IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Adam M. PYRON** Master-at-Arms Second Class (E-5) United States Navy, Appellant	**SUPPLEMENT TO PETITION FOR GRANT OF REVIEW** USCA Dkt. No. 22-0277/NA Crim. App. Dkt. No. 201900296R

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

Megan E. Horst
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
megan.e.horst@navy.mil
Bar no. 37381

Index

Table of Authorities

UNIFORM CODE OF MILITARY JUSTICE

RULE FOR COURTS-MARTIAL

MILITARY RULES OF EVIDENCE

CAAF RULES OF PRACTICE AND PROCEDURE

Issues Presented

I.

WHETHER THE LOWER COURT EXCEEDED THE SCOPE OF REVIEW UNDER ARTICLE 62, UCMJ, AND DEPARTED FROM THIS COURT'S PRECEDENT SET IN *UNITED STATES V. VANGELISTI* BY ATTACHING MATERIALS TO THE RECORD THAT WERE NOT PROFFERED AT TRIAL AND USING THEM TO APPELLANT'S DETRIMENT.

II.

WHETHER THE MILITARY JUDGE CORRECTLY CONCLUDED APPELLANT'S TESTIMONY FROM HIS FIRST COURT-MARTIAL WAS INADMISSIBLE WHERE THE GOVERNMENT FAILED TO PROVE APPELLANT TESTIFIED FOR REASONS UNRELATED TO HIS BIASED MEMBERS PANEL.

Statement of Statutory Jurisdiction

This case fell within the lower court's jurisdiction under Article 62, Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

At his first general court-martial in 2019, Master-At-Arms, Petty Officer Second Class (MA2) Pyron was convicted, contrary to his pleas, of rape of a child, attempted rape of a child, and sexual abuse of a child in violation of Articles 80

and 120b, UCMJ.[1] He was sentenced to thirty-nine years' confinement, reduction to E-1, and a dishonorable discharge.[2] On appeal, the Navy Marine Corps Court of Criminal Appeals (NMCCA) set aside the findings and sentence and authorized a rehearing due to a violation of MA2 Pyron's right to an impartial panel.[3]

In July 2021, the convening authority re-referred the same charges against MA2 Pyron.[4] The government subsequently moved for a preliminary ruling on the admissibility of MA2 Pyron's testimony from his first court-martial, and the military judge deemed the evidence inadmissible.[5] The government then filed notice of the Article 62, UCMJ, appeal.[6]

On appeal at NMCCA, after the government filed its Brief and MA2 Pyron filed his Answer, the government filed a motion to attach the entire record of trial from MA2 Pyron's first court-martial.[7] Petty Officer Pyron opposed.[8] On June 28, 2022, NMCCA granted the government's motion to attach.

---

[1] *United States v. Pyron*, 81 M.J. 637, 639 (N-M. Ct. Crim. App. 2021).
[2] *Id*. at 639.
[3] *Id*. at 645.
[4] Charge Sheet, July 23, 2021.
[5] App. Ex. XVII; App. Ex. LV.
[6] App. Ex. LVIII.
[7] Gov. Mot. to Attach, June 9, 2022.
[8] Def. Opposition to Gov. Mot. to Attach, June 10, 2022.

On July 15, 2022, NMCCA issued its opinion vacating the military judge's ruling and remanding the case for further proceedings.[9] Petty Officer Pyron timely petitioned this Court for review on September 12, 2022.

Statement of Facts

A. At his first court-martial, MA2 Pyron testified and denied all the charges.

At his first trial, MA2 Pyron took the stand and denied all the charged offenses.[10] He testified that he was coerced into telling NCIS he committed the alleged acts.[11] He explained that NCIS's deceptive interrogation techniques caused him to question his memory.[12] Additionally, MA2 Pyron testified that the NCIS agents "just kept pushing, and pushing, and pushing" until he was convinced he had committed the crimes.[13]

B. NMCCA set aside the findings and sentence of MA2 Pyron's first trial due to a violation of his constitutional right to an impartial panel.

On appeal, NMCCA set aside the findings and sentence, concluding the military judge abused his discretion by failing to grant an implied bias challenge against a panel member, Lieutenant (LT) Alpha.[14] During individual *voir dire*, LT

[9] *United States v. Pyron*, No. 201900296R, 2022 CCA LEXIS 410 (N-M. Crim. Ct. App. July 15, 2022).
[10] App. Ex. XI, Encl. 5, at 9.
[11] App. Ex. XI, Encl. 5, at 5-6.
[12] App. Ex. XI, Encl. 5, at 4.
[13] App. Ex. XI, Encl. 5, at 6.
[14] *Pyron*, 81 M.J. at 645.

Alpha said he thought of his two young daughters when he read the charges on the charge sheet and admitted it would be hard not to think of them when the alleged victims (two young girls) came in to testify.[15] Neither the trial counsel nor the military judge instructed LT Alpha that he must disregard feelings concerning his daughters during deliberations and while voting on findings and sentence.[16] Yet in response to the defense's *voir dire* challenge of LT Alpha, the trial counsel wrongly represented that LT Alpha had been rehabilitated when he had not.[17]

The lower court held that because LT Alpha was never properly instructed, "an objective member of the public, and this Court, [were] left to reasonably infer that LT Alpha['s] . . . deliberations and votes on findings and sentence in the case were conducted while he viewed the evidence through that impermissible lens."[18] "Trial counsel made arguments regarding the challenge for cause that suggested a rehabilitation colloquy had been conducted, and the military judge adopted those incorrect facts and based his denial of the challenge upon them."[19] The lower court declined "to guess whether LT Alpha was able to focus on the evidence and not his

[15] *Pyron*, 81 M.J. at 640.
[16] *Id*.
[17] *Id*.
[18] *Id*. at 645.
[19] *Id*.

daughters during [MA2 Pyron's] case, as such speculation flies in the face of the liberal grant mandate."[20]

C. Before MA2 Pyron's rehearing, the trial counsel sought a preliminary ruling on the admissibility of MA2 Pyron's testimony from his first trial. The trial counsel presented no evidence to show *why* MA2 Pyron testified.

