USCA Dkt No. 22-0052/AR
Crim.App. No. 20200735

IN THE UNITED STATES
COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee
v.
SAMUEL B. BADDERS,
First Lieutenant (O-2)
United States Army,
Appellant

REPLY TO GOVERNMENT RESPONSE TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Index

Table of Authorities

Page

Court of Appeals for the Armed Forces

Page

Service Courts of Criminal Appeals

Statutes and Rules

Miscellaneous

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FOR THE ARMED FORCES

UNITED STATES,	)	**REPLY TO GOVERNMENT**
Appellee	)	**RESPONSE TO**
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	)	**PETITION FOR GRANT OF**
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	)	
	)	
SAMUEL B. BADDERS,	)	
First Lieutenant (O-2)	)	
United States Army,	)	**January 26, 2022**
Appellant	)	

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

The Appellant, First Lieutenant Samuel B. Badders, respectfully submits this Reply to the Government's Response to the Supplement to Petition for Grant of Review pursuant to Rules 19(a)(5)(A) and 21(c)(1) of this Court's Rules of Practice and Procedure. Good cause exists to show that error occurred at trial that materially prejudiced 1LT Badders' substantial rights. The military judge did not abuse her discretion in ordering a mistrial. The record supports her findings of fact and she correctly applied the law. The Army Court erred in setting aside the

mistrial order. This Court should grant review, reverse the Army Court, and return the case to the convening authority.

Reply Argument

I.
THE ARMY COURT DID NOT HAVE JURISDICTION OVER THIS GOVERNMENT APPEAL OF THE MILITARY JUDGE'S POST-TRIAL ORDER GRANTING A MISTRIAL.

Granting Review – This Is a Novel Question

The Government does not articulate a single reason why this Court should not grant review of the jurisdiction issue.

As argued in the Supplement, the three lower court opinions finding jurisdiction are wrongly decided; this Court has not, but should, answer the question.

On the Merits – the Army Court Lacked Jurisdiction

A. A Dismissal Is Distinct From A Mistrial

The Government ignores the basic, fundamental difference between mistrials and dismissals. It also focuses only on the "termination" language, and fails to account for the full text of the statute: Government appeals only lie from, "An order or ruling of the military judge which

terminates the proceedings *with respect to a charge or specification*." Art. 62(a)(1)(A), UCMJ (emphasis added). While a dismissal order, either with or without prejudice, *does* terminate the proceedings with respect to a charge or specification, a mistrial does not.

When a military judge grants a motion to dismiss, that order "*terminates the proceeding with respect to that specification*. . . ." R.C.M. 907(a), R.C.M. 907(a) Discussion (emphasis added). In that event, the Government may appeal. Art. 62, UCMJ. Alternatively, if the convening authority wishes to proceed to a second trial immediately, "The charges must be re-preferred, investigated, and referred as though there were no previous charges or proceedings." *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014) (citations omitted).[1]

When a military judge grants a mistrial, however, the charge and specification are withdrawn from the court-martial and immediately returned to the convening authority, who may immediately refer it to

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[1] The Government ignores this controlling precedent and quotes the Coast Guard Court's erroneous language that, "dismissals may also not 'extinguish *all* proceedings for *all* time' because often an accused may be re-tried on the affected charges or specifications." Gov't Br., p. 28 (quoting *United States v. Flores*, 80 M.J. 501, 505 (C.G. Ct. Crim. App. 2020) (emphasis in original)).

another court-martial without re-preferral, a new preliminary hearing under Article 32, UCMJ, or other preliminary actions. R.C.M. 915(c)(1), (2), Discussion.

Our reading of the statute makes sense. Without a right to appeal a dismissal, the Government may lose many rights, but it loses nothing requiring appellate intervention from a mistrial.

