IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Jonathan QUEZADA** Lance Corporal (E-3) United States Marine Corps, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 201900115 USCA Dkt. No. 21-0089/MC

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

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Introduction

In *United States v. Hills*, this Court stated that contradictory instructions about the bearing one charge could have on another violate due process when the instructions require members to discard the presumption of innocence on one of those charges. The military judge erred in this case by instructing the members that they could infer consciousness of guilt based on conduct for which LCpl Quezada was presumed innocent.

Here, the military judge issued a false exculpatory statement instruction—that Appellant may have made a false statement and the members can infer that innocent people generally do not make a false statement to establish their innocence.

One of the allegedly false statements presented at trial was the subject of a false official statement charge against LCpl Quezada—he denied that he engaged in any sexual acts with the complaining witness.

The Government requested the false exculpatory statement instruction at the conclusion of trial. LCpl Quezada objected, but the military judge overruled the objection. And he failed to tailor the instruction to prevent charged misconduct from being propensity evidence of another charge.

The military judge gave a spillover instruction, but it was inadequate. Not tailoring the instruction permitted the members to infer consciousness of guilt based on misconduct of which LCpl Quezada was presumed innocent.

The lower court erred by finding that there was no error and prejudice from the instruction. Furthermore, it relied on cases that were readily distinguishable from this case. False official statement was a charge in this case. It was not a charge in the cases on which the lower court relied. The lower court's insistence that only general denials of wrongdoing make the false exculpatory statement instruction inappropriate failed to address the instruction's potential to undermine the presumption of innocence when the accused is charged with false official statement.

Issue Presented

BY INSTRUCTING THE MEMBERS ON FALSE EXCULPATORY STATEMENTS IN A CASE WHERE APPELLANT WAS CHARGED WITH A FALSE OFFICIAL STATEMENT FOR THE SAME STATEMENT, DID THE MILITARY JUDGE UNDERMINE APPELLANT'S PRESUMPTION OF INNOCENCE UNDER THE DUE PROCESS CLAUSE?

Statement of Statutory Jurisdiction

The Navy-Marine Court of Criminal Appeals (NMCCA) had jurisdiction to hear this case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), jurisdiction.[1] This Court has jurisdiction under Article 67(a) of the UCMJ.

Statement of the Case

A panel of officer and enlisted members, sitting as a general court-martial, convicted Lance Corporal (LCpl) Quezada of violating Articles 92 (one specification), 107 (one specification), and 120 (two specifications).[2] The members sentenced LCpl Quezada to six years' confinement and to be discharged from the service with a dishonorable discharge.[3] The convening authority approved the

[1] 10 U.S.C. § 866 (2012).
[2] J.A. at 40.
[3] J.A. at 242.

findings and sentence as adjudged.[4] On October 26, 2020, the NMCCA affirmed the findings and sentence.

Statement of the Facts

LCpl Quezada was married to S.Q.[5] S.Q. had a sister, D.E.A.[6] During the summer of 2017, LCpl Quezada and S.Q. hosted D.E.A. at their home onboard Camp Pendleton, CA.[7] D.E.A. was seventeen at the time.[8]

Appellant and S.Q. hosted a cookout.[9] LCpl Quezada and S.Q. provided food for the event.[10] S.Q., LCpl Quezada, and his friends brought alcohol to the party.[11] D.E.A. testified that she drank Jack Daniels whiskey.[12] The alcohol made her dizzy and emotionally upset about the death of her pet fish.[13]

As the cookout wound down, S.Q. went to her bedroom with her son to sleep.[14] LCpl Quezada, D.E.A., and two friends remained downstairs.[15] The

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[4] J.A. at 27.
[5] J.A. at 47.
[6] *Id*.
[7] *Id.*
[8] J.A. at 62.
[9] J.A. at 55
[10] J.A. at 62.
[11] J.A. at 121.
[12] J.A. at 58-62.
[13] J.A. at 61-62. Appellant does not concede that the testimony of D.E.A. was true in fact.
[14] J.A. at 123.
[15] *Id*.

