IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **MICHAEL P. WHITEEYES** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20190221 USCA Dkt. No. 21-0120/AR

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

Granted Issue

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT IN VIOLATION OF MILITARY RULE OF EVIDENCE 304(c).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ (2018).

Statement of the Case

On April 2–5, 2019, an enlisted panel sitting as a general court-martial convicted appellant, Specialist (SPC) Michael P. Whiteeyes, contrary to his plea,

of one specification of sexual abuse of a child, in violation of Article 120b, UCMJ. (JA016). The panel subsequently sentenced appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge from the service. (JA017). On March 27, 2020, the convening authority approved the sentence as adjudged. (JA021).

On December 15, 2020, the Army Court affirmed the findings and only so much of the sentence as provided for a dishonorable discharge, confinement for four years and eleven months, total forfeiture of all pay and allowances, and a reduction to E-1. *United States v. Whiteeyes*, ARMY 20190221, 2020 CCA LEXIS 461 (Army Ct. Crim. App. December 15, 2020) (JA002). This Court granted Appellant's petition for grant of review on March 10, 2021 on the issue above and ordered briefing under Rule 25. (JA001).

Statement of Facts

A. The Happy Family

Appellant and Mrs. Maryssa Moore married in December 2017. (JA105). At the time, Mrs. Moore had an eighteen-month old daughter, E.M., and lived in Opelika, Alabama near her mother. (JA105, JA111). Shortly after marrying appellant, Mrs. Moore and E.M. moved to Fort Drum, New York, and the three lived together in an apartment. (JA109).

E.M.'s biological father was not "in the picture," so appellant stepped into the role as step-father. (JA105-06). Appellant assisted Mrs. Moore with "regular parental duties," with E.M. (JA110). These duties included things like giving E.M. a bath, dressing her, and changing her diapers. (JA110).

B. The Stressors of Service

For Mrs. Moore, the move from Alabama to New York was "stressful," and she called her mother multiple times throughout each day. (JA110-11). Fort Drum was tough, but when appellant was reassigned to Germany, things went from bad to worse. (JA124). Mrs. Moore "didn't want to be there," and she became "irritated." (JA124). She was separated from her family, and living in a transitional hotel rather than housing. (JA124-26).

Things also became strained between Mrs. Moore and appellant. Sometime after arriving to Germany, Mrs. Moore discovered pornography on appellant's computer and became concerned. (JA127, JA139). Because of Mrs. Moore's deeply held religious beliefs, she did not like appellant watching pornography. (JA139-40). She believed that because appellant watched pornography, he "needed help," and believed it would be best for him to get that help without her or E.M. present. (JA140). As a result, she decided to return home to her family in Alabama. (JA127).

In an attempt to save the marriage, appellant offered Mrs. Moore the opportunity to speak with his supervisor, Sergeant (SGT) Kelsey Scott. (JA127-28). Mrs. Moore spoke to SGT Scott and complained that appellant was looking at pornography, and appellant was "lazy" and "dirty." (JA127-28, JA171).

C. Appellant Seeks Help

Soon after Mrs. Moore spoke to SGT Scott, appellant also reached out to SGT Scott. (JA172). Appellant confided the following to SGT Scott via text message:

> Hey sgt there is a real reason why my wife is leaving she believes that I sexually touched her daughter and as a concerned parent I believe that she needs to get tested for that I don't want risk of losing my job if it's true or not And I would never do anything to hurt her daughter

(JA055). After receiving this text message, SGT Scott forwarded it to her leadership. (JA173). This singular message sparked a law enforcement investigation. (JA176).

D. The Investigation

Appellant's message eventually made its way to the United States Army Criminal Investigative Command (CID). (JA176). Agents from CID contacted Mrs. Moore for an interview. (JA180). When Mrs. Moore spoke with them, she did not relay any concern that appellant had touched E.M. in a sexual manner; in fact, she explicitly disclaimed any belief that he had done so. (JA130-31).

Nonetheless, despite not believing appellant had molested her daughter, Mrs. Moore took E.M. to be physically examined. (JA130-31). Consistent with her belief, the examination revealed no indication of sexual abuse. (JA204). Once the investigation was complete, Mrs. Moore left Germany and returned to Alabama to live with her mother. (JA132).

Based on the interview with Mrs. Moore, Special Agent (SA) Tayler Tait interviewed appellant on August 18, 2018. (JA178). During that interview, appellant explained that Mrs. Moore was concerned that he might have an "urge" for E.M. (JA184). When SA Tait asked appellant whether appellant thought he would have urges toward E.M., appellant appeared startled, and said "No. No." (JA184). When further pressed by SA Tait, appellant stated, "I really don't have any urges for her, she's my daughter," and confirmed that E.M. was safe around him. (JA186). Throughout the entire interview, appellant repeatedly and explicitly denied inappropriately touching E.M., as well as having any inappropriate urges toward her. (JA 203, JA199). At no point in this interview did he ever state that he had urges toward his daughter.

About a month after his interview, on September 27, 2018, appellant underwent a polygraph examination. (JA069-70). Throughout the entire three-hour pre-instrument phase, appellant continued to steadfastly deny that he had touched E.M. (JA072-73). Appellant was then given the polygraph examination,

during which he continued to deny any sexual abuse. (JA073). Following the polygraph, the polygrapher, SA Aaron Bettes, told appellant that he had not passed. (JA074). Later in the interview, SA Bettes told appellant he "failed." (JA075). At this point, roughly four and a half hours into the interview, SA Bettes asked appellant to tell him "about the time that he stepped over the line." (Pros. Ex. 2, 49:22). Appellant replied that he once blew on E.M.'s vagina while changing her. (Pros. Ex. 2, 49:22). When asked why, appellant said he was curious but quickly realized that he should not do it. (Pros. Ex. 2, 52:00). Special Agent Bettes continued pressuring appellant to say more and eventually, after numerous additional denials, appellant broke down and stated that he accidentally digitally penetrated E.M. while changing her diaper. (Pros. Ex. 2, 1:20:30). Appellant maintained he did these actions unintentionally, that he must have done it "subconsciously," and, "without knowing." (Pros. Ex. 2, 1:46:30). Special Agent Bettes responded by accosting appellant for his answer, telling him not to "waste my time." (Pros. Ex. 2, 1:47:00).