B. The Civilian Statute Does Not Help the Government

While the civilian statute does permit a Government appeal of orders granting a new trial after verdict or judgment in addition to dismissals, the Government does not cite to a single civilian case interpreting the statute to authorize a Government appeal of a mistrial order. There is no support whatsoever for the claim that, "Just as the Criminal Appeals Act does not constrain jurisdiction solely to dismissals in federal cases, this court should likewise interpret Article 62(a)(1)(A), UCMJ, to not constrain jurisdiction solely to dismissals in courts-martial." (Gov't Br., p. 32). A new trial order is not at issue in the instant case. Neither the civilian nor military statute permits a Government appeal of a mistrial order.

C. Conclusion

The term "terminates the proceedings with respect to a charge or specification" is properly interpreted to broadly apply to all proceedings on the charge or specification, not just the immediate court-martial proceeding. The military judge's mistrial order withdrew the charge and specification from the court-martial and returned the case to the convening authority, who could elect to re-refer it. The mistrial order did not "terminate the proceedings with respect to a charge or specification" within the meaning of Article 62; thus, the Army Court lacked jurisdiction. Lower courts have addressed this issue, one with a strong and persuasive dissent, but this Court has not and should settle the issue.

II.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION WHEN SHE FOUND IMPLIED BIAS OF A MEMBER WHO, UNBEKNOWNST TO THE MILITARY JUDGE DURING TRIAL, MET WITH THE SJA, DSJA, AND COJ ON THE NIGHT BEFORE DELIBERATIONS BEGAN TO DISCUSS THE COMMAND'S EFFORT TO RESPOND TO SEXUAL ASSAULT BY "ERADICATING CORROSIVES" FROM THE UNIT.

Granting Review – The Army Court Did Not Follow the Law

The Government does not articulate any reason why this Court should not grant review of the implied bias issue.

As argued in the Supplement, the Army decided a question of law in a way that conflicts with applicable decisions of this Court, so review is warranted.

On the Merits – the Military Judge Did Not Abuse Her Discretion; the Army Court Simply Disagreed with Her

The military judge ruled that had she known about the meeting at issue, she would have granted the Defense request to re-open voir dire. App. Ex. LXV, p. 23. She further ruled that, "Since the court did not have this information, a perception was created that could lead members of the public to believe that the Accused did not receive a fair trial." App.

Ex. LXV, p. 23. These findings and conclusions are absolutely supported by the record and within her discretion. Her mistrial ruling was appropriate. The Army Court simply disagreed; this Court should reverse.

A. There was No Defense "Waiver"

As a preliminary matter, the Government is mistaken in its claim that 1LT Badders waived this issue. (Gov't Br., p. 34, 40-44).

1. Initial voir dire

The Government claims that because the member discussed his relationship with the OSJA during voir dire, the Defense was on notice that an improper meeting took place and should have challenged the member at that time. (Gov't Br., p. 34 ("Appellant did not challenge LTC CB for cause"); *see also* p. 48, 49 (failure to challenge during original voir dire)). This argument is nonsensical; the improper meeting at issue in this case had not yet taken place at the time voir dire was conducted. We acknowledge that the professional relationship between the Public Affairs Officer and the SJA is not per se disqualifying. That was not the point at the beginning of the trial. Unlike the cases the Government

cites, we are not arguing that there was a basis for a challenge during the initial voir dire in this case. Failure to challenge LTC CB then did not waive the instant claim, which involves an event that happened *after* voir dire was complete (and the peremptory challenges were exercised).

2. The Defense Request to Reopen

The Government next argues that the Defense request to reopen voir dire was deficient because they only asked to question the member about the article, and did not seek to question the member about any meetings he had with the SJA. (Gov't Br., p. 34, 40-44). We also respectfully, but strongly, disagree with this argument.

Although LTC CB did mention in voir dire that he met with members of the SJA staff in the course of his normal duties, it is not reasonable to expect that the Defense would even consider the possibility that such meetings would take place *on the night before deliberations in the court-martial on which the member was sitting.* This is especially so when a *topic of the meeting was sexual assault*, and the *court-martial involved allegations of sexual assault*. The Defense reasonably relied on the fact that the SJA, DSJA, and CoJ should know better than to meet

with a sitting member in the middle of the trial – the night before deliberations, no less – at least not without disclosing that it occurred.