alcohol eventually made D.E.A. sick.[16] She went upstairs to LCpl Quezada's son's bedroom, where she had been sleeping during her stay to lay down on the bed.[17] D.E.A. testified LCpl Quezada brought her more alcohol, she took another shot of whiskey, and this caused her to vomit in the bathroom.[18]

D.E.A. further testified she returned to bed after getting sick.[19] She testified that LCpl Quezada got into bed with her and proceeded to bite her ear, touch her chest, lick her vagina, and lick her anus.[20] D.E.A. testified that LCpl Quezada stopped after she told him to stop; she pushed him off of her and he laid on the floor.[21]

After that, S.Q. awoke to get some water.[22] On her way downstairs, S.Q. walked into her son's room and saw D.E.A. texting on the bed and LCpl Quezada on the floor.[23] D.E.A. was texting her friend Mr. B.[24] Although the Naval Criminal Investigative Service (NCIS) made several attempts to obtain these messages from D.E.A., she later admitted she deleted these messages.[25]

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[16] J.A. at 68.
[17] J.A. at 70.
[18] J.A. at 84.
[19] J.A. at 62.
[20] J.A. at 76-80.
[21] J.A. at 82.
[22] J.A. at 124.
[23] *Id*.
[24] J.A. at 95.
[25] J.A. at 95-96.

D.E.A. followed S.Q. downstairs and asked to talk to her outside.[26] After D.E.A. relayed her version of the evening's events to S.Q., S.Q. angrily confronted LCpl Quezada.[27] He called the police.[28]

Lance Corporal Quezada was taken into custody and provided a statement to NCIS.[29] S.Q. took D.E.A. to a medical facility where she received a Sexual Assault Medical Forensic Examination (SAMFE).[30] During the course of this examination, she gave a statement to the nurse about the alleged assault.[31] The samples collected during the SAMFE were collected and sent to the U.S. Army Criminal Investigation Laboratory (USACIL), where they were tested for the accused's DNA.[32]

At some point between the initial report and the trial, D.E.A. told NCIS agents that the entire encounter with LCpl Quezada was consensual and she no longer wanted to participate in the investigation.[33] She told the NCIS agents that she did not feel pressured by anyone to make this recantation.[34] But at trial, she

[26] J.A. at 84.
[27] J.A. at 126.
[28] J.A. at. 127-28.
[29] J.A. at 246.
[30] J.A. at 86-87.
[31] J.A. at 247.
[32] J.A. at 168.
[33] J.A. at 93-94.
[34] J.A. at 93.

testified that S.Q. *pressured* her to recant.[35] S.Q. testified that her family was supportive of D.E.A. and she did not pressure D.E.A. to recant.[36]

Lance Corporal Quezada was charged with providing a false official statement to NCIS Special Agent GM, a violation of Article 107, UCMJ.[37] The Government alleged LCpl Quezada lied by telling NCIS Agents he did not lick and touch D.E.A.'s vagina, or words to that effect.[38] The Government presented evidence of other allegedly false statements LCpl Quezada made to investigators, which were not charged.

At trial, the military judge instructed the members on the elements of the false official statement charge.[39] He also stated he planned to give the standard Benchbook instruction for false exculpatory statements.[40] Defense counsel objected to this instruction "because of potential confusion with the Article 107 false official [statement]."[41] The military judge overruled the objection and instructed the members that there "has been evidence that . . . the accused may

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[35] J.A. at 31.
[36] J.A. at 133-34.
[37] J.A. at 40. After arraignment, the Government moved to change the specification to allege that the statement was made to Special Agent Michelle Harris. The military judge found this to be a minor change under R.C.M. 603 and instructed the Government to make the change on the charge sheet. *Id.*
[38] *Id.*
[39] J.A. at 181-82.
[40] *Id.*
[41] J.A. at 181.

have made a false statement or given a false explanation about the alleged offense."[42] The instruction did not identify the allegedly false statement to which the instruction applied.[43] The military judge then instructed the members they could "infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence."[44]

Summary of the Argument

The false exculpatory statement instruction as given in this case directed the members to infer consciousness of guilt from charged conduct.