Roughly 20 minutes later, appellant told SA Bettes that appellant "lied" and "misled" SA Bettes into thinking that appellant had touched E.M. (Pros. Ex. 2, 2:01:20). When pressed on this statement, appellant again steadfastly denied penetrating E.M. (Pros. Ex. 2, 2:02:20). Special Agent Bettes raised his voice and asked a series of aggressive questions without allowing appellant to respond,

including: “Are you kidding me right now?,” “Are you so afraid of what’s going to happen that you are going to tell your best friend that all of this is a lie, now?,” and “How could you?” (Pros. Ex. 2, 2:02:30). Special Agent Bettes then turned his back to appellant, who softly responded, “I’m sorry.” (Pros. Ex. 2, 2:04:30).

Special Agent Bettes began yelling, and accusing appellant of jeopardizing SA Bettes’s career by claiming SA Bettes forced appellant to say things that were untrue, adding “I don’t deserve that.” (Pros. Ex. 2, 2:05:20). Special Agent Bettes accused appellant of lying and said, “next thing you’re going to tell me [the blowing] was a lie to?” (Pros. Ex. 2, 2:02:20). Special Agent Bettes went as far as mocking appellant with a child-like voice, saying, “boo-hoo.” (Pros. Ex. 2, 2:08:00). Appellant reiterated that he did not touch E.M., explaining that he only said he did because he was afraid of SA Bettes. (Pros. Ex. 2, 2:20:00).

E. Sudden Revelations

Back in Alabama, Mrs. Moore was unaware of the status of the investigation or the fact that CID had twice interviewed appellant. (JA133). Because Mrs. Moore wanted details on the investigation, she visited the “JAG” office at Fort Benning, Georgia, and requested information. (JA133). Special Agent Tait, who called to provide her a briefing, eventually informed Mrs. Moore of the status of the investigation. (JA137). Special Agent Tait told Mrs. Moore appellant made a “confession” and “admitted to fingering” E.M.. (JA089, JA137, JA181).

Upon hearing this troubling information, Mrs. Moore suddenly told SA Tait several things she had never told anyone before. (JA143). Specifically, she claimed E.M. would "run and hide and say 'Shh, he's coming.'" (JA133). Additionally, Mrs. Moore claimed E.M. had attempted to put several children's toys inside her vagina. (JA135-36). Mrs. Moore later testified to other "alarming" things appellant allegedly said months before while he was stationed at Fort Drum. (JA090). Mrs. Moore described two specific scenarios: one where appellant allegedly commented that E.M. looked like she was "sucking a dick" when she put a plastic toy carrot in her mouth; and one where appellant allegedly commented that E.M. looked like she had "cum all over her face" when E.M. poured milk on her face. (JA091). These statements were made near the time that Mrs. Moore and appellant first moved in together at Fort Drum, months before the alleged offenses. (JA099). Mrs. Moore never told CID any of these assertions when they interviewed her in Germany and she told them that she did not believe appellant would ever do anything to hurt her daughter.

F. The Trial

Prior to trial, defense counsel objected to admission of several of appellant's statements on the ground that they lacked sufficient corroborating evidence as required under Military Rule of Evidence (Mil. R. Evid.) 304(c). (JA041). The government argued four pieces of evidence supported appellant's September 27,

2018 statements: (1) "the [Mil. R. Evid.] 404(b) evidence, where the child [sic] says she looks like she sucking like a dick--sucking a dick. She looks like she has cum on her face;" (2) appellant's 18 August statement to SA Tait, "that he had urges towards the child and fears that he may become sexually attracted to the child in the future";[1] (3) appellant resided in the same house as E.M., where a specific piece of furniture existed; and (4) appellant sent a message to SGT Scott asking for assistance. (JA159-60).

The military judge ruled that appellant's August 18, 2018 statement to law enforcement, discussing whether he ever had "urges," was admissible under Mil. R. Evid. 404(b), and therefore admissible under a rule "other than pertaining to admissibility of the admissions or confessions." (JA168). Yet, out of an abundance of caution, the military judge ruled that appellant's "sexually charged statements regarding E.M. when she had milk running down her face and he said it looks like cum is dripping down her face, and his comment when she was sticking a carrot in her mouth, about it looking like she's sucking a dick" was also sufficient to establish "independent evidence" to support this statements' admissibility. (JA168-69).

[1] This is a reference to the interview SA Tait conducted on August 18, 2018. The quoted language is the government's characterization of the content of that interview. As stated earlier, appellant never said he had "urges" for E.M. during the interview, despite being asked multiple times. (JA203, JA199).

The military judge also admitted the entirety of appellant's September 27, 2018 statement, determining that it was supported by three pieces of independent evidence: (1) that "after the time period of the charged offense, [E.M.'s] behavior changed, where she would get naked, take off her diapers and poke objects and toys in her vagina;" (2) that "the accused had an opportunity and explained the location of the offense or alleged offense, which was in [E.M.'s] bedroom, on the changing table and on a specific dresser made by the grandfather, during the time of the charged offenses"; and (3) the comments regarding the toy carrot and milk previously discussed. (JA169).

Summary of Argument

The military judge erred in admitting two uncorroborated statements by appellant into his court-martial. This error directly led to appellant being convicted of an offense, despite the government having absolutely no independent evidence that a crime even occurred. The military judge found that the statements were corroborated based on exceptionally weak, ancillary facts, that in no way meet the standard set forth by law. Some of the facts the military judge relied upon are directly in conflict with prior holdings of this Court, one was directly contradicted by expert testimony, another should have been found inadmissible. The American legal system has a long history of protecting accused from conviction by an

uncorroborated confession alone. Appellant did not receive the benefit of this protection.

Both the Supreme Court and this Court have relied upon a two-prong analysis when corroborating confessions. First, there must be sufficient evidence to establish that an offense was actually committed. In cases where there is a tangible injury or other *corpus delicti*,[2] all that is necessary to satisfy this requirement is independent evidence establishing a crime occurred, and some person was criminally culpable. In cases where there is no tangible *corpus delicti*, the independent evidence must also implicate the accused. If the government has satisfied this initial requirement, they must then present sufficient corroborating evidence to "raise an inference of the truth of the confession or admission."

