, 238, 256.

Appellant testified that SA Harris texted him on November 3, 2017, asking if Appellant knew anyone who could get him marijuana. J.A. at 215-18, 257. According to Appellant, this was the first time and SA Harris had interacted in a "non-professional" manner. J.A. at 215-18, 257. Appellant testified he asked an acquaintance who he knew smoked marijuana if SA Harris could contact him to buy marijuana. J.A. at 218. While that acquaintance never got back to Appellant, Appellant testified he reached out to SA Harris to see if SA Harris could take the

[1] Appellant had been aboard FORWARD during the deployment but returned to Base Portsmouth in October of 2017 before the cutter because he was separating from the Coast Guard. J.A. at 205-06.

package for SN Hind and leave it on FORWARD.[2] Appellant never made SN Hind aware of this plan. J.A. at 273.

Appellant testified he arranged to meet SA Harris on base on November 4, 2020. J.A. at 223. Once on Base Portsmouth, Appellant testified he met SA Harris in the main base parking lot. J.A. at 224. Appellant testified that just as SA Harris arrived at his vehicle, he realized he had received a text message from SN Hind asking if Appellant could mail the package to SN Hind's father's house. J.A. at 225. So when SA Harris got in his car, Appellant testified that he apologized for making SA Harris walk out to his car for no reason, drove SA Harris to the exchange, and then back to SA Harris' truck. J.A. at 225-29. During his direct examination, Appellant also testified that the videos played by Trial Counsel (TC) and narrated by SA Harris were accurate, including the video that depicted SA Harris using the ATM at the exchange. J.A. at 224, 255. Appellant never mailed, or otherwise gave, the package to SN Hind. J.A. at 233-34.

SN Hind, who lived on Base Portsmouth, testified that he ordered a hair care product online, and had it shipped to Appellant's off base residence because it was faster than the mailing distribution system on base. J.A. at 178. After FORWARD

[2] While FORWARD had returned to Base Portsmouth, at the time SN Hind was on leave, and not in Portsmouth. J.A. at 315-16.

returned from deployment around the end of October 2017, SN Hind attempted to meet Appellant to pick up his shipment, but he went on leave before he and Appellant had an opportunity to meet. J.A. at 180.

On direct examination, SN Hind testified that the only time he and Appellant communicated about the hair care products was in early November to figure out how to get SN Hind his shipment. J.A. at 180, 183-84. However, TC confronted SN Hind with a text message dated November 14, 2017, from Appellant stating Appellant would be in the area that day and he could bring the package to SN Hind. J.A. at 187. SN Hind acknowledged that it was possible he had not communicated with Appellant not until mid-November.[3] J.A. at 187. SN Hind also testified he had no knowledge of Appellant's plan to give the hair care products to SA Harris. J.A. at 188.

After both parties rested, Appellant was recalled by the Court and testified he deleted text messages from SN Hind, as well as messages from other crew members, after he was told SA Harris provided his name to the Coast Guard in connection with marijuana.[4] J.A. at 322-24. Appellant testified that he deleted text

[3] While Appellant left the Portsmouth area when he was on terminal leave, he was recalled on November 13, 2017. J.A. at 231.
[4] According to Appellant, other crew members aboard the FORWARD told him about the ongoing investigation. J.A. at 323.

messages because he did not want other members to be involved in an investigation. J.A. at. 322-23.

2. Pre-trial and trial proceedings

Prior to trial, Appellant filed a "Motion to Suppress Pursuant to M.R.E. 404(b)" any 'text message[s] made to 'Brazil,' 'Ishiah,' and 'Brittany,' on or after 4 November 2017." J.A. at 399. The text messages Appellant sought to exclude included the texts sent on November 6, 2017, where Appellant exchanged messages with his sister, Brittany, and friend Ishiah, seeking to procure marijuana. J.A. at 455-60. Treating it as a motion *in limine*, the Military Judge granted Appellant's motion, and precluded the Government from entering the text messages under M.R.E. 404(b). J.A. at 43-44. After his ruling, the Military Judge made clear that he would reconsider his ruling if Trial Defense Counsel (TDC) opened the door to the evidence at trial. J.A. at 44.