LCpl Quezada objected to the instruction because of the potential for confusion between the instruction and the false official statement charge. The military judge should have tailored the instruction so it was clear that one charge could not be used as propensity evidence for another charge.

Providing the standard Benchbook false exculpatory statement instruction without regard for the charging scheme in this case undermined LCpl Quezada's presumption of innocence. The members were told his denials of sexual assault may have been false and he was charged with a false official statement for denying a sexual assault.

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[42] J.A. at 197.
[43] *Id.*
[44] *Id.*

The lower court erred by failing to address the charging scheme and the instruction. It relied on cases in which the accused were not charged with false official statement. It held that because LCpl Quezada did not make a general denial of wrongdoing the false exculpatory statement instruction was appropriate.

The military judge and the lower court failed to apply the Benchbook guidance not to provide the false exculpatory statement instruction when it would force the members to decide the ultimate issue of guilt or innocence in the case. The instructions directed the members to find that at least one denial of sexual acts was more than evidence of consciousness of guilt because it was a charge in this case. This undermined the presumption of innocence. This Court should set aside the findings and sentence with relation to the false official statement and sexual assault charge.

Argument

By indiscriminately instructing the members on false exculpatory statements in a case where Appellant was charged with a false official statement for the same statement, the military judge undermined Appellant's presumption of innocence under the Due Process Clause.

Standard of Review

Whether a military judge properly instructed a panel is a question of law this Court reviews *de novo*.[45]

Analysis

A. Because LCpl Quezada was charged with false official statement for denying another charged offense, the false exculpatory statement instruction permitted the members to infer guilt based on conduct of which LCpl Quezada was presumed innocent.

In *United States v. Hills*, this Court held that contradictory statements during instructions undermined the appellant's presumption of innocence.[46] In *Hills*, the judge instructed members they could consider charged offenses as propensity evidence under M.R.E. 413 if the Government proved them by a preponderance of the evidence.[47] This Court found this instruction incongruous with the presumption of innocence.[48]

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[45] *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2018) (quotes and citations omitted).
[46] *Hills*, 75 M.J. at 357.
[47] *Id*. at 353.
[48] *Hills*, 75 M.J. at 357; *see also United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019) (finding it permissible, under an abuse of discretion standard, to use charged acts for a specific purpose under M.R.E. 404(b) in a judge-alone trial).

A military judge shall give the members appropriate instructions on findings.[49] Instructions must be evaluated "in the context of the overall message conveyed to the jury."[50] A military judge must "tailor instructions in order to address only matters at issue in each trial and provide lucid guideposts to enable the court members to apply the law to the facts."[51]

"False exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt."[52] They "cannot be considered by the jury as direct evidence of guilt."[53] In the context of jury instructions, a "circularity problem recurs whenever a jury can only find an exculpatory statement false if it already believes other evidence directly establishing guilt. Under such circumstances, it is error to give a false exculpatory statement instruction."[54]

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[49] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [HEREINAFTER MCM], Rule for Courts-Martial (R.C.M.) 920(a).
[50] *United States v. Prather*¸ 69 M.J. 338, 344 (C.A.A.F. 2011) (quoting *Humanik v. Beyer*, 871 F.2d 432, 441 (3d Cir. 1989) (internal quotation marks omitted)).
[51] *United States v. Buchana*, 19 C.M.A. 394, 396-97 (C.M.A. 1970).
[52] *United States v. DiStefano*, 555 F.2d 1094, 1104 (2d Cir. 1977).
[53] *United States v. Davis*, 437 F.3d 989, 996 (10th Cir. 2006) (quoting *United States v. Zang*, 600 F.2d 260, 262 (10th Cir. 1982) (internal quotation marks omitted)).
[54] *United States v. Colcol*, 16 M.J. 479, 484 (C.M.A. 1983) (finding error but no prejudice); *see also United States v. Durham*, 139 F.3d 1325, 1331-32 (10th Cir. 1998) (finding error, but no prejudice).

i. The lower court relied on factually distinguishable cases in which the military judges gave the false exculpatory statement instruction, but the accused were not charged with false official statement.