In fact, even after being aware that he, the SJA, and the DSJA had met with the member to craft the response that led to the very article that formed the basis for the Defense request to reopen voir dire, the CoJ – who was in the courtroom at all relevant times – sat silent. Not only did he affirmatively choose not to disclose the relevant facts, he advised the trial counsel to oppose the Defense request to reopen voir dire.[2] (*See* R. at 633, 687.) In light of these facts, the Government's argument that, "With these disclosures on the record, the onus was on Appellant to further inquire about whether LTC CB met with OSJA staff in responding to the CS Article," rings hollow. The Defense brought the article to the military judge's attention and requested additional voir dire to explore issues of actual and implied bias. (R. at 562-67). Defense onus

[2] Knowing all of this, the SJA then detailed the CoJ to represent the Government at the post-trial hearing. (R. at 597, 671-72). The Defense moved to disqualify him based on the fact that he was a percipient witness on a matter to be litigated at the hearing, but the Government opposed and the military judge denied the motion. (R. at 683-86). Respectfully, this entire chronology would make a reasonable member of the public question the fairness of the military justice system.

or not, the Government's lack of candor to the court is what prevented the questions from being asked.

The Government knows there is a duty to bring such matters to the military judge's attention, and did so in this case regarding other matters. For example, during the original voir dire, trial counsel stated, "just for the court's awareness, [LTC P, a member] used the wrong latrine during the break, and the court reporter went out and corrected him on that. Just for everyone's situational awareness." (R. at 96). Even the bailiff had the wherewithal to tell the military judge when a member asked a question: "The panel member asked me to work on adjusting his seat because he was sitting too low." (R. at 364.). After both of those disclosures, the military judge properly asked both sides if they had any questions for the member at issue. It defies reason and common sense that a mid-trial meeting between the legal brass and a sitting member to discuss the Commander's plan to "eradicate corrosives" from the unit would not merit the same degree of disclosure as an errant latrine run or a broken chair.

The Government completely failed to disclose the existence of the 30-minute, after hours meeting between the member, the SJA, the DSJA, and the CoJ. As the military judge found in her post-trial ruling, that information would have caused her to grant the additional voir dire the Defense requested. It is unreasonable to assume that the Defense was somehow on notice of the meeting and thus waived an issue by failing to articulate it. Further, had the military judge allowed the requested additional voir dire about the press release, surely that questioning would have revealed the fact that the meeting took place and counsel would have explored that issue then.

The Government should have disclosed the meeting, even if "just for everyone's situational awareness." They did not. There was no waiver.

3. The Government Actually Waived This Argument

The Government had multiple opportunities – in writing, and at a live, in-person hearing – to make this Defense waiver argument at the trial level. The Government made no such argument, so the parties and the military judge did not have a chance to address it. The Government

is precluded from raising it now. *See United States v. Carpenter*, 77 M.J. 285, 288 (C.A.A.F. 2018) ("We conclude that there is a foundational problem with Appellant's position. Namely, the argument that Appellant now makes before this Court is not the argument he made before the military judge."); *United States v. Lloyd*, 69 M.J. 95, 101 (C.A.A.F. 2010) (noting "the general rule that a legal theory not presented at trial may not be raised for the first time on appeal absent exigent circumstances").

In other words, the Government has waived its waiver argument.

B. The Government *Did* Have a Duty to Disclose the Meeting

The Government argues, "The correct analysis is whether the government should have disclosed the conversation because it could have served as a basis for a challenge for cause or otherwise precluded effective voir dire. Here, Appellant conducted effective voir dire because he asked LTC CB about the nature of his PAO role, and Appellant concluded that there was no basis for a challenge for cause." (Gov't Br., p. 24). We agree that the Court should find that there was a duty to disclose. We do not agree that 1LT Badders "conducted effective voir dire."

We do not understand how the Government can argue that the voir dire that did take place was "effective" since the meeting at issue had not yet occurred. Because of the Government's failure to disclose the meeting, the military judge denied the request for additional voir dire entirely, so the Defense did not have an opportunity to voir dire on this matter at all. It was the Government's conduct that not only prevented "effective" voir dire, but *any* voir dire at all on this most relevant issue.