At an Article 39(a) hearing, the government moved for a preliminary ruling on the admissibility of MA2 Pyron's court-martial testimony.[21] The government argued that MA2 Pyron's prior testimony is admissible under Military Rule of Evidence (MRE) 801(d)(2) because the testimony was not induced by any wrongfully introduced evidence and not the result of ineffective assistance of counsel.[22] The government argued "member selection here is something that was totally unrelated to any evidence" and "had nothing to do with the rest of the proceedings of the case."[23]

[20] *Pyron*, 81 M.J. at 645.
[21] App. Ex. XVII.
[22] App. Ex. XVII, at 1.
[23] R. at 153.

When the military judge asked the trial counsel if there was any evidence to show that the Fifth Amendment violation did not cause MA2 Pyron to testify, the trial counsel responded:[24]

> TC: No, Your Honor, other than nothing relating to any other evidence in the case was ever--was ever brought up in terms of evidence, and also the general rule is you can use an accused's prior testimony against him in a subsequent trial. This--because this is something that had nothing to do with the evidence in this case, it was purely a member issue, it would be difficult to see how the government could ever meet its burden under those circumstances. One moment.
>
> [The trial counsel and assistant trial counsel conferred.]
>
> TC: The government has nothing further, Your Honor.

D. The trial defense counsel argued the government failed to prove the Fifth Amendment violation did not induce MA2 Pyron to take the stand in his own defense.

The defense opposed the government's motion to admit MA2 Pyron's prior testimony, arguing that (1) the prior testimony is not relevant to the prosecution's case, (2) the prior testimony fails the MRE 403 balancing test, and (3) the government failed to meet its burden to show the prior testimony was not induced by the illegality of the first trial.[25] Related to the defense's third argument, the

[24] R. at 153.
[25] R. at 151-52; App. Ex. XLV, at 4.

defense counsel explained that MA2 Pyron's "initial trial was marred by a structural error, which was apparent to MA2 Pyron and his counsel from the moment the military judge in that case denied their challenge against a member for cause."[26]

E. The military judge found the government failed to meet its burden.

The military judge concluded MA2 Pyron's testimony was not admissible under MRE 801(d)(2).[27] He relied on the Supreme Court's holding in *Harrison v. United States* to find that "the government has not shown their actions from the first trial did not induce the accused's testimony in his second trial."[28] He also looked to NMCCA's holding in *United States v. Murray* to conclude "that the introduction of the accused's prior testimony in this case under M.R.E. 801(d)(2) would bring the 'taint' of the first trial into the second."[29]

F. In addition to the limited rehearing record certified for the Article 62 appeal, NMCCA attached the entire record from MA2 Pyron's first trial.

In its Article 62 brief to NMCCA, the government cited and relied on extra-record material that was never put before the military judge nor attached to the

[26] App. Ex. XLV, at 4.
[27] App. Ex. LV, at 3-4.
[28] App. Ex. LV, at 3; *Harrison v. United States*, 392 U.S. 219, 225 (1968).
[29] App. Ex. LV at 4; *United States v. Murray*, 52 M.J. 671 (N-M. Ct. Crim. App. 2000).

record.[30] In MA2 Pyron's Answer, he objected to the government's extra-record citations and asked NMCCA not to consider them.[31] Petty Officer Pyron argued that by citing extra-record material in its brief, the government violated Article 62, UCMJ, this Court's precedent set in *United States v. Becker*, and NMCCA's Rules of Appellate Procedure.[32]

On the same day the government filed its Reply, the government filed a motion to attach the entire record of trial from MA2 Pyron's first court-martial.[33] The government explained these materials were excluded from the rehearing record of trial "due to an administrative oversight."[34] However, the military judge did not consider MA2 Pyron's first court-martial record in ruling on the admissibility motion and neither party proffered it as evidence.[35]

Petty Officer Pyron opposed the government's Motion to Attach, arguing that the material was neither required nor relevant to NMCCA's review under Article 62, UCMJ.[36] The lower court granted the government's Motion to Attach without explanation on June 22, 2022.

---

[30] Gov. Br. at 4-9, 11, 20 23, 31-32. Specifically, the government cited MA2 Pyron's first court-martial record transcript, Prosecution Exhibits 2 through 4, 7, 19, 21, 24.
[31] Def. Ans. at 24.
[32] Def. Ans. at 24; *United States v. Becker*, 81 M.J. 483 (C.A.A.F. 2021).
[33] Gov. Mot. to Attach, June 9, 2022.
[34] Gov. Mot. to Attach, June 9, 2022, at 3.
[35] *See* App. Ex. LV.
[36] Def. Opposition to Gov. Mot. to Attach, June 10, 2022.

G. Admittedly relying on new evidence "attached to the record," but not proffered to the military judge, NMCCA held the military judge abused his discretion in denying the government's motion to admit MA2 Pyron's prior testimony.

