IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee/Cross-Appellant

v.

Paul E. COOPER
Yeoman Second Class (E-5)
U.S. Navy,

Appellant/Cross-Appellee

REPLY BRIEF ON BEHALF OF APPELLANT/CROSS-APPELLEE

Crim. App. Dkt. No. 201500039

USCA Dkt. No. 21-0149/NA

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

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Argument

I.

AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO HAVE HIS COUNSEL MAKE A PROPER ARGUMENT ON THE EVIDENCE AND APPLICABLE LAW IN HIS FAVOR. DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN HE ALLOWED THE MEMBERS TO RECALL THE COMPLAINING WITNESS BUT REFUSED THE DEFENSE REQUEST TO PRESENT A RENEWED CLOSING SUMMATION ON HER NEW TESTIMONY? DID THE LOWER COURT ERR BY REFUSING TO CONSIDER THIS ISSUE?

A. The Government's waiver argument is unavailing. Trial defense counsel asked to reopen argument based on "certain points of evidence that will be brought out based on these questions" by the members.

In requesting a renewed summation to the military judge, the defense counsel referred to "the questions that were asked" by the members.[1] Defense counsel then requested "reopening argument to the members on certain points of evidence that will be brought out based on these questions."[2] A second time, the defense requested the military judge to "allow arguments to be reopened to the members following the evidence being presented to them."[3]

Not good enough, says the Government. According to the Government,

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[1] J.A. 555.
[2] J.A. 555.
[3] J.A. 555.

counsel was also required to list every reason why additional closing argument was necessary. Otherwise, the Government argues, the request was merely a "generalized" request resulting in waiver of every issue relating to the closing argument other than the one counsel specifically mentioned—that he wished to rebut the testimony giving rise to a motive to fabricate.[4]

There are several problems with this argument. For one, it ignores the rule that "there is 'a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'"[5] Indeed, "'courts indulge every reasonable presumption against waiver of fundamental constitutional rights'" and do not presume acquiescence in relinquishment of these rights."[6] In light of this presumption, counsel's statements to the military judge requesting to reopen argument based on "*points* of evidence" in response to the members' "*questions*" support that counsel was requesting to argue based on *all* of the new evidence from the members' "questions," not merely a single question.

Second, the Government's view conflicts with *United States v. Datz*, where

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[4] Ans. at 21.
[5] *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008) (quoting *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation omitted))).
[6] *United States v. Avery*, 52 M.J. 496, 498 (C.A.A.F. 2000) (quoting *Zerbst*, 304 U.S. at 464)).

this Court explained that "M.R.E. 103 does not require the moving party to present every argument in support of an objection, but does require argument sufficient to make the military judge aware of the specific ground for objection, "'if the specific ground was not apparent from the context.'"[7] This Court explained that "[t]o require counsel for either side to identify all available arguments in support of his or her objection is unnecessary in a context where the military judge is presumed to know the law and follow it" before adding: "[i]n the heat of trial, where counsel face numerous tactical decisions and operate under time pressure, we do not require such elaboration to preserve error on appeal."[8] Here, after counsel's request to respond to the members' "questions," the military judge said counsel had not "persuaded [him] yet."[9] He did not say he did not understand the request.

Third, the Government misconstrues the sequence of events. Counsel made his two requests to reopen argument, referring generally to the need to respond to the questions the members had asked.[10] After this, trial counsel said he opposed the

[7] 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting M.R.E. 103(a)(1)).
[8] *Id*.
[9] J.A. 555.
[10] J.A. 555.

request.[11] The military judge then stated he agreed with the trial counsel.[12] Only after this did defense counsel make a more specific explanation about needing to respond to new testimony that would suggest that the complaining witness had spoken to her friend about the incident before reporting it.[13] Thus, in context, this latter statement was merely a reason offered in support of counsel's earlier request to respond to reopen argument based on all of the new evidence the members had received—which the military judge had already effectively denied.