In performing this second prong of the analysis, the Court should assess any indicia of unreliability surrounding a confession or admission and employ a more "careful scrutiny," when circumstances surrounding an accused's statement are suspect. In determining whether a confession is corroborated, the Court should only consider those facts which are "vital" or "essential" to the charged offense, rather than making an assessment that the confession is "generally trustworthy"

[2] Black's Law Dictionary defines *corpus delicti* as "[t]he fact of a transgression; *actus reus*. The phrase reflects the simple principle that a crime must be proved to have occurred before anyone can be convicted for having committed it." Black's Law Dictionary (10th ed. 2014).

based on the corroboration of irrelevant, ancillary facts. Finally, while the evidence need only be "slight" to corroborate a relevant fact, the government must demonstrate that there is an adequate criminal connotation, and that there is a sufficient connection between the evidence presented, and a given claim in an accused's statement.

The Government failed to present evidence necessary to satisfy these legal requirements, and the military judge thereby abused his discretion in admitting the accused's statements. First, the government did not present *any* independent evidence that the crime of sexual abuse was actually committed by anyone, let alone appellant. Second, some of the evidence they did present was so ancillary to the essential facts in the confession that it should not be relied upon in determining whether appellant's statements were corroborated, and even if this Court believes the facts were relevant to the trustworthiness of the statement, the evidence failed to satisfy the threshold quantum for establishing that appellant's statements were, in fact, trustworthy.

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Standard of Review

Appellate courts review a military judge's determination that Mil. R. Evid. 304(c) does not bar admission of an appellant's statement for an abuse of discretion. *United States v. Jones*, 78 M.J. 37, 41 (C.A.A.F. 2018) (citing *United States v. Adams*, 74 M.J. 137, 139 (C.A.A.F. 2015)). In determining whether there was an abuse of discretion, findings of fact are reviewed under a clearly-erroneous standard and conclusions of law are reviewed de novo. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

Law

It is foundational to the American system of justice that to convict a citizen, or in this case a soldier, the prosecution must present evidence that proves the elements of the charged offense beyond a reasonable doubt. If the totality of the government's evidence is the words of the accused, there are safeguards in place to ensure the reliability of such admissions. "It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused." *Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963). "This

'corroboration rule' was initially intended to mitigate the risk that a false confession would lead to a conviction for a crime that not only had not been committed by the defendant but also that had not been committed by anyone else." *United States v. Tanco-Baez*, 942 F.3d 7, 13 (1st Cir. 2019) (citing *Smith v. United States*, 348 U.S. 147, 153-54 (1954)). "That risk was evident from early English and American cases. Defendants in some of them had been sentenced to death for homicide solely on the basis of their confessions of guilt, but the supposed victims had then appeared, post-sentencing, very much alive." *Id.* Common law courts addressed this problem through the implementation of the *corpus delicti* doctrine, requiring independent proof of a crime before an accused could be convicted on their confession alone. *See generally*, Major Russell L. Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1, 4-10 (2003).

In the military justice system, the spirit of that foundational protection was codified in Mil. R. Evid. 304(c).[3] In its current iteration, the rule states, in relevant part:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence

[3] Prior to the 2013 amendment to the rules, corroboration of confessions was covered in Mil. R. Evid. 304(g). Manual for Courts-Martial, United States (2012 ed.)

> that would tend to establish the trustworthiness of the admission or confession. . . . Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety. . . The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the admission or confession. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

Mil. R. Evid. 304(c)(1), (2), & (4)

A. The Recent Amendment

This current version of the rule was drafted in 2016 following a change intended to "bring[] military practice in line with federal practice." Manual for Courts-Martial, United States (2016 ed.), Analysis of the Military Rules of Evidence at A22-12 (citing *Opper v. United States*, 348 U.S. 84 (1954) and *Smith*, 348 U.S. 147). As the drafter's analysis implies, military jurisprudence had deviated from its civilian counterpart. The primary source of this deviation was this Court's interpretation of the "essential facts" language originally added in the 1969 version of the rule. *See United States v. Adams,* 74 M.J. 137, 139 n.6 (C.A.A.F. 2015) (explaining the 1969 amendment).

Prior to the recent amendment, admissions were segmented into their individual "essential facts" for analysis under the rule. If an individual "essential

fact" within the confession was uncorroborated, that specific factual assertion could not be used as evidence against the accused. *See* Mil. R. Evid. 304(c)(2) (2012 ed.). "There [was] no 'tipping point' of corroboration which would allow admission of the entire confession if a certain percentage of essential facts are found to be corroborated. If four of five essential facts were corroborated, the entire confession would not be admissible. Only the four corroborated facts [were] admissible . . . ." *Adams*, 74 M.J. at 140 (referencing *United States v. Seay*, 60 M.J. 73, 80 (C.A.A.F. 2004)). In circumstances where portions of the confession remained uncorroborated, military judges were encouraged to "redact a statement by excising the uncorroborated portions and then admitting [only] the redacted statement into evidence." *Adams*, 74 M.J. at 140.

As an unsurprising result, this Court's precedent has focused on the weight of evidence necessary to adequately corroborate each "essential fact" rather than the guarantees of trustworthiness necessary for the entire confession to be admitted. *See e.g. United States v. Maio,* 34 M.J. 215, 218 n.1 (C.M.A. 1992); *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988) (quantum of corroboration needed "very slight"); *United States v. Yeoman,* 25 M.J. 1, 4 (C.M.A. 1987) (corroboration needed is "slight"). Under previous versions of the rule, there has been no need to address the issue present in the immediate case; when every "essential fact" required its own independent corroboration to be

admitted, it was unnecessary to determine how much corroboration was necessary to admit a statement in its entirety. *See Adams,* 74 M.J. at 140. Because of this history and the recent change to the rule, military case law provides limited guidance and this Court should consider the current state of federal practice in deciding the degree to which a confession needs to be corroborated to admit the entirety of the statement.

B. Civilian Precedent

In three decisions decided on the same day in 1954, the Supreme Court clarified the modern corroboration requirement. *Smith*, 348 U.S. 147; *Opper*, 348 U.S. 84; *United States v. Calderon*, 348 U.S. 160 (1954). The test requires "the Government to introduce *substantial* independent evidence which would tend to establish the trustworthiness of the statement" before it may rely on the statement as evidence of an element of the offense. *Opper,* 348 U.S. at 93 (emphasis added). In many respects, this was an expansion of the protections of the traditional *corpus delicti* doctrine. *Smith*, 348 U.S. at 153-54 ("The corroboration rule, at its inception, served an extremely limited function."). Whereas the original doctrine only protected accused charged with "serious crimes of violence," the new standard was intended to expand the protection to all crimes, even those without a "tangible injury which [could] be isolated as a *corpus delicti*;" including crimes

like tax evasion. *Id.* ("We choose to apply the rule, with its broader guarantee, to crimes in which there is no tangible corpus delicti. . ..").