The lower court cites *United States v. Opalka* in support of its holding.[55] But the accused was not charged with false official statement in that case.[56] The Air Force Board of Review held the false exculpatory statement instruction was appropriate in the case of an Airman accused of theft of another Airman's tachometer.[57] When confronted by an investigator, the accused told the investigator he purchased the device from a store in Philadelphia.[58] The accused later stated his brother purchased the tachometer.[59] Eventually, Opalka produced a bill of sale for a tachometer and testified at trial that his brother and a friend purchased the device for him.[60] But the actual owner had placed distinctive markings on the tachometer at issue, a tachometer that had been stolen from him previously.[61] This distinctive markings proved that Opalka was lying about how he got the tachometer.[62] Defense counsel made no objections to the false exculpatory statement instruction.[63]

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[55] *United States v. Opalka*, 36 C.M.R. 938 (A.F.B.R. 1966).
[56] *Id*. at 939.
[57] *Id*.
[58] *Id*. at 940.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*. at 945.

The president of the court-martial instructed the members that the accused's false statements were evidence of consciousness of his guilt.[64] Opalka challenged the instruction on appeal arguing the president should have pointed to the statements that were false.[65] The Board of Review held the president was correct not to point out the statements given the circumstances of the case.[66] The government presented the evidence in a way that allowed the members to determine which statements were false and they were allowed to infer consciousness of guilt based on those statements.[67] The court stated the president would have emphasized the government's case "to the detriment of the accused" if he highlighted the statements.[68] The board also pointed out that the lack of an objection at trial meant Opalka needed to show a miscarriage of justice to receive relief and the evidence did not support that finding.[69]

The lower court also cites this Court's ruling on the false exculpatory statement instruction in *United States v. Colcol* in its ruling. In *Colcol*, an Airman was charged with stealing a stereo from the base mailroom.[70] When investigators

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[64] *Id*. at 944.
[65] *Id*.
[66] *Id.*
[67] *Id*. at 945.
[68] *Id*.
[69] *Id*.
[70] 16 M.J. at 480.

initially confronted him with the allegation, he stated he "was not involved in any illegal activity[.]"[71] Colcol was not charged with false official statement.[72]

Over objection, the Government requested the false exculpatory statement instruction.[73] Relying on *United States v. Opalka*, the military judge in *Colcol* ruled the instruction was appropriate.[74] The Court of Military Appeals concluded it was an error to give the instruction because Colcol's false statement was a general denial of guilt rather than a false explanation.[75]

The Court stated a general denial of wrongdoing forces the members to decide the ultimate issue in the case.[76] The general denial went beyond mere consciousness of guilt and to the issue of guilt itself.[77] The court found that giving the instruction in those circumstances was an error, but it was not prejudicial because the evidence was overwhelming. The Court explained that the appellant confessed to the crime, there was extensive corroborating evidence, and there was also testimony from another witness that contradicted the accused's statement.[78]

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[71] *Id*. at 482.
[72] *Id*. at 480.
[73] *Id*. at 483.
[74] *Id*.; *see Opalka,* 36 C.M.R. at 944.
[75] *Colcol,* 16 M.J. at 484.
[76] *Id.*
[77] *Id*.
[78] *Id*.

Finally, the lower court also relied on an Air Force Court of Military Review case in its ruling, *United States v. Mahone.*[79] *Mahone* was a three-defendant case in which all were charged with the rape of a dependent spouse, but not false official statement.[80] Upon initial questioning, two defendants denied having sex with anyone.[81] At trial, they both admitted to having sex with the victim, and explained the earlier denials were the result of a "misunderstanding as to the questions they had been asked."[82]

The military judge gave the members the false exculpatory statement instruction.[83] The military judge instructed the members that statements of the accused when confronted with the offense may be considered in determining guilt or innocence.[84] When those statements are later proven to be false, they are evidence of the accused's consciousness of guilt.[85]

On appeal, one defendant argued the instruction was error because he never denied wrongdoing. [86] Additionally, he alleged that the instruction resulted in burden shifting.[87]

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[79] *United States v. Mahone,* 14 M.J. 521 (A.F.C.M.R. 1982).
[80] *Id*. at 523.
[81] *Id.*
[82] *Id*.
[83] *Id.* at 524-25.
[84] *Id.* at 524.
[85] *Id.*
[86] *Id.* at 525.
[87] *Id.*