Fourth, the Government's argument also conflicts with *Herring*. There, the Supreme Court did not hold it against the defense counsel for failing to articulate a list of reasons why closing argument was necessary. In fact, the defense counsel in *Herring* merely requested "to 'be heard somewhat on the facts.'"[14]

Finally, there are practical difficulties with the Government's position owing to the issue at stake. As the Supreme Court explained in *Herring*, closing argument consists of "partisan advocacy" by both adversaries.[15] In another case, the Supreme Court stated that counsel have a "broad range of legitimate defense strategy" in

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[11] J.A. 555 ("Sir, I don't know how it really changes the arguments. I mean, [the members] are seeking fine points, but the arguments—the answers to the questions as the government heard them don't really change the arguments here, and [the] government doesn't feel it's necessary.").
[12] J.A. 555 ("And neither does the court.").
[13] J.A. 555.
[14] *Herring v. New York*, 422 U.S. 853, 856 (1975).
[15] *Id*. at 862.

closing argument.[16] The point is that a request for argument is not analogous to making an evidentiary objection, which is governed by enumerated Rules of Evidence. The same applies to the Government's analogy of requesting an evidentiary instruction, which R.C.M. 920(f) governs,[17] a motion for discovery, which seeks production of specific evidence,[18] or an objection to an unsworn statement.[19] Unlike a request for "partisan advocacy," these motions deal with a request for something specific: an instruction, an item of evidence, or a request to stop a party from making a certain argument. Thus, it makes sense to require specificity in a corresponding motion.

In effect, the Government's position would require the defense to give a preview of how it intends to advocate on behalf of an accused in order to properly preserve the issue. There is no support to this view.

B. <u>In arguing there was no prejudice because, in the Government's eyes, the evidence the members received was not important, the Government overlooks that the right to summation is not conditioned on the strength of the evidence</u>.

The Government essentially argues that even though the members submitted a long list of questions seeking evidence they believed was important, the

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[16] *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003).
[17] *Cf. United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014) (explaining similarity between M.R.E. 103(a)(1) and R.C.M. 920(f)).
[18] Ans. at 21 (citing *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020)).
[19] Ans. at 19.

questions really were *not* important, so there was no need for closing argument.[20] It cites a passing statement in *United States v. Lampani*, a 1982 decision by the Court of Military Appeals, suggesting that a renewed summation may not always be necessary when the members receive new evidence.[21]

For one, the Government reads *Lampani* too broadly. The Court in *Lampani* suggested that "reargument, reinstructions, and that type of thing" may not be necessary in the case of a recalled witness.[22] This is correct: it may not be necessary to reopen argument and give new instructions if a witness recalled provides no additional relevant testimony. That is not what happened in this case. Here, the members learned new information relevant to the allegation.[23]

Though the Government deems the new information unimportant, this ignores what the Supreme Court explained in *Herring*. The Supreme Court did not

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[20] Ans. at 24 (arguing there was no error since the new evidence "did not reveal a motive to lie" by the complaining witness); Ans. at 28 (deeming the new testimony as only revealing a possible "minor inconsistency" in the complaining witness' testimony); Ans. at 34 (claiming that new testimony in response to members' question "would have added nothing of substance to the Members' deliberations").
[21] Ans. at 24 (citing 14 M.J. 22, 26 (C.M.A. 1982)).
[22] *Lampani*, 14 M.J. at 26.
[23] The Government also cites an unpublished Ninth Circuit memorandum affirming the trial court's decision not to reopen closing arguments after the court gave an instruction regarding citizenship after the jury retired. Ans. at 28 (citing *United States v. Sandoval-Gonzalez*, 95 Fed App'x 203, 204-05 (9th Cir. 2003)). This opinion has little relevance here, where the members received new substantive evidence, not an instruction, on various questions they posed to the key witnesses.

condition closing argument on the *quality* of the evidence. To the contrary, it stated that the right to present a closing argument applies "no matter how strong the case for the prosecution may appear to the presiding judge."[24]

The Supreme Court explained that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[25] The Court went so far as to say that "no aspect of such advocacy could be more important than the opportunity *finally* to marshal the evidence for each side before submission of the case to judgment."[26]

The Supreme Court explained that "it is only after *all* the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole" and "argue the inferences to be drawn from the testimony" while pointing out weaknesses of the opposing parties' positions.[27]

C. The Government's argument also overlooks two warnings: 1) the Supreme Court's warning in *Bayer* that evidence received after deliberations poses a risk of distorted importance; and 2) this Court's warning in *Bess* that a military judge should weigh requests for new evidence with "great caution" and allow procedures to ensure Appellant is not prejudiced.