While the protection now covers a broader spectrum of crimes, it no longer requires that corroborative evidence be sufficient, independent of the statements, to establish the whole of the *corpus delicti*. *Opper,* 348 U.S. at 93. Nonetheless, the government must still provide independent evidence that a crime has *actually been committed.* That is to say, "the state no longer need introduce independent, tangible evidence supporting *every element* of the corpus delicti. . . . only the gravamen of the offense – the existence of the injury that forms the core of the offense. . .." *United States v. Lopez-Alvarez*, 970 F.2d 583, 592 (9th Cir. 1992)(citing *Wong Sun*, 371 U.S. at 489 n.15) (emphasis added). Thus, the first step in the modern *corpus delicti* analysis is determining whether a crime was committed *by anyone*.

C. Step One – Did a Crime Actually happen?

This first step traces its roots to an oft-cited footnote in the Supreme Court's 1963 decision in *Wong Sun*:

> Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. . . There need in such a case be no link, outside the confession, between the injury and the accused who admits having inflicted it. But where the crime involves no tangible corpus delicti, we have said that "the

> corroborative evidence must implicate the accused in order to show that a crime has been committed."

371 U.S. at 489 n.15. (citing *Smith*, 348 U.S. at 154).

While this footnote has caused some confusion,[4] many courts, including this one, have properly interpreted it to distinguish between two types of offenses: those *with* tangible *corpus delicti*, and those *without*. *See United States v. Yates*, 24 M.J. 114, 115-16 (C.M.A. 1987), *cert. denied*, 484 U.S. 852 (1987). Both categories require the government prove that a crime was actually committed. *Wong Sun*, 371 U.S. at 489 n.15. The only difference is whether there needs to be corroborative evidence which "implicates the accused," or whether it is sufficient that the government proves a crime was committed by *someone*. *Id.*

As the Ninth Circuit explained, "*Wong Sun* merely reaffirms the elementary proposition that the prosecution must introduce independent evidence that the criminal conduct at the core of the offense *actually occurred*. . . ." *Lopez-Alvarez*, 970 F.2d at 592 (citing *Won Sun*, 371 U.S. at 489 n.15) (emphasis added). With this in mind, the Ninth Circuit adopted a two-prong test for corroborating confessions, the first prong of which is aimed at addressing this concern. *Id*. First, although the government need not introduce evidence of the *corpus delicti*, as was

[4] *See e.g. United States v. Johnson*, 589 F.2d 716, 719 n.32 (D.C. Cir. 1978) (suggesting that *Wong Sun* allows the state to convict without independent evidence suggesting that a confession is reliable).

required under the traditional test, "it must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred." *Id.* The second prong then requires the government "introduce independent evidence tending to establish the trustworthiness of the admissions." *Id*. "That is, the *Wong Sun* statement suggests that when the state has adequately demonstrated the occurrence of a tangible crime, an adequately trustworthy confession will suffice under the corroboration requirement without independent evidence linking the confessor to the crime." *Id.*

This is the same two-prong test that this Court used in *Yates.* 24 M.J. at 115-16. In *Yates*, the accused had been charged with committing rape, carnal knowledge, sodomy, and indecent acts against his two-year-old daughter. *Id.* at 114. This Court held, "[i]n a case such as this, where the crime is one involving physical injury to a person, *Wong Sun* says it is sufficient under the *Opper-Smith* approach if the independent evidence establishes 'that the injury for which the accused confesses responsibility did-in-fact occur, and that some person was criminally culpable.'" *Id.* at 116. The military judge in *Yates* incorrectly required independent evidence that implicated the accused. *Id.* This was error because the record contained evidence supporting the fact a crime had been committed and that someone was criminally culpable. *Id.* Even though the government satisfied the first prong, by showing a crime had been committed, there was a second step

which was still within the purview of the trial judge: determining "whether the corroborating evidence [was] sufficient to 'raise an inference of the truth of the essential facts admitted.'" *Yates*, 24 M.J. at 116-17 (citing Mil. R. Evid. 304(g)). This Court returned the case to the trial judge to make that decision. *Id.*

Therefore, as part of assessing a confession, *Wong Sun* and *Yates* require a preliminary finding of independent evidence a crime actually occurred. This initial finding protects accused from the original danger of false confessions as recognized by common law, while still granting more flexibility than the original *corpus delicti* doctrine.

> It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, *as long as there is substantial independent evidence that the offense has been committed*, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty.

United States v. Melvin. 26 M.J. at 146-47 (citing *Smith,* 348 U.S. at 156) (emphasis added).

D. Step Two – Does the Independent Evidence Establish Trustworthiness?

After the government satisfies its initial requirement by showing that a crime occurred, the next step is to assess whether the independent evidence is sufficient to establish the trustworthiness of the admission or confession. *See Yates*, 24 M.J. at 116-17; *Lopez-Alvarez*, 970 F.2d at 592. In assessing the trustworthiness, the

first consideration is determining which facts, within an admission or confession, are relevant.

1. "Vital" Facts – Which Facts Matter?

In *Tanco-Baez*, the First Circuit explored this issue in depth. Finding it was not entirely clear from the Supreme Court's precedent, the First Circuit set off to determine whether independent evidence could render an admission trustworthy if the "vital" facts remained uncorroborated. 942 F.3d at 20. The First Circuit held it could not. *Id.* at 21-22. The court was trying to determine whether the defendant's confession to being a "long-term user" of drugs was adequately corroborated. *Id.* at 23. The government offered independent evidence that a multitude of other admissions made by the defendant in the same statement were entirely uncontroverted; including the fact that he was present in a gray Toyota Yaris during a shootout, that he escaped into a Jeep, and as this was going on, he was carrying an automatic weapon and a concealed pistol. *Id.* As a result, the government argued the entirety of the statement, including the admissions about the defendant's drug use, were reliable. *Id.* The First Circuit rejected the government's argument, finding there was "too little relationship between the admitted fact that is directly confirmed by independent evidence and the admitted fact for which there is none." *Id.* at 23-24. In essence, there is no point where an accused's statement has a sufficient number of corroborated facts to render the

entire statement admissible, unless the independently corroborated facts are relevant to the charged offense.