Relying on "the evidence introduced in Appellee's first trial by the Government, *and attached to the record before us now*," NMCCA found the government met its burden in demonstrating by a preponderance of the evidence that MA2 Pyron did not testify at his initial court-martial due to the Fifth Amendment violation.[37]

First, contrary to the military judge's finding that the government failed to show its actions from the first trial did not induce MA2 Pyron's testimony, NMCCA found as fact that MA2 Pyron testified at his first trial *only* because of the strength of the evidence against him.[38] Specifically, NMCCA cited MA2 Pyron's NCIS interrogation, the alleged victims' testimony, and DNA evidence.[39]

Next, NMCCA concluded that the military judge's application of *Harrison v. United States* to the circumstances of MA2 Pyron's prior testimony was "clearly erroneous."[40] The lower court reasoned that it was error for the military judge to

[37] *Pyron*, 2022 CCA LEXIS 410, at *14 (emphasis added).
[38] App. Ex. LV at 3; *Pyron*, 2022 CCA LEXIS 410, at *14.
[39] *Pyron*, 2022 CCA LEXIS 410, at *14.
[40] *Id*. at *15.

equate an error in the member selection process with the erroneous admission of evidence illegally obtained by government agents.[41]

Additionally, NMCCA concluded that even if reliable evidence was presented that MA2 Pyron testified as a result of the biased member on his panel, the military judge abused his discretion in applying NMCCA's decision in *United States v. Murray*.[42] The lower court explained *Murray* stands for the proposition that the government should not benefit during a rehearing from testimony that was the direct result of denying the accused the right to effective assistance of counsel—not an accused's right to an impartial panel.[43]

Finally, NMCCA found the government met its burden of demonstrating by a preponderance of the evidence that MA2 Pyron did not testify at his initial court-martial due to any illegal government action—despite the government's concession at trial that it did not have any evidence and it could not meet its burden.[44] The lower court did not conduct an analysis under Military Rule of Evidence (MRE) 403. It vacated the military judge's ruling and remanded the case for further proceedings not inconsistent with its opinion.[45]

---

[41] App. Ex. LV at 3.
[42] *Pyron*, 2022 CCA LEXIS 410, at *15-16.
[43] *Id*. at *16.
[44] *Id*.; R. at 153.
[45] *Pyron*, 2022 CCA LEXIS 410, at *16.

Reasons to Grant Petition for Review

This Court should grant review of MA2 Pyron's case for three reasons. First, NMCCA violated the scope of review under Article 62, UCMJ, by relying on new evidence that was not put before the military judge.[46] In *United States v. Vangelisti*, this Court held it is improper for appellate courts to consider extra-record materials belatedly introduced that were not proffered at trial and "not particularly identified by trial counsel as the source of the 'relevant evidence.'"[47] *Vangelisti* explicitly adopted this principle for government appeals.[48] Here, NMCCA's reliance on material not proffered at trial to find the military judge abused his discretion was error. This Court could remand the case on this issue alone.[49]

Second, NMCCA applied the wrong standard of review under Article 62, UCMJ, by failing to view the evidence in the light most favorable to MA2 Pyron and engaging in factfinding, which it is not permitted to do in an Article 62 appeal.[50] After allowing the government to supplement the record with new "evidence" on appeal, NMCCA found that MA2 Pyron testified at this first trial

---

[46] C.A.A.F. Rule 21(b)(5)(B), (F).
[47] *United States v. Vangelisti*, 30 M.J. 234, 237 (C.A.A.F. 1990).
[48] *Id*. ("This same principle should apply to government appeals.").
[49] *Vangelisti*, 30 M.J. at 237 (explaining reversal of the lower court's decision was justified based on the court's reliance on extra-record material alone).
[50] C.A.A.F. Rule 21(b)(5)(B), (F); *Becker*, 81 M.J. at 488-90 ("On an Article 62, UCMJ, appeal, the lower court is not authorized to make factual determinations to support a simple difference of opinion between it and the military judge.").

only because of the strength of the evidence against him.[51] This finding of fact is contrary to the military judge's finding that the government failed to show that its actions from the first trial did not induce MA2 Pyron's testimony.[52]

Finally, this Court should grant review because Issue II is an issue of first impression.[53] Whether an accused's prior testimony is admissible at a later proceeding where government action caused a Fifth Amendment violation in the first court-martial is a question of law that has not been, but should be, settled by this Court.

[51] *Pyron*, 2022 CCA LEXIS 410, at *14.
[52] App. Ex. LV at 3.
[53] C.A.A.F. Rule 21(b)(5)(A).

I.

NMCCA EXCEEDED THE SCOPE OF REVIEW UNDER ARTICLE 62, UCMJ, AND DEPARTED FROM THIS COURT'S PRECEDENT SET IN *UNITED STATES V. VANGELISTI* BY ATTACHING MATERIALS TO THE RECORD THAT WERE NOT PROFFERED AT TRIAL AND USING THEM TO MA2 PYRON'S DETRIMENT.

Standard of Review

This Court reviews whether the lower court exceeded the scope of review under Article 62, UCMJ *de novo*.[54]

Analysis

A. On Article 62 appeals, appellate courts may not consider extra-record materials that were not proffered as evidence at trial.

This Court has held that, on interlocutory government appeals, appellate courts cannot consider extra-record materials that were not properly put before the military judge. In *United States v. Vangelisti*, the military judge suppressed the accused's confession at trial, and the government appealed.[55] In its brief to the lower court, the government appellate counsel attached and cited affidavits of

[54] *Vangelisti*, 30 M.J. at 237 (reversing the lower court, in part, for violating the scope of review under Article 62 by considering extra-record evidence not specifically proffered at trial)); *see also United States v. Kosek*, 41 M.J. 60, 64 (C.A.A.F. 1994) (reversing the lower court for violating the scope of review under Article 62 by making rulings of law on issues either not decided by the military judge or on which the military judge's rulings were ambiguous or incomplete)).
[55] *Vangelisti*, 30 M.J. at 235.

Coast Guard Special Agents who interrogated the accused.[56] These affidavits asserted that the accused expressly waived his right to counsel.[57] But the agents, who testified in support of the government's suppression motion at trial, never said the accused expressly waived his right to counsel.[58]

This Court held the lower court's reliance on these affidavits exceeded the scope of review under Article 62 because the "affidavits were not specifically proffered at trial . . . and the affiants were not particularly identified by trial counsel as the source of 'relevant evidence' she sought to belatedly introduce."[59] This Court held reversal of the lower court's decision was justified on that basis alone.[60]

B. NMCCA erroneously attached materials to the record that were not proffered at trial, and relied on them to MA2 Pyron's detriment.