At trial, Appellant testified in his own defense. J.A. at 198. During direct examination, TDC asked Appellant how many drug tests he had taken in the Coast Guard, and whether he had ever failed a test. J.A. at 234-35. Appellant testified he had taken 12-15 tests and had never failed. J.A. at 234-35. Before beginning the cross-examination, TC requested that the Military Judge reconsider his ruling excluding the text messages that Appellant had sent to Ishiah and Brittany. J.A. at

239-40. TDC objected, arguing the messages were irrelevant to the charged acts, and had a low probative value. J.A. at 242-43. The Military Judge reconsidered his ruling and found that, pursuant to M.R.E. 404(b) and 608(b) and (c), Appellant could be cross-examined about the text messages he sent to Ishiah and Brittany regarding marijuana. J.A. at 240-48, 296-302.

During cross-examination, before TC asked Appellant about any text messages, TC had the following exchange with Appellant:

> TC: And it's your testimony, and it is your testimony you had no involvement with marijuana during your time in the Coast Guard?
>
> Appellant: That is affirmative.
>
> J.A. at 258.

Only after that exchange did TC ask Appellant questions regarding his text messages to Ishiah and Brittany. J.A. at 264-68. Appellant acknowledged he sent messages asking his friend for marijuana, exchanged messages regarding where he could get marijuana, expressed a desire to smoke marijuana, and acknowledged he should stop smoking marijuana but that he "truly enjoy[ed] it." J.A. at 264-66. Appellant claimed that that his text message to Brittany where he stated "I want to smoke!!!" was not about smoking marijuana, but smoking tobacco using a hookah. J.A. at 281-82. Despite acknowledging he sent the text messages, Appellant denied

conducting a web search on his cellular telephone for a "Newport News Weed seller – buy, sell, trade, classifieds, backpage.com." J.A. at 267, 461.

After Appellant rested his case, TC called CGIS Special Agent Denise Andersen, who had conducted the forensic logical extraction of Appellant's cellular phone. J.A. at 295, 299. She testified she was unable to find evidence of any texts between Appellant and SN Hind sent or received on November 4, 2017. J.A. at 299-300. Through Special Agent Andersen, TC also moved to admit Prosecution Exhibit 5, which showed the text messages between Appellant and Ishiah and Brittany. J.A. at 301-02. TDC objected to the admission of Prosecution Exhibit 5 on relevance grounds because it included the internet search for the marijuana dealer in Newport News. J.A. at 297. TDC also stated he "renewed [his] objection on 403 grounds." J.A. at 298. The Military Judge found Prosecution Exhibit 5 was proper rebuttal evidence to Appellant's testimony he had taken 12-15 urinalysis exams and never failed. J.A. at 298-99.

Summary of Argument

The Military Judge did not abuse his discretion in admitting the text message evidence. The evidence of Appellant's internet search for a marijuana dealer on October 22, 2017, combined with the text messages indicating Appellant was seeking marijuana on November 6, 2017, demonstrate Appellant had a plan to

maintain a continuous supply of marijuana. The text messages also demonstrate Appellant had a motive to misrepresent his involvement with marijuana while in the Coast Guard. Finally, the text messages validly rebut Appellant's statement he had no involvement with marijuana while in the Coast Guard, and impeach his credibility.

Even if the text messages were erroneously admitted, Appellant was not prejudiced by their admission. The Government has met its burden to show the text messages did not substantially influence the member's findings. The Government presented a strong case through SA Harris's testimony, which was substantially corroborated by surveillance video evidence. Conversely, Appellant presented a weak, implausible, and uncorroborated case. The text messages were not material to the charged misconduct as they did not provide "new ammunition" to the Government, were not relied upon by the Government to prove any central element of the charged misconduct, and the Military Judge's instruction prohibited the members from using the text messages for propensity purposes. Finally, the text messages were low quality evidence as they lacked sufficient impact to support a prejudice finding.

Argument

I. THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BECAUSE MULTIPLE THEORIES OF ADMISSIBILITY ALLOWED

THE GOVERNMENT TO INTRODUCE APPELLANT'S TEXT MESSAGES SEEKING MARIJUANA.