This view has been adopted by a number of other federal circuits. *See United States v. Stephens*, 482 F.3d 669, 673 (4th Cir. 2007) (finding a defendant's confession uncorroborated despite testimony demonstrating that a person described in the confession existed and owned the car described by the defendant); *United States v. Calhoun*, No. 92-2001, 1993 U.S. App. LEXIS 20032 at *3 (6th Cir. July 26, 1993) (per curiam) ("Nor do we believe that the fact the other crimes admitted to in the confession are corroborated permits the use of the confession to prove an uncorroborated crime."); *Lopez-Alvarez*, 970 F.2d at 595 (holding that a defendant's admission that he helped a murderer avoid capture at an airport was uncorroborated where "[t]he only elements of [it] that have been independently verified are those relating to his presence at the airport" and rejecting as insufficient the government's evidence that other unrelated admissions of the defendant "appear[ed] trustworthy").[5]

Such a rule dovetails well with existing military case law. As previously stated, the bulk of military jurisprudence on corroboration focused on "essential

[5] *But see United States v. Dalhouse*, 534 F.3d 803, 806 (7th Cir. 2008) (explaining that corroboration is "typically accomplished by presenting evidence that a few of its key assertions are true, which is sufficient to show that the statement as a whole is trustworthy.")

facts." *See e.g. Adams*, 74 M.J. 137. Determining whether a fact is "essential" or "vital" to the charged crime is a concept that is already present in this Court's precedent. If a fact was not sufficiently "essential" to require independent corroboration under military law, it should likewise not be important enough to bear the weight of the trustworthiness of an entire statement.

"What constitutes an essential fact of an admission or confession necessarily varies by case." *Adams*, 74 M.J. at 140. This Court has previously considered "essential facts to include the 'time, place, persons involved, access, opportunity, method, and motive of the crime.'" *Id*. (citing *United States v. Baldwin*, 54 M.J. 464, 465-66 (C.A.A.F. 2001); *United States v. Rounds*, 30 M.J. 76, 77-78 (C.A.A.F. 1990); *United States v. Melvin*, 26 M.J. 145, 147 (C.M.A. 1988)). If, on the other hand, the facts are of such an ancillary nature that they were determined too insignificant to require their own corroboration, that lack of importance should exclude them from serving as a constitutional safeguard.

Such a rule would also protect against abuses by law enforcement. If all that matters is that a certain percentage of the facts within a statement are corroborated, regardless of those facts' relevance to the crime, law enforcement would be able to stack a coerced confession with insignificant, but provable, facts to demonstrate reliability of the entire statement. If an accused's address, hair color, or the type of furniture in his home can be relied upon to show that he is "generally truthful,"

there is little left in service of the Supreme Court's caution that "sound law enforcement requires police investigations which extend beyond the words of the accused." *Smith*, 348 U.S. at 153.

2. Indicia of Unreliability

Not all statements and admissions are created equal. Another relevant consideration is the circumstances surrounding the confession or admission. In the decretal paragraph of the Supreme Court's *Smith* decision, the Court noted, "[t]he circumstances leading up to petitioner's statement," and conflicts between admitted facts and the independent evidence, "imposed on the trial judge and the reviewing courts a duty of *careful scrutiny*." 348 U.S. at 159 (emphasis added). In establishing such a sliding scale, the court mandated a requirement for stronger evidence of corroboration when the underlying confession bears "indicia of unreliability." *Tanco-Baez,* 942 F.3d at 23.

This principle is consistent with some courts' treatment of so-called, "self-corroborating statements." *See United States v. Irving,* 452 F.3d 110, 118 (2d Cir. 2006). That is, when a statement has certain "indicia of reliability," such as being made prior to an offense, or between co-conspirators, it does not need to be independently corroborated. *See Smith*, 348 U.S. 147 (citing *Miles v. United States*, 103 U.S. 304 (1880) (statements that the accused was married were properly relied upon in a bigamy trial); and *State v. Saltzman*, 44 N. W. 2d 24

(Iowa 1950) (statements about betting and losing money were part of the res gestae of the offense of gambling and did not need to be corroborated)). The fact that more reliability entails less careful scrutiny necessarily means less reliable statements should require more.

Such a rule also embodies one of the Supreme Court's primary rationales for its 1954 adoption of the *Smith-Opper* standard. While protections already exist for "involuntary" confessions, the law must recognize an accused is not always able to prove the circumstances surrounding his or her confession. *Smith*, 348 U.S. at 153. "Moreover, though a statement may not be 'involuntary' within the meaning of [the] exclusionary rule, [ ] its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation -- whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past." *Id*.

Confessions can be incredibly persuasive; whether they are true or not. *See Crane v. Kentucky*, 476 U.S. 683, 688-89 (1986). The average juror is not familiar with the criminal justice system's troubling history with false confessions, which is why it is so important that judges adequately screen confessions for corroboration. *Smith,* 348 U.S. at 153. Recognizing that juries are less likely to adequately scrutinize false confessions, courts should apply a more "careful scrutiny"

dependent on the indicia of unreliability surrounding an accused's confession. *See id.*

3. Corroborating Individual Facts

Once this Court has decided which facts are relevant in determining the trustworthiness of a confession, and whether indicia of unreliability raise the requirement of independent corroboration, it can then rely on its existing military precedent to determine whether a particular fact is sufficiently supported by the evidence. The quantum of corroboration needed to corroborate a fact is "slight." *Yeoman,* 25 M.J. at 4; see also *Melvin*, 26 M.J. at 146. Nonetheless, the evidence needs to at least have a "criminal connotation." *See United States v. Faciane*, 40 M.J. 399 (C.A.A.F. 1994). Evidence must also be admissible to serve as corroboration. *See United States v. Duvall*, 47 M.J. 189, 192 (C.A.A.F. 1997); *Faciane*, 40 M.J. at 403 (finding that inadmissible hearsay evidence could not be considered corroboration for a confession). "[N]o mathematical formula exists to measure sufficient corroboration." *Melvin*, 26 M.J. at 146.

Once the court determines which facts can be relied upon, and how many have been adequately corroborated by the evidence, it can then determine whether "independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession" as a whole. Mil. R. Evid. 304(c)(1).