Like the government appellate counsel in *Vangelisti*, the government appellate counsel here "attempted to catapult" the entire record of MA2 Pyron's first court-martial "into the appellate arena" simply by citing the materials in its brief.[61] While portions of MA2 Pyron's first record (including MA2 Pyron's NCIS interrogation and prior testimony) were proffered as evidence before the military

[56] *Vangelisti*, 30 M.J. at 236.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 237.
[60] *Id*.
[61] *Id*.

judge, a majority of the material the government referenced was not. The extra-record material included:

- Record Transcript pages
  - Lieutenant Alpha *voir dire* (R. at 297, 304, 317-18, 357-58.)
  - Testimony of alleged victims' mother (R. at 433, 445, 452-58, 470.)[62]
  - Testimony of alleged victims' stepsister (R. at 487, 489-90, 492, 498-500, 502, 507.)
  - Testimony of NCIS Special Agent #1 (R. at 620-38.)
  - Testimony of NCIS Special Agent #2 (R. at 638-67.)
  - Testimony of NCIS Special Agent #3 (R. at 667-708.)
  - Testimony of forensic DNA examiner (R. at 745, 753-55, 760.)
- Pros. Ex. 2 Photographs of crime scene
- Pros. Ex. 3 Text messages from alleged victims' stepsister to mom
- Pros. Ex. 4 Text messages from alleged victims' stepsister to boyfriend
- Pros. Ex. 7 Alleged victim's drawn diagram
- Pros. Ex. 19 Case evidence list
- Pros. Ex. 21 Photograph of grey blanket
- Pros. Ex. 24 Extraction report of text messages from MA2 Pyron to wife

As this Court held in *Vangelisti*, the government's appellate practice here was impermissible.[63]

The government attempted to include MA2 Pyron's first record in its interlocutory appeal as though it was automatically incorporated into his rehearing record and automatically put before the military judge. But "rehearings are to be treated as if a new court-martial has been convened."[64] A rehearing places "the

[62] Only one page of the testimony of the alleged victims' mom is included in the certified record. App. Ex. X, Encl. 11.
[63] *Vangelisti*, 30 M.J. at 237.
[64] *United States v. Staten*, 21 U.S.C.M.A. 493, 495 (C.M.A. 1972).

United States and the accused in the same position as they were at the beginning of the original trial,"[65] "reopens the whole case," and "no vestiges of the former court-martial should linger."[66] The parties are required to file new motions, make new arguments, and ultimately create a new record of the court-martial from scratch. There must be new members, and the accused's procedural rights are restored.[67] Thus, MA2 Pyron's first court-martial record is irrelevant to this Article 62 appeal to the extent that it was not proffered to the military judge presiding over the rehearing.

But instead of correcting the Article 62 scope of review violation, NMCCA relied on it to MA2 Pyron's detriment. Over MA2 Pyron's objection, NMCCA granted the government's delayed motion to attach.[68] Then, NMCCA explicitly considered this new "evidence" to resolve the government's appeal in its favor. NMCCA wrote: "the evidence introduced in Appellee's first trial by the Government, *and attached to the record before us now*, is sufficient to meet its burden of demonstrating that Appellee did not testify at his first trial due to the error in the member selection process."[69] Answering this mixed question of fact

[65] *Staten*, 21 U.S.C.M.A. at 495 (citing *United States v. Cox*, 12 USCMA 168, 169 (1961)).
[66] *Howell v. United States*, 75 M.J. 386, 391-92 (C.A.A.F. 2016).
[67] R.C.M. 810(b).
[68] Def. Opposition to Gov. Mot. to Attach, June 10, 2022.
[69] *Pyron*, 2022 CCA LEXIS 410, at *14 (emphasis added).

and law required the NMCCA to engage in impermissible factfinding during an Article 62 appeal.[70] The lower court allowed the government to supplement the record on appeal and used material not proffered at trial to vacate the military judge's ruling.[71]

Conclusion

Because NMCCA departed from *United States v. Vangelisti*, this Court should grant review and reverse NMCCA's opinion.[72]

II.

THE MILITARY JUDGE CORRECTLY CONCLUDED MA2 PYRON'S TESTIMONY FROM HIS FIRST COURT-MARTIAL WAS INADMISSIBLE WHERE THE GOVERNMENT FAILED TO PROVE MA2 PYRON TESTIFIED FOR REASONS UNRELATED TO HIS BIASED MEMBERS PANEL.

Standard of Review

On appeal under Article 62, UCMJ, this Court reviews a military judge's decision to exclude evidence for an abuse of discretion.[73] However, this Court is "bound by the military judge's factual determinations unless they are unsupported

---

[70] Art. 62(b), UCMJ; *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004); *United States v. Kokuev*, 77 M.J. 531, 536-37 (N-M. Ct. Crim. App. 2017).
[71] *Vangelisti*, 30 M.J. at 237 (explaining "the pertinent inquiry is the legal sufficiency of evidence of *record* supporting the judge's finding, not the existence of evidence—or of potential evidence—supporting a contrary holding").
[72] C.A.A.F. Rule 21(b)(5)(B); *Vangelisti*, 30 M.J. at 236.
[73] *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008).

by the record or clearly erroneous."[74] Additionally, reviewing courts must view the evidence in the light most favorable to the party that prevailed at trial.[75]

An abuse of discretion is far more than a difference of opinion.[76] It occurs when the reviewing court "has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[77] This standard recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.[78] "[T]he pertinent inquiry is the legal sufficiency of evidence of *record* supporting the judge's finding, not the existence of evidence—or of potential evidence—supporting a contrary holding."[79]

A. The Supreme Court has held that a defendant's testimony from a prior trial is admissible only if the government can prove illegal government action did not induce the testimony.