Despite the actual facts, for some reason the Government refers to the mid-trial meeting as "unrelated" to this court-martial. (Gov't Br., p. 24, 35, 50). Respectfully, this is not so. As argued in the Supplement, if the meeting concerned a press release about an upcoming golf tournament on post, or even a military justice issue regarding a larceny case, perhaps it would be "unrelated" to the instant case. But the Government ignores this argument, and glosses over the fact that *the meeting involved the convening authority's specific directive regarding what to do in a specific situation – eradicate corrosives from the unit* – and the member was about to begin deliberating the next morning on whether 1LT Badders was a corrosive to be eradicated. There is no

dispute that "corrosives" refers to extremism, suicide, *sexual assault*, and sexual harassment. The SGT EF case did involve suicide, but it was no secret that many believed his suicide occurred because his sexual assault claim was unsubstantiated. Before this meeting took place, LTC CB had heard quite a bit of evidence in the instant case that the complaining witness suffered mental health issues. (R. at 382-87). The issues discussed in the meeting – sexual assault, mental health, and the connection between them – and the issues in the case in progress (this one) were *very* much related.[3]

It is also interesting to note that the original email the member received from the reporter primarily asks about SGT EF's suicide; the only language in the email regarding sexual assault is, "They [the Congressional delegation] also said they were surprised that the sexual assault allegation that Sgt. [EF] made was discounted because of just a polygraph test. Was it only a polygraph test? Is that common practice, despite polygraph tests not being completely reliable and not being admissible in court?" (App. Ex. XXXVII, Attach. 4, p. 46-47). Despite

[3] The Government also never explained why the matter was "urgent" or could not have been handled by another staff member.

this, after consulting with the SJA, DSJA, and CoJ, the member sought fit to include in the press release the language from Operation Pegasus Strength, "which aims to eradicate corrosives in the 1st Cavalry Division." (App. Ex. XXXVII, Attach. 4, p. 45). Please remember that 1LT Badders was a member of the 1st Cavalry Division at the time of the court-martial.

While true, the military judge did not instruct the members that they could not attend to their normal duties during recesses, she *did* instruct them not to discuss the case prior to deliberation. She specifically instructed them, "Do not consult any source of law or information, written or otherwise, *as to any matters involved in this case* . . ." (R. at 43) (emphasis added). The member should have realized that the topic of the meeting was too close to the matters involved in the trial and he should not be engaged in that conversation, but in fairness, one can hardly blame him – he emailed the SJA about the press release from the courthouse during the trial before the court recessed for the day and met with the SJA, DSJA, and CoJ without them advising the member that it was improper. It was likely reasonable for the member, as a non-

lawyer, to think that if three experienced lawyers – the commander's lawyer included – thought it was permissible to meet with him on this topic, it was permissible.

He was wrong. They should have suggested to him that he should not reply to the reporter in the middle of a sexual assault trial if the substance of the reply involved the command's initiative to eradicate corrosives, to include sexual assault, from the unit; delegate the reply to another member on his staff who had experience interacting with the press (such as his NCOIC, a Master Sergeant); be excused from the panel in this case; or report the email traffic and meeting to the military judge. None of those occurred. ***The military judge should not have had to specifically instruct the members not to discuss the topic of the trial on which they were sitting with any lawyers, especially not the convening authority's lawyers.***

Finally, it is important to remember that the SJA himself, as well as his Deputy and the CoJ, were involved in this meeting with the sitting member. Both the SJA and the member were present at the Saturday meeting the convening authority called to initiate the implementation of

Operation Pegasus Strength. (App. Ex. LXV, p. 3; R. at 691). The DSJA was the lawyer from the office primarily responsible for dealing with Operation Pegasus Strength, which means he worked closely with the member, who was the Public Affairs Officer, on its initiation and implementation. (R. at 617, 636, 644-45). The CoJ directly supervised the trial counsel, was well aware of the Defense request to re-open voir dire because the trial counsel consulted him, advised trial counsel how to handle the situation when court resumed, and was present in the courtroom during the ensuing discussion. (R. at 633, 687).