Standard of Review

This Court "…reviews a military judge's decision to admit evidence for an abuse of discretion." *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)). "A military judge abuses his discretion when his 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." *Frost*, 79 M.J. at 109 (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)).

Discussion

The Military Judge did not abuse his discretion because Appellant's text messages to Ishiah and Brittany were admissible under M.R.E. 404(b), 608(c), and to rebut Appellant's testimony on direct and cross-examination pursuant to *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989).

First, under M.R.E. 404(b), the text messages were admissible as evidence that Appellant had a plan to secure continuous supply of marijuana. In *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), this Court's predecessor outlined the three-part test required to show evidence admissible as uncharged

misconduct. Applying the first part of the *Reynolds* test, Prosecution Exhibit 5 clearly shows Appellant texted his friend and sister regarding marijuana. J.A. at 455-60. Applying the second part of the *Reynolds* test, the text messages provide evidence Appellant distributed marijuana to SA Harris. Not only was Appellant attempting to procure marijuana days after he distributed to SA Harris, but weeks before. On October 22, 2017, Appellant conducted an internet search seeking marijuana, searching for "Newport News Weed seller – buy, sell trade classifieds, - backpage.com." J.A. at 461. Appellant does not now contest the admission of the internet search. *See generally* App. Br. Then on November 4, 2017, Appellant distributed marijuana to SA Harris. J.A. at 12. And two days after distributing marijuana to SA Harris, Appellant sought out more marijuana. J.A. at 455-60. Appellant's actions show a plan to continually acquire and distribute marijuana, making the text message evidence admissible under M.R.E. 404(b). Finally, applying the third part of the *Reynolds* test, the probative value of the text messages was high, and not substantially outweighed by unfair prejudice.

Second, under M.R.E. 608(c), the text messages were admissible to show Appellant's motive to misrepresent his involvement with marijuana while in the Coast Guard. The Military Judge allowed TC to impeach Appellant regarding the subject matter of the text messages to Ishiah and Brittany because Appellant

testified on direct examination he did not distribute marijuana to SA Harris, he only had one conversation with SA Harris, and that he was not meeting SA Harris to distribute marijuana. J.A. at 245-46. But before TC confronted Appellant with the text messages, Appellant unequivocally affirmed he had no involvement with marijuana while he was in the Coast Guard. J.A. at 258. As the Military Judge acknowledged, the admission of the text messages showed Appellant's motive to misrepresent his conduct regarding the charged acts, because Appellant's desire to seek out marijuana two days after the charged acts tended to show that SA Harris did not randomly send a text message to Appellant asking for marijuana. J.A. 247-48. Additionally, the Appellant's broad-based denial of any involvement with marijuana while in the Coast Guard only provided additional testimony on which the Government could impeach Appellant.

Third, the text messages were admissible to rebut Appellant's testimony on direct and cross-examination pursuant to *Trimper,* 28 M.J. 460. In *Trimper*, this Court's predecessor court upheld the admission of urinalysis results because that evidence rebutted Captain Trimper's testimony on cross-examination that he had never used drugs. 28 M.J. at 467. If an accused "testifies that he has never engaged in conduct like that for which he is being tried is offering evidence that he possesses the 'pertinent trait of' abstaining from such conduct. A logical—and

permissible—rebuttal by the prosecution is to show that the accused previously has engaged in similar misconduct." *Id*. Here, the text messages in Prosecution Exhibit 5 rebutted Appellant's broad-based claim on cross-examination of non-involvement with marijuana during his time in the Coast Guard, a relevant character trait subject to rebuttal. J.A. at 258.

The lower court concluded the Military Judge abused his discretion because during cross-examination, Appellant acknowledged sending the text messages leaving nothing for the texts messages in Prosecution Exhibit 5 to rebut, and the text messages were irrelevant to the charged acts. J.A. at 6. However, in *Trimper*, this Court's predecessor held that extrinsic evidence was admissible both to rebut Captain Trimper's statements, "as well as to impeach his credibility." 28 M.J. at 467.