In *Harrison v. United States*, the Supreme Court placed the burden on the government to show, by a preponderance of the evidence, that its illegal actions did not induce the testimony of the criminal defendant.[80]

---

[74] *Becker*, 81 M.J. at 489-90 (reversing the lower court for violating the scope of Article 62 review for making unauthorized factual determinations to support a difference of opinion between it and the military judge).
[75] *Id*. at 488.
[76] *See United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995).
[77] *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993).
[78] *Gore*, 60 M.J. at 187 (quotations omitted).
[79] *Vangelisti*, 30 M.J. at 237.
[80] *Harrison*, 392 U.S. at 225.

The Supreme Court promulgated the general evidentiary rule that a criminal defendant's testimony from a prior trial is admissible in evidence against him at a later proceeding.[81]

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.[82]

But this general principle is not a bright-line rule. For example, where a defendant's prior testimony was induced after the prosecution put into evidence illegally obtained confessions or admissions, the testimony becomes the fruit of the poisonous tree and cannot be used against the accused at later proceedings.[83]

In *Harrison*, the petitioner was convicted at his first trial after the prosecution introduced three confessions and the petitioner took the stand in his own defense.[84] On appeal, the reviewing court concluded that all three confessions had been illegally obtained and were thus inadmissible against the petitioner.[85] On rehearing, the prosecutor read the petitioner's prior testimony to the jury, and he was again convicted.[86]

---

[81] *Harrison*, 392 U.S. at 225.
[82] *Id*.
[83] *Id*. at 222.
[84] *Id*. at 220.
[85] *Id*.
[86] *Id.* at 221.

While it was true that the petitioner "waive[d] his privilege against compulsory self-incrimination with respect" to his prior testimony, the Supreme Court observed that "[t]he question is not whether the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained . . . then his testimony was tainted by the same illegality that rendered the confession themselves inadmissible."[87]

The Supreme Court explained that the government had not "dispelled" the "inference" that the petitioner testified because the prosecutor put the petitioner's damaging confessions before the jury.[88] In finding that the government had failed to satisfy its burden, the Supreme Court noted that it is "difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial."[89]

B. NMCCA expanded the logic of *Harrison* to additional due process concerns.

In *United States v. Murray*, NMCCA reversed a military judge's decision to allow the admission of prior trial testimony as evidence in the appellant's court-martial.[90] There, the appellant's conviction from his initial trial was set aside because he received ineffective assistance of counsel.[91] On rehearing, the

[87] *Harrison*, 392 U.S. at 222-23.
[88] *Id*. at 225-26.
[89] *Id*. at 224.
[90] *Murray*, 52 M.J. at 675.
[91] *Id*. at 672.

government moved to admit the appellant's testimony from his first trial.[92] The military judge in *Murray* ruled that the appellant's testimony was admissible since ineffective assistance of counsel "had nothing to do with" the appellant's decision to testify.[93]

The lower court disagreed, finding the appellant testified as a "direct consequence of" the ineffective assistance of counsel.[94] Allowing the government to use the appellant's testimony "brought the taint of the first constitutional error of the first trial into the second trial."[95] The lower court explained that the exclusion of the appellant's testimony "deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime, and no more than restores the situation that would have prevailed if the appellant had not been so denied."[96]

C. The military judge properly relied on *Harrison* and *Murray* to conclude the government failed to show the constitutional error from the first trial did not induce MA2 Pyron's testimony.

Here, the military judge appropriately relied on *Harrison* by analogy. First, like in *Harrison*, the reversible error in MA2 Pyron's first trial was

[92] *Murray*, 52 M.J. at 672.
[93] *Id*. at 672, 675.
[94] *Id*. at 675.
[95] *Id*.
[96] *Id*. at 676; *see also People v. Duncan*, 527 N.E.2d 1060, 1062 (Ill. App. 1988) (precluding the accused's testimony from the first trial because the accused "had received ineffective assistance of counsel, which colored the entire proceeding").

constitutional.[97] The government violated his due process right to an impartial panel of members, which tainted the entire proceeding.

Second, also like *Harrison*, government conduct contributed to the error that resulted in a rehearing—the trial counsel falsely proffered that the biased panel member had been rehabilitated.[98] In ruling on the admissibility motion, the military judge acknowledged that "the government's error may not rise to the level of 'illegal action' articulated in *Harrison*.'"[99] Nevertheless, the military judge explained that the government's "inaccurate recitation of the facts" caused the constitutional error.[100]

Following the Supreme Court's lead in *Harrison*, the military judge placed the burden on the government to show that its actions did not induce MA2 Pyron's testimony at his first trial.[101] The military judge ultimately concluded that "the government has not shown their action from the first trial did not induce the

---

[97] *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008) ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.") (quoting *United States v. Downing*, 56 M.J. 419, 421 (C.A.A.F. 2002)).
[98] *Pyron*, 81 M.J. at 645 ("Even worse, the trial counsel made argument regarding the challenge for cause that suggested a rehabilitation colloquy had been conducted, and the military judge adopted those incorrect facts and based his denial of the challenge upon them.").
[99] App. Ex. LV, at 3.
[100] App. Ex. LV, at 3.
[101] *Harrison*, 392 U.S. at 225; App. Ex. LV, at 3.

accused's testimony in his first trial in July 2019."[102] This finding was based on the lack of evidence before him and the trial counsel's concession that the government did not have any evidence to show MA2 Pyron did not testify based on the Fifth Amendment violation from his first trial.[103] On the record, the trial counsel stated "it would be difficult to see how the government could ever meet its burden under the circumstances."[104]

Building from the Supreme Court's fruit-of-the-poisonous-tree analysis in *Harrison*, the military judge then looked to NMCCA's similar rationale in *United States v. Murray* to decide whether admitting MA2 Pyron's testimony would bring "the taint of the constitutional error of the first trial into the second trial."[105] He found that it would, and concluded that the government should not get to benefit from its error in the first trial.[106]