Argument

In the immediate case, the government failed to establish that a crime was committed *at all*, thereby failing the first prong of the *Wong Sun-Yates* test. *See Wong Sun*, 371 U.S. at 489 n.15; *Yates,* 24 M.J. at 115-16. Should this Court disagree and move to the second prong, the government similarly fails. First there is a great number of indicia of unreliability in this case, requiring "careful scrutiny." *See Smith,* 348 U.S. at 159. Second, the military judge's analysis relies upon ancillary facts which have little to do with the heart of appellant's statements. Last, those facts which are arguably *relevant* do not sufficiently satisfy the quantum requirement necessary to establish the statements' trustworthiness.

A. There is insufficient evidence that a crime actually occurred.

The government failed to provide "substantial independent evidence that the offense has been committed." *Melvin,* 26 M.J. at 146-47 (citing *Smith,* 348 U.S. at 156). Other than appellant's confession, there is nothing in the record indicative of sexual abuse and certainly nothing which implicates appellant.

Compare this case to *Yates,* where the charged offenses were substantively the same. 24 M.J. 114. In *Yates*, the child victim was taken to the hospital due to a number of troubling symptoms, including an unknown vaginal discharge. *Id.* at 115. Upon examination, medical providers diagnosed the two-year old child with gonorrhea. *Id.* As this Court correctly held, that diagnosis was clearly

independent evidence that a crime occurred, given how unlikely it would have been for the two-year-old girl to have contracted the sexually transmitted disease from an innocent source. *Id.* There are a variety of other circumstances which satisfy this requirement. In most sexual assault cases, for example, there would be a reporting victim. Even in child sexual abuse cases, military jurisprudence contains countless examples of young children making outcries which establish the existence of a crime. *See e.g. United States v. Cottrill,* 45 M.J. 485, 486 (C.A.A.F. 1997) (Three-year-old victim reported that "her privates hurt."). The necessary corroboration could be a witness, an injury, or DNA evidence; but there must be something to establish that the accused has not admitted to a wholly fabricated offense. There is nothing in appellant's case which performs this role.

In *Yates*, there was a medical condition, followed by Yates' admission to the crime that caused that condition. On the contrary, in the instant case, there was a statement by appellant, and then after being misled about the statement, appellant's wife changed her mind and alleged facts that the government later used to corroborate the admission. Appellant's wife, Mrs. Moore, did not believe that her husband was abusing her daughter but agreed to take E.M. to be physically examined by a medical provider. (JA130-31). The examination revealed no indication of sexual abuse, no injuries, no semen, nothing of evidentiary value. (JA204). The child victim never said anything alarming to her mother, or any

other witness. *Compare Cottrill*, 45 M.J. at 486. She did not contract a disease or show signs of an injury. *Compare Yates,* 24 M.J. at 115. There was not even evidence of a tense moment or strange look. *Compare United States v. Baldwin*, 54 M.J. 551, 552 (A.F. Ct. Crim. App. 2000), *aff'd*, 54 M.J. 464 (C.A.A.F. 2001) (The child-victim's mother "testified that on a weekend near the end of April 1999, she found the accused in the child-victim's bedroom covering her with blankets. When she entered, he gave her a look she had never seen before and then left. When she found him on the floor in the living room crying, she knew something was terribly wrong."). There is absolutely nothing contained within the facts of the immediate case which can satisfy the preliminary requirement. *See Wong Sun*, 371 U.S. at 489 n.15; *Yates,* 24 M.J. at 115-16. As such, there is no need to go farther into the analysis because the government failed to independently establish a crime *actually occurred.*

B. Even if this Court finds there was sufficient evidence a crime occurred, there was insufficient independent evidence to establish the trustworthiness of appellant's confession.

There are three reasons the evidence in the immediate case was insufficient to establish an "inference of the truth of the admission or confession." Mil. R. Evid. 304(c)(4). First, there were numerous indicia that appellant's admission was unreliable which should cause this Court to employ "careful scrutiny." *See Smith,* 348 U.S. at 159. Second, some of the facts from appellant's admission, which the

military judge relied upon, were too ancillary to the charged offenses to establish the confession's trustworthiness. Last, to the degree appellant's corroborated claims were relevant to the charged conduct, the evidence used to corroborate those claims provided an insufficient quantum of support.

1. Appellant's statements were riddled with indicia of unreliability.

In performing its analysis, this Court should consider the Supreme Court's holding in *Smith,* and apply "careful scrutiny" based on the facts surrounding appellant's confession. 348 U.S. at 159. Appellant litigated a motion to suppress the confession for being involuntary, based on the tactics employed by law enforcement. While the military judge ultimately decided the confession was voluntary, the circumstances surrounding appellant's statements are also relevant to the degree of corroboration needed. *Id.* ("though a statement may not be 'involuntary'. . . its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation.").

Throughout the entirety of the August 18 interview, appellant steadfastly denied ever touching E.M.. (JA072). A little over a month later, on September 27, appellant was interviewed again and administered a polygraph. During that interrogation, SA Bettes who has a Chief Warrant Officer-3, referred to appellant by his first name, and told appellant he was appellant's "best friend." (JA070). Special Agent Bettes further told appellant he was "there to help" and wanted to

help "the doctor know what to look for," discussing options for appellant to receive therapy. (JA071). During the entirety of the pre-instrument phase before appellant's September 27 statement, appellant denied ever sexually abusing E.M. (JA073). Special Agent Bettes directly asked appellant several times; every time, appellant denied it. (JA073). Special Agent Bettes also told appellant that, "worst case scenario," he would not tell his commander or escort "today," and the military police would not be waiting for him outside. (JA073). Despite these assurances, for over three hours, appellant continuously denied penetrating E.M. (JA073).

After conducting the polygraph, SA Bettes informed appellant, "there were some issues with the poly." (JA074). He falsely told appellant he "failed" the test. (JA075). Special Agent Bettes also employed a "minimizing" technique, explaining to appellant that sexual abuse was not an uncommon issue, and he "was not a monster." (JA076-77).

Special Agent Bettes next provided appellant with the substance of what would ultimately be part of his admission. Special Agent Bettes told appellant he "stuck maybe the tip of a pinky—that tip of a finger in her vagina and then thought – 'oh that's you know, that's the wrong thing to do. I didn't need to do that.'" (JA078). After hours of questioning, that law enforcement-crafted statement is exactly what appellant ultimately admitted to doing. (JA078). Although appellant repeated what SA Bettes volunteered, his statement wasn't made unequivocally.