There is another problem in the Government's argument: it ignores that

[24] *Herring*, 422 U.S. at 858.
[25] *Id*. at 862.
[26] *Id*. (emphasis added).
[27] *Id*.

evidence received after deliberations have begun poses an undue risk of prejudice. This is true even if, standing alone, the evidence was not especially probative. As the Supreme Court suggested in *United States v. Bayer*, allowing the jury to receive new evidence after deliberations have begun creates a danger that the evidence will be viewed with "distorted importance" by the jury.[28] The Supreme Court stated that allowing such evidence "surely" is "prejudicial" to the opposing party, who has "no chance to comment on it [after] summation ha[s] been closed."[29] As the Second Circuit similarly explained in *United States v. Crawford*, "whenever the response to a jury note is a formal evidentiary hearing, the importance of that evidence is unduly amplified to the jury."[30]

This Court in *Bess* echoed this concern. This Court explained that if some of the new questions are responsive to what the parties said in closing argument, this tends to further show prejudice in denying additional closing argument: it reveals that the members viewed arguments of counsel as relevant.[31] This concern shows why this Court wrote that while a military judge may allow the members to receive new evidence after deliberations have begun, "the military judge should review

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[28] 331 U.S. 532, 538 (1947).
[29] *Id*.
[30] 533 F.3d 133, 142 (2d Cir. 2008).
[31] 75 M.J. 70, 77 (C.A.A.F. 2016) ("Clearly, the members were affected by defense counsel's argument, since they then requested the muster reports to see what was in them.").

and weigh such requests with great caution. Procedures should be employed to ensure that no unfair prejudice is afforded to either party."[32]

Here, like in *Bess*, some questions the members asked appeared to directly respond to matters that had been raised during closing argument:

Argument by counsel:	Question by member in response:
TC: "Who knew about it?" (JA 522)	"Did you talk to anyone else after the incident on 27 October 2013, but before you went to the chapel to talk to RP2 Owens?" (JA 540)
TC: "There was no testimony that ooh, the rumors were flying, somebody confronted her; none of that, none of that." (JA 522)	"Did you hear any rumors about the alleged sexual assault between 28 October and 1 November 2013?" (JA 540)
DC: "What's more believable in this case . . . out of nowhere YN2 Cooper pulls her down, [she] goes into this catatonic state . . . or is it more believable that there was two people that had sex?" (JA 526)	"Has [the complaining witness] experienced tonic immobility since the event . . . or at any time prior to [the event]?" (JA 542)
DC: "How do we know she was enjoying it? She was rubbing his—his head. . . She was showing that she was enjoying it by rubbing his head." (JA 527)	"Was [the complaining witness] aroused enough for intercourse without injury or was she hurt?" (JA 541)[33]
TC: "[T]he military judge just talked to you about . . . the Secretary of the Navy instruction, and he's provided you what the definitions are so that you	"Did you receive any sexual-harassment or sexual-assault training?" (JA 568)[34]

[32] *Id*.
[33] The military judge sustained trial counsel's objection to this question. *See* J.A. 542.
[34] The military judge told the members he would not answer this question directly. *See* J.A. 572.

can . . . find that the accused violated this lawful general reg-regulation." (JA 513) DC: "You've been told that the SECNAV instruction tells you what sexual harassment is." (JA 523)	
TC: "From the moment he found out he was being accused of sexual assault, he decided to rewrite history." (JA 512) TC: "I heard somebody's accusing me of sexual assault. Oh, I'd better start writing my story." (JA 522)	"How did [Appellant] get word of being accused of sexual assault against [the complaining witness]?" (JA 539)[35]

As this Court explained in *Bess*, in evaluating prejudice, this Court looks "not at some hypothetical reasonable panel, but at 'whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'"[36] These questions show that the members in *this* trial were especially tuned in to the parties' closing arguments, making a denial of closing argument on the new evidence they requested particularly problematic.