The text messages served both purposes here. It was immaterial that Appellant acknowledged sending the text messages on cross-examination because, just like *Trimper*, the text messages rebutted Appellant's pertinent character trait he put in issue, his non-involvement with marijuana. J.A. at 258. While TC's impeachment of Appellant during cross-examination attacked his credibility by showing he did have involvement with marijuana while in the Coast Guard, the impeachment alone did not rebut Appellant's character trait because it could not be

used as substantive evidence. *See Trimper*, 28 M.J. at 467 (distinguishing rebuttal evidence from impeachment evidence). Under *Trimper* and M.R.E. 404(a)(2)(A), the Government properly rebutted Appellant's self-proclaimed and broad-based character trait through the admission of Prosecution Exhibit 5.

The Military Judge's decision to admit the text messages was within the "range of choices reasonably arising from the applicable facts and the law." *Frost*, 79 M.J. at 109 (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)). The web search and text messages provide evidence Appellant had a continuous plan to procure and distribute marijuana. The text messages also show Appellant had a motive to misrepresent his interactions with SA Harris, because they would show his involvement with marijuana while in the Coast Guard. Finally, the texts rebut Appellant's pertinent claimed character trait of non-involvement with marijuana. The lower Court erred by not deferring to the Military Judge's reasonable application of M.R.E. 404(b) and 608 to this case. The Government concedes that while an appellate court may differ in its interpretation of character evidence, under the appropriate standard of review, this Court should find that the Military Judge did not abuse his discretion.

II. ASSUMING *ARGUENDO* THE MILITARY JUDGE ERRED IN ADMITTING THE TEXT MESSAGES, THE GOVERNMENT HAS MET

ITS BURDEN TO SHOW THE ADMISSION WAS HARMLESS UNDER THIS COURT'S FOUR-PART PREJUDICE TEST.

Standard of Review

This Court reviews *de novo* the question of whether a preserved non-constitutional error "had a substantial influence on the members' verdict in the context of the entire case." *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010) (quoting *United States v. Harrow*, 61 M.J. 91, 98 (C.A.A.F. 2007)).

Discussion

Applying this Court's four-part prejudice test, the Government has met its burden to show that the admission of Appellant's text messages *did not* substantially influence the members' findings. *See Frost*, 79 M.J. at 112. When prejudice is alleged based upon erroneous admission of evidence the Government bears the burden of demonstrating such admission was harmless. *Id.* at 111 (citing *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014)) (internal quotations omitted). The test for non-constitutional evidentiary errors is whether the error had a substantial influence on the findings. *Frost*, 79 M.J. at 111 (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)). This Court applies a four-part test to determine prejudice: (1) the strength of the Government's case; (2) the strength of the defense's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Frost*, 79 M.J. at 112 (citing *Kohlbek*, 78 M.J.

at 334); *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)); *See also United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985) (announcing this prejudice test initially).

Here, the four factors favor the Government and support a finding that Appellant was not prejudiced by the admission of the text message evidence. First, the Government presented a strong case and substantially corroborated case. Second, Appellant presented a weak, implausible, and uncorroborated case. Third, the text messages were not material to the charged acts. Finally, the text messages were of low quality because they had little impact. Applying this Court's four-part prejudice test indicates that the admission of the text message evidence did not "materially prejudice" Appellant's "substantial rights" under Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2016).

1. The Government presented a strong case, proving Appellant's guilt separately from the introduction of the text messages.

The Government presented a strong case against Appellant separately from the text messages in Prosecution Exhibit 5. SA Harris's testimony, corroborated by the video surveillance, showed SA Harris did not have a motive to falsely allege Appellant of selling him marijuana.

The timeline of events which SA Harris testified to was corroborated by surveillance video, which Appellant conceded was accurate. J.A. at 89-100, 254-

55. SA Harris testified that around 1300 on November 4, 2017, Appellant told SA Harris that he was parked in a parking lot located near FORWARD. J.A. at 89. SA Harris then testified that he walked from FORWARD to meet Appellant in Appellant's blue Dodge Charger that was parked near FORWARD in parking lot eleven for the purpose of "picking up marijuana that [Appellant] had bought for [Harris]." J.A at 90-92. The surveillance video from Base Portsmouth on November 4, 2017, shows SA Harris walking to parking lot eleven and into a blue Dodge Charger. J.A. at 92.