After hearing SA Bettes's recitation of imagined facts, appellant asked, "Do you honestly think I did this?" to which SA Bettes replied "Yeah." (JA079). Appellant then agreed, adding that he must have been doing it subconsciously, "not even knowing it." (JA080). Towards the end of the interview – not the next day or next week, but rather before even leaving CID – appellant fully recanted his statement and repeated that he never put his finger inside E.M.'s vagina. (JA078).

These are all alarming facts. At worst, this was an involuntary confession, and at best it bore all of the indicia of unreliability the Supreme Court warned about in *Smith*. 348 U.S. at 159. This was not an independently reliable and detailed declaration to a friendly witness, this was a methodically constructed, suggested, and extracted admission using deliberate law enforcement tactics. As a result, this Court should adopt the same "careful scrutiny" as the Supreme Court in *Smith,* and the First Circuit in *Tanco-Baez,* when assessing whether appellant's confession was adequately corroborated. *Id.*; 942 F.3d at 23.

2. Some corroborated claims were too ancillary to the offense to establish the trustworthiness of appellant's statements.

As a preliminary note, the military judge appeared to equivocate between two types of "facts" when making his ruling. When performing his analysis, he should have started by identifying the "facts" contained within appellant's statement in need of corroboration. These are the "essential facts" that were the subject of the pre-2016 amendment to the rule. The second type of "fact" is the

corroborative evidence which independently supports and corroborates those statements.

In his brief ruling, the military judge relied on three items to corroborate appellant's September 27 statement: (1) appellant's immature comments involving E.M., (2) that appellant "explained the location" including a description of a unique piece of furniture, and (3) E.M.'s apparent change in behavior. (JA169). Appellant's explanation of the location is the first type of "fact," something actually contained within appellant's statement. The other two items mentioned by the judge, the comments made by appellant and E.M.'s behavior, are the second type of "fact," corroborative evidence used to support claims made by appellant, but not actually referenced in the statement itself.

When the military judge referenced appellant's explanation of the location and description of the furniture, he did not say what evidence from the record supported those claims. The corroboration could have come from a map of the house, an agent performing a walk-through, or by a photograph. Or, more troubling, it could have just been a general conclusion that appellant would have known the layout of the house because he lived there. Because we do not know what evidence the military judge relied upon, we cannot adequately review his findings.

Similarly, the judge's reference to appellant's comments and E.M.'s behavior were apparently offered to corroborate certain claims within appellant statement. That being said, the military judge did not "show his work" and explain which statements within appellant's admission they are intended to corroborate, nor how they do so. As described below, these "facts" may have been admissible evidence of the crime, but they were not necessarily evidence of corroboration unless they were somehow relevant to the claims in appellant's statement. This general confusion of issues is indicative of the military judge's misunderstanding of the law. Rather than a careful analysis elaborating appellant's specific claims and detailing which evidence supported those claims, the military judge listed evidence from the case, generally related to the fact pattern, and summarily concluded there was sufficient corroboration.

Because the military judge did not clearly identify which of appellant's statements he was corroborating, it is impossible to determine whether he was relying on "essential" or "vital" facts. The only thing appellant said, which the judge referenced, was the information about the antique dresser made by the grandfather. (JA169). This is a near textbook example of an irrelevant or ancillary fact that cannot be relied upon to corroborate an admission. It clearly does not qualify as a "vital" fact. There is simply "too little relationship" between the fact appellant knows what his home and the dresser looked like and the fact that

appellant sexually abused his daughter. *See Tanco-Baez,* 942 F.3d at 23-24. Presumably, appellant would have provided this data during an investigation – of any alleged incident in his home – regardless of his guilt. He was, after all, the step-father of the alleged victim and an individual who regularly changed her diapers and cared for her as a parent should. (JA120). It would be much more suspicious if he did not know where her room was located or what furniture was in her room. These "admissions" are similar to appellant confirming E.M.'s name, or the fact that she was a girl, or the fact that she was Mrs. Moore's daughter. Accordingly, these simple confirmations of basic, unrelated, non-criminal facts are not the types "vital" facts which should be relied upon to corroborate a confession.

The military judge's erroneous understanding of the law demonstrates a clear abuse of discretion, and this Court should afford no deference to it. If this ruling by the military judge is correct, and this is a relevant corroborating fact, Mil. R. Evid. 304(c) no longer has meaning. Presumably, law enforcement could merely ask an interviewee some benign question, such as their home address, and if the interviewee answers that question truthfully, then the entirety of their statements can be used without further corroboration as the singular evidence to support a later conviction. This is an absurd result and gives no effect to the spirit of the rule.

3. The other claims in appellant's admission were not supported by a sufficient quantum of evidence.

While "a sufficient amount of evidence can be slight, the evidence must nevertheless be sufficient in quantity and quality to meet the plain language of the rule;" it is not a forgone conclusion. *Adams*, 74 M.J. at 140. Furthermore, while "no mathematical formula exists to measure sufficient corroboration," the Service Courts should respect the precedential value of this Court's prior holdings. *Melvin*, 26 M.J. 145, 146 (C.M.A. 1988). There remain certain facts which, even if true, are simply lacking in corroborative value. Through its prior holdings, this Court established numerous examples of facts, which do, and do not, satisfy the Mil. R. Evid. 304(c) sufficiency test. In the immediate case, the evidence does not even meet the "slight" standard because there is an insufficient nexus between the corroborative evidence and appellant's claims.

a. Appellant's Comments About E.M.

Appellant's alleged comments about E.M., if true, were boorish, uncouth, and inappropriate. That said, they were not sufficient to corroborate his admissions. These statements should have been excluded pursuant to Mil. R. Evid. 404(b) and therefore not eligible to serve as corroboration. *Duvall*, 47 M.J. at 192; *Faciane*, 40 M.J. at 403. Nonetheless, even if the comments were admissible, their corroborative value was nonexistent. Assuming arguendo appellant actually made these comments, which was never conclusively established, the person who heard

them did not believe they were "sexually charged," they were unrelated to the charges, and most importantly, they were unrelated to appellant's admissions.

Mrs. Moore, the government's own witness, the alleged victim's mother, and the only individual other than appellant who actually heard appellant's alleged statements regarding his daughter, "wrote it off" as mere immaturity from appellant. (JA122-24). No one, including E.M.'s mother, believed that these statements were "sexual[ly] charged," as the military judge found. (JA169). The statements did not even reflect the crime that was charged. There would be an argument that the comments were relevant if appellant was making jokes about performing the same sexual acts he later admitted committing, but the comments were entirely unrelated to him and the charged act. The jokes were also made months before the incidents allegedly happened. (JA 099). The fact that appellant once made immature comments of a sexual nature involving E.M., that were nothing like the charged offenses, should not be relied upon in assessing the trustworthiness of his admission.