The Government focuses on the amount of time between when the members heard evidence on these new questions and their verdict. The Government argues the members must have viewed these questions as being of little importance to the verdict since they announced the verdict about two hours after receiving the new

[35] The military judge sustained the defense objection to this question. *See* J.A. 539.
[36] *Bess*, 75 M.J. at 77 n.9 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original)).

evidence as opposed to the thirty minutes in *Bess*.[37]

This ignores two important points. First, of this roughly two-hour period, nearly thirty minutes was time not spent in deliberations.[38] And second, the members received no additional new evidence during this time period.[39] Thus, the live testimony they received in direct response to their questions was the last evidence they received before finding Appellant guilty.

In any event, regardless of the exact amount of time that passed, the most relevant issue is that the members received new evidence and the defense was unable to comment on it.

D. In any event, the Government's assessment of the new evidence is incorrect. In a case where the evidence was already "not overwhelming," the new evidence provided new reasons to doubt the allegations, but counsel was denied the opportunity to explain why.

As the NMCCA noted, the evidence here simply was "not overwhelming."[40] Earlier in the trial, the witness to whom the complaining witness made her initial formal report said she told him only that she "*may* have been assaulted."[41] In fact,

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[37] J.A. 572-73.
[38] *Compare* J.A. 563 (submitting second set of questions at 1502) *with* J.A. 568 (excusing the members for 15-minute recess) *and* J.A. 575 (telling the members to return to deliberations at 1528 after the military judge refused to answer these new questions).
[39] J.A. 572-73.
[40] *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114, at *46 (N-M. Ct. Crim. App. Mar. 7, 2018).
[41] J.A. 465 (emphasis added).

this witness said she stated the encounter was "consensual" and she had "made a mistake[.]"[42] As the lower court noted, the evidence that had been admitted earlier in the trial showed that there had been no alcohol involved, no forensic evidence suggesting lack of consent, and that the complaining witness went to Appellant's room freely.[43]

On top of a case was already weak, the new testimony the members received after deliberations had already begun revealed for the first time that the complaining witness had spoken to a trusted friend immediately before reporting the incident. The members even began to hear the complaining witness explain the friend's warning to her that if she did not report Appellant, he would do it again.[44] Contrary to the Government's suggestion, there was no prior evidence that she had spoken to anyone about the incident before reporting it.[45] Thus, this evidence was critical: it directly undercut the trial counsel's argument that the allegation had added reliability since nobody else had known about it.[46]

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[42] J.A. 465.
[43] *Cooper*, 2018 CCA LEXIS at *47.
[44] J.A. 559 ("Yes, Your Honor. I have spoken to HN Beard, Ian, before going to the chaplain's office, and initially out of just not knowing how this may affect me, I had just told him, 'Hey I can trust you, and I can tell you this, so I'm going to disclose it to you,' *and when I had spoke to him, he had mentioned how if I do not* –") (emphasis added).
[45] *Contra* Ans. at 25 ("The Members already heard from RP2 Owens that HN Beard was with the Victim when she came to talk to him.").
[46] *Cf*. J.A. 522 ("Who knew about it? There was no testimony that ooh, the rumors

The new testimony also undercut trial counsel's claim in another way: it showed the complaining witness did not go to the chaplain's office on her own volition. In reality, as the complaining witness testified, "after [she] had the conversation with [her friend], [she] also asked him whether [she] should go to the chain of command or to chaplain's office to share this."[47]

The Government argues that when she used the term "whether" here, the complaining witness was not asking for advice on whether to *report* the incident, but rather only as to *how* she should report it.[48] At best, this is debatable. Outside the presence of the members, she admitted she did not want to report the incident until the friend warned her Appellant would harm other females if she did not.[49] She even admitted that this became her "main concern."[50] Thus, given that the *complaining witness* admitted she was influenced by the friend outside the presence of the members, surely it is possible the members could have agreed had the defense been allowed to make this argument to them. Doing so would have also allowed the defense to remind the members why her statements to the Sailor who took her formal report—that she "may have been assaulted;" the encounter was

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were flying, somebody confronted her; none of that, none of that. She went to the chaplain's office to say she'd been assaulted.").
[47] J.A. 560.
[48] Ans. at 25.
[49] J.A. 548.
[50] J.A. 548.