The Air Force Court of Military Review held there was no error in giving the instruction and that it did not shift the burden.[88] The members were properly instructed that the government bore the burden in the case.[89] It rejected the appellant's argument that the instruction unfairly affected him because the military judge properly tailored the instruction to only apply to the two accused who denied sexual intercourse.[90]

In LCpl Quezada's case, lower court erred when it found that the denial to NCIS did not cause a circularity problem. The Government charged LCpl Quezada with certain acts under Article 120.[91] It also charged him with making a false official statement for his denial of those same acts.[92]

The military judge instructed the members that "there has been evidence . . . that the accused may have made a false statement," and that the evidence "may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused."[93] The military judge went on to instruct the members that they "may infer that an innocent person does not ordinarily find it necessary to

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] J.A. at 43.
[92] *Id.*
[93] J.A.at 196

invent or fabricate a voluntary explanation or statement tending to establish his innocence."[94]

The instruction and charging scheme here presented a circularity problem that the cases on which the lower court relied did not have. The members were instructed that LCpl Quezada might have made up a story to establish his innocence when confronted with the charge of sexual assault *and* he was charged with denying the same conduct.

Tailoring here would not have had the effect of emphasizing the government's case like it would have in *Opalka*. Because there was no false official statement charge in *Opalka*, tailoring was unnecessary. The government's larceny theory was predicated on the distinctive marking of the allegedly stolen tachometer. The president pointing out the accused's statements in that case would have had the effect of bolstering the government's case from the bench.

But the military judge in LCpl Quezada's case had a duty to offer an instruction that provided guidance to the members as to which statements could be used to infer consciousness of guilt of the Article 120 charge. The military judge did not instruct the members how they were suppose treat the statement in the false official statement charge given its relation to the sexual assault charge. This failure allowed one charge to become propensity evidence for another.

[94] J.A. at 197.

The lower court's reliance on *Colcol* for a rule that the false exculpatory statement instruction is only improper when there is a general denial of wrongdoing moves the court away from a fact specific analysis of instructions and charging schemes. Such analysis ensures instructions do not violate due process by offering contradictory statements about the bearing one charge might have on another. Given the facts of this case, it was an error to give the standard false exculpatory statement instruction.

ii. The lower court failed to address the relationship between the charged conduct and the false exculpatory statement instruction, the need for tailoring, and the resulting prejudice.

By relying on *Opalka*, *Colcol*, and *Mahone*—which did not involve false official statement charges—the lower court failed to assess the relationship between the charging scheme and the instruction. Tailoring the instruction in LCpl Quezada's case would have addressed the issue.

In *United States v. Francis*, the accused was charged with attempt, conspiracy, violating a lawful general order, false official statement, and obstruction of justice.[95] Investigators questioned him in connection with his receipt and compromise of an Air Force Promotion System.[96] He later called one of the investigators multiple times and said he did nothing wrong and was not involved in

[95] *United States v. Francis*, No. ACM 33080, 2000 CCA LEXIS 177 (A.F. Ct. Crim. App. July 25, 2000).
[96] *Id*. at *3.

the compromise of the system.[97] His multiple calls to investigators went beyond a general denial like the single denial in *Colcol*.[98] These statements were the basis of his false official statement charge.[99] When the military judge provided the members with the false exculpatory statement instruction, counsel questioned its redundancy, but did not object to it.[100]

The Air Force Court of Criminal Appeals concluded there was no plain error after conducting a specific analysis of the military judge's instruction.[101] The court distinguished this case from *Colcol* by stating: "[u]nlike the instruction given in the *Colcol* case, the trial judge in the appellant's case gave a specific and detailed instruction to the court members on the limited purpose for which they could consider the false exculpatory statements the appellant 'may have made.'"[102]

By contrast, in LCpl Quezada's case, the lower court did not conduct an analysis of the effect the instruction had on his denial of the *actus reus* of a specific intent crime when his denial and the specific intent crime were both charged offenses. It stopped short when it merely found that because LCpl Quezada only denied the *actus reus* of the offense his statement was not a general denial of the

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[97] *Id*.
[98] *Id*. at *6.
[99] *Id*. at *4.
[100] *Id*.
[101] *Francis*, 2000 CCA Lexis 117 at *6 (applying plain error because the issue was not preserved).
[102] *Id*. at *5.

offense; had they found a general denial, the false exculpatory statement instruction would not have been permissible under *Colcol*.