Furthermore, to the extent the comments about E.M. have *any* corroborative value, it is unclear which claims, from within appellant's admission, the comments would corroborate. As mentioned above, the military judge never identified how the comments about E.M. were related to appellant's admissions to CID, which further erodes any deference this Court affords the military judge's ruling.

Presumably, it would have to be related to appellant's state of mind. During the September 27 interrogation, appellant maintained that the acts were done by accident and not based on any sexual intent. (Pros. Ex. 2, 2:00:15; JA203, JA199). That being the case, it is hard to see how evidence arguably indicative of appellant's culpable state of mind could corroborate appellant's admissions where he steadfastly claimed that he never had a culpable state of mind. Just because the military judge found the comments about E.M. relevant to the crime, does not mean they were corroborative evidence of an admission. As an example, imagine an accused who admits to taking property in a larceny investigation, but insists he was the proper owner. If the government wanted to corroborate the admission regarding *the taking*, they need to provide evidence corroborating *the taking*, which is the substance of the admission. If instead, they only provide tangential evidence of a culpable mens rea, perhaps an earlier announcement that he wanted to buy something similar in the future, that evidence may be relevant in the prosecution of the crime of larceny, but it would not be relevant to the trustworthiness of appellant's admission pertaining exclusively to a taking. In the immediate case, the government needed to articulate how appellant's comments about E.M. were related to one of the things he said to CID. They did not. Because the comments about the milk and carrot are irrelevant to what appellant actually said in his

admission, they do not provide any corroboration to the statement, regardless of their admissibility at trial.

c. E.M's Troubling Behaviors and Appellant's Access

E.M.'s behaviors were also too distantly related to the charged crimes for the military judge to rely upon them as corroboration. The military judge found that E.M.'s behaviors—namely, the insertion of toys into her vagina—created an inference of truth in appellant's admissions. The military judge erred in arriving at this conclusion.

As a preliminary matter, the military judge did not wait to hear expert testimony regarding this behavior. Had he done so, he would have heard Dr. Kuhle explain that even if appellant's alleged conduct did occur, there was no nexus between E.M.'s alleged behavior and that alleged conduct. (JA207, JA215). Specifically, Dr. Kuhle stated, "it would be inappropriate, just from that behavior itself, to determine that [E.M.] had been sexually abused." (JA215). Instead, the military judge, who is assumedly not a pediatrician or other such expert on child sex abuse, made an uninformed assumption about the validity of this evidence before hearing from an actual expert who could properly interpret it. In other words, the military judge determined—on his own, without the proper qualifications to do so — that this evidence created an inference of truth. What's worse, the military judge did not even revisit his decision, based on his faulty

analysis, after hearing the expert testimony of Dr. Kuhle. While the government may have argued a connection between E.M.'s troubling behaviors and a sexual act committed by appellant, they presented no evidence to rebut Dr. Kuhle. As a result, the only evidence in the record said E.M.'s behaviors were unrelated to sexual abuse.

Even without the expert testimony of Dr. Kuhle, this Court previously determined such scant corroboration was insufficient in *United States v. Faciane*. 40 M.J. at 403. In *Faciane*, the appellant was convicted of indecent acts committed upon his 3-year-old daughter. 40 M.J. at 399. At issue was whether sufficient evidence of corroboration remained in the record after this Court held the victim's outcry statements to a social worker were inadmissible hearsay. *Id*. at 403. Amongst the remaining evidence in the case were the child victim's dramatic change in behavior culminating in inserting an object in her vagina. *Id*. at 400. Additionally, the government argued that the appellant's exclusive custody at his home established access and the opportunity to abuse. *Id*. at 403. In setting aside the findings, this Court held that, despite a clearly troubled child and the appellant's access, there was insufficient evidence to corroborate the confession. *Id*. at 403-04. While the quantum is "slight," this Court refused to "attach a criminal connotation to the mere fact of a parental visit." *Id.* at 403

Here, two of the three pieces of evidence relied upon by the military judge were the exact same nature and quality of evidence this Court ruled insufficient in *Faciane*. The fact that the accused "had an opportunity and explained the location of the offense," and that the child victim was misbehaving and inserting objects into her vagina is insufficient corroboration. (JA169). Just like in *Faciane*, this Court should refuse to attach a criminal connotation to the fact that appellant described the location where he regularly changed E.M.'s diapers, and further decide that E.M.'s behavior "does not suggest or corroborate sexual abuse," especially in light of the expert testimony provided by Dr. Kuhle. *Faciane,* 40 M.J. at 403. The evidence does not support the military judge's findings. In addition, it is important to consider the circumstances under which the evidence of this behavior came to light. It was only after SA Bettes mischaracterized appellant's statement that Mrs. Moore made her allegation. Certainly, the military judge should have attached at least some skepticism to these allegations. Because E.M.'s behavior is not related to appellant's alleged actions (assuming this behavior even occurred), it could not possibly create an inference of truth in appellant's statement.

The military judge clearly abused his discretion in ruling that the admissions were adequately corroborated. There was no evidence a crime was committed by

anyone, and the evidence presented by the government failed to raise an "inference of the truth" regarding appellant's statements. Mil. R. Evid. 304(c)(4).

Conclusion

Based on the foregoing, the appellant respectfully requests that this Court set aside appellant's findings and sentence.

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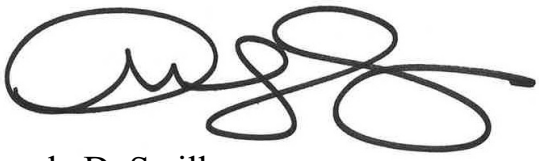

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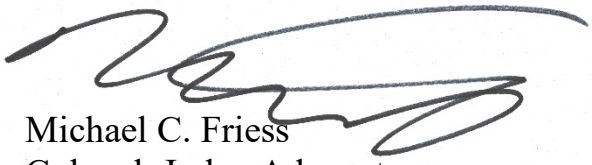

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 10,573 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Whiteeyes, Crim. App. Dkt. No. 20190221, USCA Dkt. No. 21-0120/AR, was electronically filed with the Court and Government Appellate Division on April 5, 2021.

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