"consensual;" and she "made a mistake"—were now even *more* revealing. The defense could have argued that these statements showed her true feelings, but she reported because her friend urged her to do so.

Additionally, the Government argues that comment on the new revelation that the complaining witness had experienced tonic immobility in her past would have added nothing to the defense theory that she misrepresented what happened.[51] Not so. The defense could have argued that the prior traumatic incident may have been distorting her perception of what happened with Appellant. Perhaps the defense could have argued that it was unlikely that the complaining witness experienced two independent episodes of tonic immobility. It could have also argued that the revelation of a prior episode of tonic immobility suggested a pattern: that the complaining witness agrees to have sex but later claims she was the victim of aggression that causes her to become immobile.

The Government also argues that additional closing argument in response to the question about whether the other complaining witness heard "rumors" was unnecessary since the question focused only on whether the other complaining witness was fabricating her sexual harassment allegation.[52] Again, this is debatable. As the testimony showed the two complaining witnesses worked in the

[51] Ans. at 33.
[52] Ans. at 33-34.

same unit,[53] the question could have been gauging how fast word about the sexual assault allegation had spread. This would have been a direct inquiry to trial counsel's argument that "there were no rumors floating around."[54]

The Supreme Court's words in *Herring* are on point: "[T]here will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a [trier of fact] to identify accurately which cases these will be, until the [trier of fact] has heard the closing summation of counsel."[55]

E. This Court's conclusion in *Bess* that the error was not harmless, even where the Government's evidence was far stronger than it was in this case, only underscores why reversal is warranted here.

In arguing that any error was harmless beyond a reasonable doubt, the Government asks this Court to use *Bess* as a point of comparison. But *Bess* only highlights why the error in this case was *not* harmless.

The evidence of the appellant's guilt in *Bess* was far stronger than in this case, yet this Court still reversed due to a similar error. In *Bess*, the relevant issue was the identity of the person who ordered the women to disrobe before taking their x-rays.[56] The Government had already presented relatively strong evidence of

[53] J.A. 357.
[54] J.A. 522.
[55] *Herring*, 422 U.S. at 863.
[56] *Bess*, 75 M.J. at 76.

the perpetrator's identity. At trial, three victims identified Bess as the perpetrator.[57] All four of the victims' x-rays even "bore Appellant's identifying symbol."[58] Yet this court still reversed after the military judge admitted muster reports showing that the appellant was marked "present" when the x-rays were taken when the members asked for this evidence during deliberations.[59]

Relevant to Appellant's case, this Court explained the powerful impact that additional closing argument on the muster reports may have had. This Court explained that "[i]f allowed to make a renewed closing summation, Appellant's counsel would have been able to argue to the factfinder that the muster reports should not carry much weight."[60] This Court added that allowing the defense counsel to present argument on the muster reports "could have shaken the Government's case."[61]

This analysis must apply with greater force in Appellant's case. As the lower court noted, the evidence in this case was "not overwhelming." The issue in this case turned exclusively on the reliability of the testimony of the complaining witness, who reportedly said the encounter may have been "consensual." And

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[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.

unlike in *Bess*, there was no independent evidence corroborating Appellant's guilt.

That the members submitted numerous questions seeking additional testimony from the complaining witness during deliberations only underscores that the evidence was weak. These questions strongly suggest that their view of the case could turn on how they interpreted the complaining witnesses' responses to these questions.

In short, if reversal in *Bess* was warranted because additional closing argument "could have shaken the Government's case"—even where there was considerable evidence pointing to the appellant's guilt to begin with—the same was certainly true here.

Conclusion

This Court should set aside the findings and sentence.

Respectfully submitted,

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on September 27, 2021.

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