Courts have held for more than 50 years that when the SJA or his staff, including trial counsel, is aware of matters that might lead to a valid challenge, a duty to disclose exists. *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *United States v. Glenn*, 25 M.J. 278, 280 (C.M.A. 1987) (reversing, holding that "Lieutenant Colonel Stine, the deputy and later acting staff judge advocate in this case, had an affirmative duty to inform the staff judge advocate, trial counsel, and defense counsel that Captain Hamlyn was related to him by affinity. His failure to do so has invited needless appellate litigation in this case.");

United States v. Schuller, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954) (error when the trial counsel and the law officer (now the military judge) failed to disclose to the accused that the law officer had previously served as the staff judge advocate to the convening authority in the accused's case).

The Rules for Courts-Martial also provide for this mandatory disclosure: R.C.M. 912(c) "requires the prosecutor to state any ground for challenge for cause against any member of which he or she is aware. *R.C.M. 912(c) does not presume that the trial counsel acts as the arbiter of the merits of a challenge*. Rather, the rule was designed to allow the defense to explore the *potential conflict* through voir dire, with the judge as the decision maker on the merits of the challenge." *United States v. Dunbar*, 48 M.J. 288, 290 (C.A.A.F. 1998) (emphasis added). In other words, it was not up to trial counsel to determine whether the meeting constituted grounds for a challenge; the potential existed and it was the military judge's job to rule on the challenge that the Defense told her they wanted to make based on the situation. The Government's multiple failures to disclose relevant information "made it impossible for the military judge to exercise [her] discretion." *Glenn*, 25 M.J. at 280.

Finally, it is worth noting the Army Rules of Professional Conduct for Lawyers prohibits the meeting that occurred in this case. *See*, specifically, Rule 3.5 Impartiality and Decorum of the Tribunal, Rule 3.3 Candor Toward the Tribunal, Rule 3.4 Fairness to Opposing Party and Counsel, and Rule 5.1 Responsibilities of Senior Counsel and Supervisory Lawyers, Army Regulation 27-26, Legal Services, Rules of Professional Conduct for Lawyers. It should not have happened, and when it did, it should have been disclosed.

None of the cases the Government cites involve a mid-trial meeting attended by the convening authority's lawyer, the deputy, and the Chief of Justice. None concern a discussion at the meeting regarding the convening authority's plan to eradicate corrosives from the unit – in the middle of a sexual assault trial. LTC CB, on the night before he begins deliberating whether 1LT Badders is a "corrosive," knowing that his commander wishes such corrosives to be "eradicated," is broadcasting this policy to the world on behalf of Fort Hood. None of those cases are instructive on the issue of whether such a meeting is proper, should be disclosed, or constitutes implied bias.

C. The Meeting was Grounds for a Challenge for Cause – the Military Judge Did Not Abuse Her Discretion

On the morning of September 24, 2020, at a time when the consequence of the failure to disclose the previous evening's mid-trial meeting through a complete and truthful proffer was available and could have avoided or mitigated the consequence of the failed disclosure, it is undisputed that the SJA, DSJA, and CoJ failed to make the required disclosure or take any remedial action.

Nor did these officers of the Court bring it to anyone's attention when they had actual knowledge of Defense's request to re-open voir dire based on the very press release that was the subject of the meeting. In fact, the Government objected to the request to re-open voir dire. (R. at 566).

Finally, the Government's pattern of attempting to avoid a full accounting of this issue becomes even more clear considering that the SJA failed to disclose the information entirely to Defense Counsel post-trial; the DSJA, when asked about the meeting, failed to mention that the CoJ was present at the meeting; and the CoJ denied the Defense request to produce him as a witness to answer Defense questions at the

hearing (although he was at the hearing as counsel) and to produce the other witnesses to the meeting (the SJA and the member). The doctrine of chances indicates that the evasive conduct was intentional. *United States v. Tyndale*, 56 M.J. 209, 213 (C.A.A.F. 2001) (citations omitted). The military judge was correct to find error.