SA Harris then testified he told Appellant he needed to go to the exchange to "pull out cash so we [Harris and Appellant] can exchange [the cash for marijuana]." J.A. at 93. The video shows SA Harris at the exchange withdrawing cash. J.A. at 95. SA Harris then testified that he got back into Appellant's vehicle, exchanged $65 for the marijuana, and Appellant drove SA Harris back to parking lot eleven where SA Harris's truck was parked. J.A. at 96. The video showed SA Harris's truck parked in parking lot eleven with Appellant's Charger nearby, which was not parked in a parking spot. J.A. at 100. SA Harris testified that he got out of Appellant's car, opened the door to his truck, and placed the marijuana he had just bought from Appellant inside. J.A. at 100. SA Harris testified he needed to store the marijuana in his truck because he was concerned others on FORWARD would

smell the marijuana if he brought it back to the ship. J.A. at 100. The video showed SA Harris getting out of Appellant's car and opening the door to his truck. J.A. at 100.

Appellant testified that the video footage and the description SA Harris gave were accurate. J.A. at 254-55. With the exception of the actual marijuana transaction, the video surveillance corroborated each detail of Harris's testimony. Based upon this testimony and corroborating evidence, the Government based its strong case against Appellant without the use of the text messages.

Appellant sought to undermine SA Harris's credibility, but this effort was not persuasive. J.A. at 106-09, 111-21. While SA Harris testified under a grant of testimonial immunity, he had a significant incentive not to lie, as lying would be cause for the Convening Authority to withdraw from his pretrial agreement and potentially refer his drug possession charge to a court-martial, as well as add a perjury charge. J.A. at 76, 119, 124. SA Harris and Appellant had a prior professional relationship as confirmed by SA Harris on cross-examination and redirect as well as by Appellant during cross-examination. J.A. at 106, 122, 256. SA Harris did not have any animosity towards Appellant, but rather trusted Appellant and looked up to him as a mentor. J.A. at 83-84, 106, 122. Appellant did not provide any basis to show SA Harris had motive to accuse Appellant of selling

marijuana, and there is none apparent from the Joint Appendix. *See* J.A. at 201-93. The Government showed that SA Harris had no reason to falsely allege Appellant had sold him marijuana, and in fact had a strong motive to tell the truth at Appellant's court-martial.

2. Appellant presented a weak case, arguing an implausible theory of why Appellant was onboard Base Portsmouth

Appellant presented an implausible case-in-chief. The strength of Appellant's defense's case is evaluated by asking whether his theory of the case was feeble or implausible. *Weeks*, 20 M.J. at 25 (citing *United States v. Lewis*, 482 F.2d 632, 646 (D.C. Cir 1973)).

Appellant's theory was highly implausible, undermining arguments he was prejudiced by admission of the text message evidence. Appellant asserted at trial that he only came onboard Base Portsmouth to deliver a package of hair care products to SN Hind via SA Harris. J.A. at 223, 227. Appellant never told SN Hind about this plan. J.A. at 181, 188-89. Despite testifying to not having anything but a prior professional work relationship with SA Harris, Appellant testified that he asked SA Harris to deliver the package to SN Hind after SA Harris had contacted

Appellant, seemingly out of the blue,[5] to acquire marijuana.[6] J.A. at 203, 216-17, 218. This initial contact was followed by four phone calls between Appellant and Harris between 1127 and 1308 on November 4, 2017. J.A. at 142, 145. Appellant testified the calls were to arrange meeting SA Harris on Base Portsmouth to drop off the box of hair products for SN Hind. According to Appellant this required multiple calls due to Appellant's inability to receive some calls while driving. J.A. at 221, 223-24.

After four phone calls to arrange the meeting with SA Harris, Appellant testified that, coincidentally, he realized he had received a text message from SN Hind moments before SA Harris got in his car. J.A. at 225. That text message requested Appellant mail the hair care products to SN Hind's father's house.[7] J.A.

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[5] SA Harris testified that he had previously discussed his plan to get discharged from the Coast Guard for drug use with Appellant. J.A. at 83, 107. SA Harris testified that he did not know of anyone in Virginia to buy marijuana from, but, after asking around FORWARD's crew, learned that Appellant could help him procure marijuana. J.A. at 83. SA Harris's testimony regarding his conversations with Appellant about getting out the Coast Guard by engaging in misconduct refutes Appellant's claim that Appellant's relationship with SA Harris was professional.