The Military Judges' Benchbook cautions judges against the instruction when: "the alleged false statement is a general denial of guilt[,] [] or the determination of the falsity of the statement turns on the ultimate question of guilt or innocence of the accused."[103] The lower court conducted no analysis as to whether the military judge's instruction applied to the second half of the Benchbook's guidance.

Without further tailoring or guidance, members could infer that conduct for which LCpl Quezada was presumed innocent was now evidence that he was guilty. The lower court failed to account for the effect of this instruction and its lack of tailoring on the presumption of innocence. Further tailoring of the instruction was necessary. The lack of tailoring exacerbated the instructional error in this case.

B. <u>The error was not harmless beyond a reasonable doubt.</u>

When "there are constitutional dimensions at play, [Appellant's] claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt."[104] To do so, courts must determine "whether, beyond a reasonable doubt,

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[103] J.A. at 264.

[104] *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (quoting *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal marks removed)).

the error did not contribute to the defendant's conviction or sentence."[105] An instructional error cannot be harmless beyond a reasonable doubt if "there is a reasonable probability that the [error] complained of might have contributed to the conviction.[106] Whether the error contributed to the conviction is to ask whether it was unimportant in relation to everything else the jury considered.[107]

Here, the error implicates the Due Process Clause. Like in *Hills*, the instruction gave the members conflicting statements about the bearing one charge had on another. In particular, the military judge instructed the members that LCpl Quezada might have made statements that an innocent person would not make and that was circumstantial evidence that he was guilty.[108]

The government argues that LCpl Quezada's statements to his wife and the responding provost marshal officer are specific denials and the instruction is appropriate given that evidence. [109] Those statements are uncharged and, in the absence of the Article 107 charge, might support giving the false exculpatory statement instruction. This argument overlooks the critical issue in this case because the Article 107 charge contained an alleged false statement that related to

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[105] *Id*. (internal quotation marks omitted).
[106] *Id*. (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (internal quotation marks omitted)).
[107] *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007).
[108] J.A. at 197.
[109] J.A. at 133, 160-61.

another charge. Although the military judge instructed the members they could choose which statements were false based on the evidence, the charges provided the members with a false statement that was a denial of another charge.

This was not a case with otherwise overwhelming evidence of LCpl Quezada's guilt. The members heard testimony that D.E.A. destroyed evidence after NCIS informed her of the need to preserve it. [110] D.E.A. had a motive to fabricate the non-consensual nature of her encounter with her brother-in-law when her sister found them in the room together.[111] D.E.A. recanted the non-consensual nature of the encounter altogether.[112] S.Q. testified that she did not pressure D.E.A. to recant or lie to NCIS.[113] S.Q. said her family was supportive of D.E.A.[114] And the members were instructed on mistake of fact as to consent as a defense.[115] This Court cannot be certain that the false exculpatory statement instruction in this case did not undermine the presumption innocence.

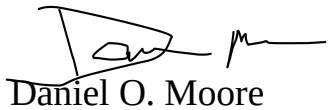
Conclusion

This Court should find that the false exculpatory instruction in this case undermined the presumption of innocence, reverse the decision of the lower court,

[110] J.A. at 96.
[111] J.A. at 124.
[112] J.A. at 116.
[113] J.A. at 133-34
[114] *Id*.
[115] J.A. at 183.

and set aside the findings and sentence in this case with respect to the Article 107 and 120 convictions.

Respectfully submitted,



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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on May 24, 2021.

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Certificate of Compliance with Rules 24(b) and 37

The undersigned counsel hereby certifies that: 1) this petition complies with the type volume limitations of rule 24(b) because it contains 5087 words; 2) is less than thirty pages; and 3) and complies with Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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