It was not an abuse of discretion for the military judge to analogize the Sixth Amendment violation in *Murray* to the Fifth Amendment violation in MA2 Pyron's first trial.[107] Contrary to NMCCA's finding, the military judge's

---

[102] App. Ex. LV, at 3.
[103] R. at 153.
[104] *Id.*
[105] App. Ex. LV, at 3 (quoting *Murray*, 52 M.J. at 675).
[106] App. Ex. LV at 3-4.
[107] App. Ex. LV, at 3-4; *see also United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) (holding "the *Sixth Amendment* requirement that the jury be impartial applies to court-martial members and cover not only the selection of

conclusion did not fall outside the "range of choices" available to him.[108] The constitutional error the government caused in MA2 Pyron's first trial tainted the entire proceeding. Petty Officer Pyron did not receive a fair trial, and NMCCA said as much it its initial opinion: "No accused, regardless of the amount of evidence the government may have to prove his guilt, can receive a fair trial if biased members are permitted to sit in judgment."[109] Based on the lack of evidence before him, the military judge was not convinced that MA2 Pyron did not testify because of the biased member on his panel.

D. NMCCA applied the wrong standard of review, relied on a theory waived by the government at trial, and engaged in factfinding.

The lower court failed to view the evidence in the light most favorable to MA2 Pyron. At the Article 39(a) hearing, the trial counsel argued "member selection here is something that was totally unrelated to any evidence" and "had nothing to do with the rest of the proceedings of the case."[110] The military judge asked, "How do you know that, though? . . . Is there anything else you can point me to?"[111] The trial counsel responded, "No, Your Honor, other than nothing

---

individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations").

[108] *Pyron*, 2022 CCA LEXIS 410, at *12.

[109] *Pyron*, 81 M.J. at 643.

[110] R. at 152-53.

[111] R. at 153.

relating to any other evidence in the case."[112] The government conceded "it would be difficult to see how the government could ever meet its burden under those circumstances."[113]

Meanwhile, the trial defense counsel relied on NMCCA's initial opinion (offered as evidence by the government) to explain exactly what MA2 Pyron observed during his first trial.[114] Petty Officer Pyron observed a panel member, LT Alpha, tell the military judge "[i]t would be hard not to" think about his daughters when witnesses testified.[115] Petty Officer Pyron heard LT Alpha say he would think of his daughters "[n]ot in a good way personally,"[116] heard his trial defense counsel object, heard the government's false proffer, and heard the military judge rely on that false proffer over his counsel's objection.[117] Petty Officer Pyron observed that a member who "was struggling to separate his own personal feelings and opinions about his daughters from the evidence and facts" of the case was sitting on his panel.[118] NMCCA set aside the findings and sentence because an objective member of the public—and the court—were left to reasonably infer that

[112] R. at 153.
[113] R. at 152-53.
[114] R. at 152.
[115] *Pyron*, 81 M.J. at 640.
[116] *Id.*
[117] *Id*. at 640-45.
[118] *Id*. at 645.

the member would view the evidence at trial through an impermissible lens.[119] The trial defense counsel argued that because MA2 Pyron observed the member selection process and saw "there was no chance to obtain a fair and impartial trial," this may have induced MA2 Pyron to take the stand in his defense.[120]

Here, the military judge heard arguments from both sides, relied on NMCCA's initial opinion, and found that the government failed to show its actions from the first trial did not induce MA2 Pyron's testimony.[121] In fact, the military judge believed the trial counsel when he said he did not have any evidence to prove why MA2 Pyron testified. Thus, viewing the evidence in the light most favorable to MA2 Pyron, the military judge's finding was not clearly erroneous.

But on appeal, the appellate government counsel presented new "evidence" and argued MA2 Pyron testified because of the strength of the evidence against him.[122] The trial counsel never made this argument at the motions hearing, nor proffered evidence to support this argument. Instead, the trial counsel conceded it could not show MA2 Pyron's decision to testify had nothing to do with the biased member on his panel.[123] Thus, the appellate government counsel decidedly took a

[119] *Pyron*, 81 M.J. at 645 (emphasis added).
[120] App. Ex. XLV at 4.
[121] App. Ex. LV at 3.
[122] Gov. Br. at 19-20.
[123] R. at 153.

second bite at the apple by proffering new evidence of a theory that was affirmatively waived at trial.

The Supreme Court has explained that "a trial on the merits, whether in a civil or a criminal case, is the 'main event,' and not simply a 'tryout on the road' to appellate review."[124] "The very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance."[125] The Supreme Court cautioned against "the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claim that the course followed was reversible error."[126]

Instead of acknowledging that the government was "sandbagging" the military judge by arguing a waived theory on appeal, NMCCA adopted it. NMCCA used the waived theory (and the improperly attached material) to find MA2 Pyron testified *only* by reason of the strength of the evidence against him.[127]

In resolving interlocutory government appeals, "the pertinent inquiry is the legal sufficiency of evidence of *record* supporting the judge's finding, not the existence of evidence—or of potential evidence—supporting a contrary

---

[124] *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J. concurring).
[125] *Id*.
[126] *Id*.
[127] *Pyron*, 2022 CCA LEXIS 410, at *14.

holding."[128] Because NMCCA allowed the government to supplement the record and engaged in factfinding, this Court should grant review, reverse NMCCA's opinion, and affirm the military judge's ruling.

E. Even if the military judge erred in applying *Harrison* and *Murray*, the probative value of MA2 Pyron's prior testimony is substantially outweighed by a danger of unfair prejudice.[129]

At trial and on appeal, MA2 Pyron argued the probative value of his prior testimony is substantially outweighed by the risk of unfair prejudice, and should therefore be excluded under MRE 403.[130] Despite holding the prior testimony is admissible under MRE 801(d)(2), NMCCA failed to conduct an analysis under MRE 403.