This Court should not reward such conduct, especially when we know that had the military judge known about the previous night's 30-minute meeting (or "engagement," as the SJA characterized it during his testimony), she would have taken steps to ensure that the meeting would not influence the member and that 1LT Badders' trial was fair. Such steps would have included asking the member questions about the contact and soliciting challenges for cause. *See Modesto,* 43 M.J. at 319 ("The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge

ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.") (citation omitted).

Even if the Court finds that the conduct at issue does not meet the strict criteria set forth in the case law or any of the applicable Rules, it certainly violates the spirit of them. Contrary to the Government's claim that this was a "typical" occurrence,[4] the mid-trial meeting was at best, an event that the Government should have reported to the military judge. We know from the military judge's ruling that this was a material fact that influenced how she ruled on the Defense request to reopen voir dire.

The only thing that could have happened that would have been worse, actually or in appearance, would have been the convening authority himself coming into the deliberation room and telling the members to eradicate 1LT Badders. A reasonable member of the public would have a significant doubt about the fairness of 1LT Badders' court-martial based on these facts. The military judge properly found implied bias. The Government does not answer the argument that the Army

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4 Gov't Br., p. 44-45.

Court merely disagreed with the military judge, nor is the liberal grant mandate addressed in its Response.

Denying review, or granting review and affirming the Army Court, sends the message to soldiers and civilians that the secret meeting was lawful. It also condones the Government conduct which preserved the improper cloak of secrecy, offending the basic principles of military justice. The Court should grant review and reverse the Army Court.

III.
THE MISTRIAL ORDER WAS JUSTIFIED BASED ON THE CUMULATIVE ERROR OF TWO EVIDENTIARY RULINGS THE MILITARY JUDGE MADE AT TRIAL AND/OR THE EXISTENCE OF ACTUAL UNLAWFUL COMMAND INFLUENCE, APPARENT UNLAWFUL COMMAND INFLUENCE, ACTUAL BIAS OF A MEMBER, AND IMPLIED BIAS OF A MEMBER.

Granting Review – The Army Court Did Not Follow the Law

The Government again concedes that this Court should grant review.

As argued in the Supplement, the military judge did not abuse her discretion and the Army Court's opinion conflicts with controlling precedent from this Court.

On the Merits – the Military Judge's Order was Within Her Discretion

The Government does not argue that the evidentiary rulings at trial were erroneous; they simply argue that the errors do not justify a mistrial. (Gov't Br., p. 52-53). However, they acknowledge that "A military judge has "considerable latitude in determining when to grant a mistrial." (Gov't Br., p. 52, quoting *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998)). The Army Court erred in finding an abuse of discretion.

A. The Two Evidentiary Errors Were Significant

The Government does not address the *Roberson*[5] factors; they just rely on evidence admitted from the complainant herself to argue that the errors were harmless. (Gov't Br., p. 53-54). With respect to both the improperly excluded text messages and the improper admission of the brigade surgeon's testimony, and especially in combination with each other,[6] 1LT Badders was harmed.

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5 *United States v. Roberson*, 65 M.J. 43, 47-48 (C.A.A.F. 2007).

6 The Government argues that there is no harm because the errors are "unrelated." (Gov't Br., p. 54). This is irrelevant; the cumulative error doctrine nonetheless applies, and is based on the idea that even

Texts

Even though the Defense did conduct a powerful cross-examination, the texts at issue are different in quality from the testimony elicited. Had the members heard and seen this additional, highly impeaching evidence, it might have been "the straw that broke the camel's back." *United States v. Brickey*, 16 M.J. 258, 265-66 (C.M.A. 1983) ("The fact that court-martial members believe a witness despite circumstances A and B, which tend to impair his credibility, does not mean they will continue to believe him if impeaching circumstance C is added."). Just as in *Brickey*, credibility was a "central issue" in the instant case, which was hotly contested with evidence of guilt far from overwhelming. *Id.* at 260. The Government fails to dispute – or even acknowledge – the argument that the evidence of guilt was weak. This is an important issue for the Court. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) ("[C]ourts are far less likely to find cumulative error . . . when a record contains overwhelming evidence of a defendant's guilt.").