[6] Appellant testified on direct examination that instead of informing SA Harris he could not help obtain marijuana, or relaying his request to CGIS, he reached out to an acquaintance to see if his acquaintance could provide marijuana to SA Harris. J.A. at 218-20.

[7] SN Hind could not accurately state when he and Appellant conducted this text message exchange. SN Hind acknowledged communications where Appellant

at 225. At that point, Appellant was in a parking lot within walking distance to FORWARD. J.A. at 227. Appellant knew SN Hind would return to FORWARD within weeks, and knew that SA Harris was going back to FORWARD after their meeting. J.A. at 215-17, 227. But rather than give SA Harris the box of hair products for SN Hind, the sole purpose of his claimed presence on Base Portsmouth, Appellant testified that he just kept the package. J.A. at 227. Appellant testified that he offered SA Harris a ride to the nearby exchange, and then brought SA Harris back to his truck, where SA Harris appeared on video to place something inside. J.A. at 99-100, 228-230. SA Harris testified he placed the marijuana he purchased from Appellant in his center console, prior to returning to FORWARD. J.A. at 99-100, 228-30.

Appellant could have walked the package a short distance to FORWARD, but declined to do so. J.A. at 274-75, 292-93. Appellant testified he simply did not want to interact with anyone onboard the cutter. J.A. at 292-93. But Appellant was willing to interact with SA Harris on November 4, 2017, and, by retaining the package, opted for future interactions with SN Hind. And despite all of these efforts, Appellant admitted that he never delivered the package to SN Hind, and

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agreed to mail SN Hind the package of hair products could have occurred in mid-November 2017, after Appellant's charged misconduct. J.A. at 187.

SN Hind testified he was never made aware of any plan to give the package to SA Harris. J.A. at 188-89, 234.

Appellant's theory of the case was implausible. It fails to believably explain why Appellant did not take the easiest course of action. Appellant had taken the time to coordinate with SA Harris over the course of days and had driven out of his way to get to Base Portsmouth.[8] J.A. at 217, 220. Appellant knew that SN Hind would soon be returning to FORWARD, moored just steps away from where Appellant had parked on Base Portsmouth. J.A. at 222. Appellant conceded that SA Harris, who would be imminently returning to FORWARD, *was already at Appellant's vehicle*. J.A. at 227. Despite Appellant's claimed plan necessitating at least four separate phone calls, his driving out of the way to drive on base, his delay in departing the Portsmouth area, Appellant then testified that he elected to keep the package and mail it to SN Hind's father. J.A. at 226-27. Despite all this claimed coordination, Appellant admitted that he, in fact, never mailed the package to SN Hind's father and SN Hind never received it. J.A. at 233-34.

[8] Appellant indicated he departed his apartment in Newport News, VA and planned to go to get his personal vehicle weighed in Chesapeake, VA prior to departing the Portsmouth area for North Carolina. J.A. at 229, 258-59, 287. Appellant testified that, according to his case, he did not come to Base Portsmouth for any other reason than to drop off SN Hind's package to SA Harris, J.A. at 275, indicating he went out of his way to go to Base Portsmouth rather than proceed from Newport News to Chesapeake to North Carolina directly.

Further, SN Hind's testimony did not support Appellant's assertion he received a text message from SN Hind on November 4, 2017. Appellant testified that he received a text message from SN Hind during a 20-minute period on November 4, 2017 between leaving his Newport News home and checking his phone onboard Base Portsmouth, a text message that completely changed Appellant's plan to give the package of hair products to SA Harris to have him deliver the package to SN Hind. J.A. at 225-27, 318. SN Hind testified he communicated with Appellant about mailing the hair care products in early November when he was on leave. J.A. at 180-81. But on cross-examination, SN Hind admitted his communications with Appellant regarding exchanging the hair care products could have taken place on November 14, 2017. J.A. at 187. Regardless, SN Hind's testimony about his discussions with Appellant concerning the delivery of the package was imprecise and confusing, including the claimed agreement to have Appellant mail the package to SN Hind's father. J.A. at 186-89.