"The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the members . . . or needlessly presenting cumulative evidence.[131] Petty

---

[128] *Vangelisti*, 30 M.J. at 237.

[129] "When the Government appeals an adverse ruling, the defense may assert additional or alternate grounds for affirming the ruling." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (citing *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6, (1970)); *see also United States v. Steen*, 81 M.J. 261, 269 (C.A.A.F. 2021) (Maggs, J., dissenting) (explaining the cross-appeal doctrine allows "the prevailing party [to] defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted") (internal quotations and citations omitted).

[130] App. Ex. XLV at 4-5.

[131] Mil. R. Evid. 403.

Officer Pyron denied all of the charged offenses during his testimony.[132] Petty Officer Pyron's testimony has little probative value in light of his extensive NCIS interrogation.[133] Allowing the government to admit his prior testimony will unfairly prejudice MA2 Pyron because it will signal quite obviously to the members that there was a previous trial and that MA2 Pyron testified at it.

This Court has held that pretrial evidentiary rulings by a military judge can produce prejudicial error where the evidence could lead the members to conclude the appellant was tried and convicted at a previous court-martial for the same offenses.[134] Evidence of MA2 Pyron's prior testimony—during which he was asked if he committed the crimes alleged and discussed the alleged victims—will likely lead the members to reasonably conclude that he has been tried and convicted of the same charges now before them.

Additionally, if MA2 Pyron chooses not to testify at his rehearing, it will leave the members wondering why. This will cause confusion, and may cause the members to hold his future silence against him, undermining his Fifth Amendment right to silence at the rehearing—through no fault of his own.

---

[132] App. Ex. XI, Encl. 5, at 9.
[133] In its Article 62 Brief to NMCCA, the government argued the strength of the government's case depended on MA2 Pyron's NCIS interrogation: "Most damaging, the United States entered Appellee's NCIS interview in evidence." Gov. Br. at 20.
[134] *See United States v. Giles*, 59 M.J. 374, 375-76 (C.A.A.F. 2004).

Conclusion

Because the military judge correctly concluded that MA2 Pyron's prior testimony is inadmissible at his rehearing, this Court should grant review and reverse NMCCA's decision.

Respectfully submitted,

MEGAN E. HORST
LT, JAGC, USN
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (202) 685-7054
megan.e.horst@navy.mil
C.A.A.F. Bar No. 37381

Appendix A: *United States v. Pyron*, No. 201900296R, 2022 CCA LEXIS 410 (N-M. Crim. Ct. App. July 15, 2022).

Certificate of Compliance

1. This Supplement complies with the type-volume limitation of Rule 21 because it contains less than 9,000 words.

2. This Supplement complies with the type-style requirements of Rule 37 because it has been prepared with monospaced typeface using Microsoft Word 2010 with 14 point, Times New Roman font.

MEGAN E. HORST
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7054
megan.e.horst@navy.mil
C.A.A.F. Bar No. 37381

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 3, 2022.

MEGAN E. HORST
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7054
megan.e.horst@navy.mil
C.A.A.F. Bar No. 37381

United States v. Pyron

United States Navy-Marine Corps Court of Criminal Appeals

July 15, 2022, Decided

No. 201900296R

Reporter
2022 CCA LEXIS 410 *; 2022 WL 2764366

UNITED STATES, Appellant v. Adam M. PYRON, Master at Arms Second Class (E-5), U.S. Navy, Appellee

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER *NMCCA RULE OF APPELLATE PROCEDURE 30.2*.

Subsequent History: Petition for review filed by *United States v. Pyron, 2022 CAAF LEXIS 646 (C.A.A.F., Sept. 12, 2022)*

Motion granted by *United States v. Pyron, 2022 CAAF LEXIS 648 (C.A.A.F., Sept. 13, 2022)*

Prior History: Appeal by the United States Pursuant to *Article 62, UCMJ* **[*1]** . Military Judge: Ryan J. Stormer. Arraignment: 21 September 2021 before a general court-martial convened at Naval Base San Diego, California.

United States v. Pyron, 81 M.J. 637, 2021 CCA LEXIS 205 (N-M.C.C.A., Apr. 29, 2021)

Counsel: For Appellant: Lieutenant John L. Flynn IV, JAGC, USN Major Kerry E. Friedewald, USMC.

For Appellee: Lieutenant Megan E. Horst, JAGC, USN.

Judges: Before MONAHAN, STEPHENS, and DEERWESTER Appellate Military Judges. Chief Judge MONAHAN and Senior Judge STEPHENS concur.

Opinion by: DEERWESTER

Opinion

DEERWESTER, Judge:

Appellee's case is before us for a second time. In 2019, a general court-martial consisting of members with enlisted representation convicted Appellee, contrary to his pleas, of attempted rape of a child, rape of a child, and sexual abuse of a child, in violation of *Articles 80* & *120b*, Uniform Code of Military Justice [UCMJ].[1] In 2021, this Court reversed Appellee's convictions and authorized a retrial owing to implied bias of one of the members.[2] In July 2021, the convening authority re-referred the same charges and specifications against Appellee to a general court-martial.[3]

---

[1] *10 U.S.C. §§ 880*, *920b*.

[2] *United States v. Pyron, 81 M.J. 637 (N-M. Ct. Crim. App. 2021)* [*Pyron I*].

[3] Citations to the record from Appellee's first court-martial, *Pyron I*, are denoted as "R." and citations to the record from the rehearing are denoted as "RR." Citations to the Prosecution Exhibits and Appellate Exhibits from the first court-martial are "Pros. Ex." and "Appellate Ex." Citations to the rehearing Prosecution Exhibits and Appellate Exhibits are "R. Pros. Ex." and "R. Appellate Ex."