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unrelated errors that are independently not harmful, in combination with each other, can constitute harm.

1LT Badders was harmed when the military judge precluded the members from hearing or seeing evidence that only two days after the event, the complainant *thanked* 1LT Badders for his *service*, meaning that she not only enjoyed, but was grateful to him, for the sexual conduct with him.

Opinion

The Government continues to erroneously characterize the brigade surgeon's testimony as "lay" witness opinion testimony. (Gov't Br., p. 52). It was not. The Government spent a great deal of time presenting evidence of MAJ SS's extensive medical qualifications to the members, including the fact that she was a brigade surgeon, has treated 10,000 patients, is board certified, and has received *specialized training* in sexual assault forensic examinations. (R. at 474-478). Further, she testified that she treated the complainant in her "role" as a SANE. (R. at 478). She gave her opinion that the complainant's behavior was not unusual. (R. at 490). A lay witness' opinion on that matter is completely irrelevant. She was permitted to give an expert opinion on a matter beyond the ken of the average lay person (who had not received

specialized training in SAFE) and that opinion was powerful based on her training, education, and position as a brigade surgeon, upon whom brigade commanders routinely rely. There were two members actually serving as brigade commanders on this panel (along with two current division staff members). The opinion – whether expert or lay – gutted the effects of any good cross-examination about the complainant's post-incident conduct and was harmful.

Note that the Government completely failed to respond to the arguments in the Supplement regarding the fact that the military judge did not find the errors non-prejudicial, instead she found that they did not affect the legal sufficiency of the findings, and that even if she had so found, that is not binding on this Court.

B. The Military Judge's Determination that a Mistrial was Appropriate was Not an Abuse of Discretion

Even excluding the implied bias issue, the military judge properly found that under a cumulative error theory, a mistrial was manifestly necessary in the interest of justice. Her ruling granting a mistrial was not an abuse of discretion and this Court should grant review and reverse.

Alternatively, this Court should find that the implied bias issue alone warranted the mistrial, or that one or all of the other briefed errors (actual and apparent unlawful command influence and actual and implied member bias) support a mistrial. The Government elects not to respond to the additional issues, claiming they are not properly before the Court. (Gov't Br., p. 55, n.13). The Government fails to address the concept that this Court may uphold the mistrial order based on any grounds apparent from the record. *United States v. Bess*, 80 M.J. 1, 11–12 (C.A.A.F. 2020), *cert. denied*, 141 S. Ct. 2792 (2021) (citing *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) (affirming a military judge's denial of a motion to suppress evidence where "the military judge reached the correct result, albeit for the wrong reason"); *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (citations omitted) ("When the Government appeals an adverse ruling, the defense may assert additional or alternate grounds for affirming the ruling."). The additional issues merit reversal.

Conclusion:
This Court Should Grant Review and Reverse

The Government concedes that review is appropriate. (Gov't Br., p. 56, asking the Court to affirm). We agree, the Court should grant review. The Army Court's opinion finding appellate jurisdiction over this Government appeal decided a question that has not, but should be, settled by this Court, and the decision, which sets aside the military judge's mistrial order, decided questions of law in conflict with applicable decisions of this Court. All of these grounds constitute good cause to grant review and to reverse the Army Court. The errors, individually and especially in conjunction with each other, were materially prejudicial to 1LT Badders' substantial right to a fair trial.

Respectfully submitted,

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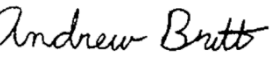

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing Reply was sent via email to this Honorable Court and the Army Government Appellate Division on January 26, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This Reply does not comply with the type-volume limitation of Rule 24(c) because it contains 5,157 words. Counsel filed a Motion for Leave to File Reply in Excess of Volume Limits contemporaneously with this Supplement.

2. This Reply complies with the typeface and type style requirements of Rule 37.

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