Importantly, no evidence of the critical November 4, 2017, text message from SN Hind to Appellant was found on Appellant's phone. J.A. at 322-23. Appellant testified to having deleted these texts and others from his cell phone upon finding out he was under investigation. J.A. at 322-23. Having no exact evidence of when SN Hind may have asked Appellant to mail the package of hair

products to his father's home and given the shifting timeline, SN Hind's testimony at most proves that *at some point* Appellant agreed to mail SN Hind the package. It does *not* prove that Appellant agreed to do so *at the critical time* when SA Harris was approaching Appellant's car to allegedly pick up the package. SN Hind's inexact timeline does not support Appellant's defense theory, undermining its plausibility.

Appellant's defense theory was highly implausible, refuting the most explicable and easiest course of action, and failed to undermine the Government's case. An implausible defense case weighs against finding prejudice due to erroneously admitted evidence. *Weeks*, 20 M.J. at 25 (citing *Lewis*, 482 F.2d at 646). Here, Appellant's implausible and unsupported case weighs against finding he was prejudiced by the admission of the text messages.

3. The text messages were not material to Appellant's introduction and distribution charges as they were not "new ammunition," but only served to further support impeaching Appellant's broad testimonial assertions of non-involvement with marijuana.

Appellant was charged with introducing and distributing marijuana. J.A. 16-19. The lower court properly found that the text message evidence was not material to the Government's case and therefore harmless. J.A. at 9.

a. The text messages were not "new ammunition."

Rather than being the sole evidence of Appellant's involvement with marijuana, the text messages represented a separate showing of Appellant's involvement, meaning the text messages were harmlessly repetitive evidence rather than harmful "new ammunition." When a fact is already obvious from testimony at trial and evidence would not provide "new ammunition" an errant admission of that evidence is likely harmless. *Yammine*, 69 M.J. at 78 (internal citations and quotations omitted).

In *Yammine*, evidence of computer file names, which were sexually explicit indicating they contained child pornography, were erroneously admitted as probative of the accused's propensity to engage in the charged sexual misconduct with a child. *Id.* at 71, 78. This Court found prejudice in part because the computer file name evidence "significantly strengthened" the Government's case and like evidence was found nowhere else in the record, rendering it harmful "new ammunition." *See id.* at 78-79.

Here, the text message evidence did not significantly strengthen the Government's case. Evidence that Appellant had an interest in marijuana was presented elsewhere in the record. SA Harris testified he discussed marijuana with Appellant, and that Appellant sold him marijuana. J.A. at 88-95. During cross-examination, Appellant admitted to texting his friend seeking marijuana. J.A. at

263. Additionally, Special Agent Andersen had also testified to finding an internet search on Appellant's phone from October 22, 2017, for a marijuana dealer, and the members were able to view that evidence in Prosecution Exhibit 5.[9] J.A. at 304, 461. In that way, the text messages were not "new ammunition," but simply information that the members had already heard from Appellant during cross-examination, as well as from Special Agent Andersen's testimony and evidence of the web search.

b. The Government did not rely upon the text message evidence to prove any central element of the introduction and distribution specifications.

The text messages on Prosecution Exhibit 5 were not central to the Government's case, lacking the substantial materiality necessary to support finding prejudice. Improperly admitted evidence has substantial materiality when that evidence goes to the heart of the matter in dispute. *See Frost*, 79 M.J. at 112. The Government relied primarily upon the testimony of Special Agent Capra, SA Harris, and Special Agent Andersen to establish Appellant's guilt. J.A. at 46-58, 75-104, 121-25, 131-52, 157-60. TC only briefly mentioned the text messages in his closing argument, dedicating a mere two sentences to them within the context of its longer recounting of why Appellant was guilty. J.A. at 352-53. TC did not

[9] Appellant does not contest evidence of Appellant's web search was admissible. *See* Br. of Appellant at 15-17, 19-24.

even mention the text messages in his rebuttal argument. J.A. at 386-91. As the text message evidence did not go to the heart of the introduction and introduction and distribution charge, it lacked substantial materiality, weighing against finding that Appellant was prejudiced by the erroneous admission of the text message evidence.

c. The Military Judge instructed the members not to use the text messages for propensity purposes, and this Court presumes members follow instructions.

The members were specifically instructed not to use the text message evidence for propensity purposes. "Court members are presumed to follow the military judge's instructions." *United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000) (citing *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)); *See United States v. Collier*, 67 M.J. 347, 355 (C.A.A.F. 2009) (presuming that members follow a military judge's instruction to consider evidence for a proper purpose).

In this case, the Military Judge expressly instructed the members not to consider the text messages for propensity purposes: "you may not conclude from [the text message] evidence that Petty Officer Steen is a bad person or has general criminal tendencies and that he therefore committed the offenses charged." J.A. at 337. Members are presumed to have appropriately followed the Military Judge's

instruction and not considered this evidence for an improper purpose. *Matthews*, 53 M.J. at 471. This was a straightforward instruction, taken directly from the Military Judge's Bench Book. Dep't of Army, Pam. 27-9, *Legal Services: Military Judges' Benchbook*, para. 7-13-1 (19 Sep. 2016) [*Benchbook*].

If this Court finds it was error to admit the text messages in Prosecution Exhibit 5, the United States concedes it was error for the Military Judge to instruct the members that they could consider the text message evidence even for the limited purpose "to prove the Government's allegation that [Appellant] allegedly needed to replenish his supply of marijuana . . ." J.A. at 337. But this alone should not result in relief, otherwise any errant admission of M.R.E. 404(b) evidence with accompanying instructions would automatically result in findings being set aside. In addition since the instruction the Military Judge gave specifically prohibited the members from considering the text message evidence for an improper propensity purpose, which he gave immediately after the limited non-character "resupply" instruction, the impact on the members was minimal. *See* J.A. at 337.

4. The quality of the text message evidence was lessened because it lacked powerful impact.

The text message evidence lacked the quality necessary to support a prejudice finding. The text messages lacked the powerful impact necessary to qualify as sufficiently high quality evidence to support finding prejudice. This

Court assesses the quality of evidence by measuring how powerful the evidence is, especially when that powerful impact is derived from emotional or heartfelt presentation. *See United States v. Fetrow*, 76 M.J. 181, 188 (C.A.A.F. 2017). When evidence is so powerful as to prompt improper propensity inferences related directly to the charged misconduct, that evidence is of higher quality, weighing towards finding prejudice. *See id.*

In analyzing the text messages' quality in this case, Appellant misapplies *Fetrow*. App. Br. at 23-24. In *Fetrow*, this Court found that the military judge erroneously applied M.R.E. 414 to allow testimony of Technical Sergeant Fetrow's daughter for propensity purposes. 76 M.J. at 186-87. Technical Sergeant Fetrow's daughter testified to three instances of uncharged prior child molestation by her father. *Id.* at 184-84, 188. This Court found the erroneous admission prejudiced Fetrow. *Id.* at 188. This Court focused its prejudice analysis on the high quality of Technical Sergeant Fetrow's daughter's testimony, noting it was "powerful because it was 'apparently emotional and heartfelt,' with [Technical Sergeant Fetrow's daughter] becoming visibly upset while testifying and telling the members that it was difficult for her to testify because she loved her father." *Id.*

The quality of the contested evidence in this case differs significantly from *Fetrow*. Here, text messages were presented in a cell phone extract report. J.A. at

455-60. The extract is convoluted and confusingly presented, requiring careful reading to find the contested evidence. J.A. at 455-60. That extract is incomparable in impact to the direct, emotional, and heartfelt testimony in *Fetrow* of a visibly upset child attesting to sexual abuse inflicted by her father in a case adjudicating similar charges of sexual abuse by her father. 76 M.J. at 184. The testimony in *Fetrow*, provided evidence to support the charged child sexual assault. *Id*. at 183. Here, the text messages primarily support impeachment and rebuttal of Appellant's broad claim of having no involvement with marijuana while on active duty. J.A. at 247, 264. The text messages here have very different impact, and thus much less quality, than the improper evidence in *Fetrow*. Lacking a sufficient impact, the text message evidence is of lesser quality, weighing against finding prejudice here.

Conclusion

Wherefore, the United States requests that this Court affirm the decision of the lower Court.

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