The Government now appeals the following issue pursuant to *Article 62(a)(1)(B), UCMJ*: Did the military judge abuse his discretion by excluding Appellee's testimony during his first court-martial due **[*2]** to Government actions in the member selection process where: (a) this Court found the trial counsel's recitation of voir dire answers was "an honest mistake," and (b) under *Harrison v. United States*[4] and *United States v. Murray*,[5] suppression is only justified where illegal government action directly induced the accused's testimony? We find that the military judge abused his discretion and reverse his decision.[6]

I. Background

Appellee was convicted at his first court-martial of attempted rape of a child, rape of a child, and sexual abuse of a child for conduct alleged to have occurred in 2019 while Appellee was stationed in Yokosuka, Japan. In February, Appellee spent the day watching the Super Bowl at a family friend's home. His friend, a civilian Navy employee, lived in off-base housing with his wife, two sons, 16-year old step-daughter, and two daughters: an 8-year-old and a 6-year-old. A panel composed of officer and enlisted members found Appellee guilty at his first court-martial of conduct which we summarized in our prior opinion:

> That evening, after the parents had retired for the night to their bedroom, [Appellee] brought both the 8-and 6-year-old girls downstairs, and **[*3]** while there, exposed his penis to both of them and rubbed his penis on the 8-year-old's leg. After the 8-year-old ran back upstairs to bed, [Appellee] placed his penis into the mouth of the 6-year-old and asked her to remove her pull-up diaper so that he could cause contact between her vulva and his mouth. After the 6-year-old returned to her bedroom, he followed her there to ask her to place her mouth on his penis again. When she refused, [Appellee] went back downstairs for the evening.[7]

During voir dire at Appellee's first court-martial, his trial defense counsel [TDC] questioned multiple members who had children similar in age to the named victims. During individual voir dire, one of the members, Lieutenant [LT] Alpha,[8] stated that he thought of his two young daughters when he read the charges against Appellee and admitted he would have difficultly not thinking of them when hearing the testimony from the victims.

At the end of voir dire, TDC challenged LT Alpha for cause. During argument on the challenge, the trial counsel [TC] incorrectly asserted that a rehabilitation colloquy had been conducted with LT Alpha. In reality, no

---

[4] *Harrison v. United States, 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968)*.

[5] *United States v. Murray, 52 M.J. 671 (N-M. Ct. Crim. App. 2000)*.

[6] Appellee argues the Government failed to meet its burden to establish jurisdiction under Article 62(a)(1)(B), UCMJ. To establish Article 62 jurisdiction, we must assess (1) whether evidence was excluded, and; (2) whether the evidence is substantial proof of a material fact. *United States v. Jacobsen, 77 M.J. 81, 85 (C.A.A.F. 2017)*. Evidence constitutes substantial proof of a material fact if "a reasonable trier of fact could find the evidence persuasive in establishing the proposition for which the government seeks to admit it." *United States v. Adrian, 978 F. 2d 486, 491 (9th Cir. 1992)*, *overruled by United States v. Grace, 526 F.3d 499, 502 (9th Cir. 1992)* (establishing that certification by a civilian court is alone sufficient to establish jurisdiction). We find that the Government has met its burden and that a reasonable trier of fact could find the excluded evidence persuasive in establishing the proposition for which the Government offered it.

[7] *Pyron I, 81 M.J. at 637*.

[8] All names in this opinion, other than those of Appellee, the judges, and counsel, are pseudonyms.

such rehabilitation colloquy occurred—neither the TC nor **[*4]** the military judge counseled LT Alpha, nor did either ask any further questions of LT Alpha after his responses. In our prior opinion, this Court found that the military judge adopted the TC's "incorrect assertions and based his denial of the challenge upon them."[9] Although we found that the TC made "an honest mistake"[10] and did not "intentionally mislead the military judge,"[11] we set aside the findings and sentence, holding that the military judge abused his discretion by failing to grant Appellee's implied bias challenge.[12]

On remand, the Government re-referred the same charges against Appellee and sought to pre-admit Appellee's testimony from his first court-martial under Mil. R. Evid. 801(d)(2). The Government cited to *Harrison v. United States* and Mil. R. Evid. 801(d)(2) for the proposition that the prior testimony was a statement of a party opponent and that "an accused's testimony from a former trial is admissible in evidence against the accused at a later proceeding." The Government argued that by choosing to testify at his first court-martial, Appellee "waive[d] his privilege against compulsory self-incrimination ... and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first **[*5]** place only by reason of the strength of the lawful evidence against him" so long as the testimony had not been induced by illegally obtained evidence.[13]

In support of its motion, and in order to meet its burden to demonstrate by a preponderance of the evidence that Appellee's prior testimony was not induced by illegal action on the part of the Government,[14] the Government enclosed with its motion a transcript of Appellee's pre-trial interview with Naval Criminal Investigative Service [NCIS], a search and seizure authorization, the trial and appellate exhibits from Appellee's first court-martial, and a copy of this Court's opinion in *Pyron I* for consideration by the military judge. Included in the filing was evidence introduced in the prior court-martial: (1) that the named victims made an immediate outcry which their mother reported to the police immediately; (2) testimony from the 8-year-old that Appellee rubbed his penis on her leg and asked her to perform oral sex; (3) testimony from the 6-year-old that Appellee made her perform oral sex; (4) law enforcement testimony establishing chain of custody over DNA evidence; (5) the victims' prior forensic interviews which were entered as prior consistent **[*6]** statements; (6) testimony from a forensic DNA examiner that she found DNA, likely from a body fluid like saliva or vaginal secretions, consistent with the 6-year-old victim on Appellee's penile, pubic mound, and scrotum swabs; (7) and Appellee's trial testimony.[15]

In addition, the Government provided to the military judge the transcript from Appellee's NCIS interview where he consented to the

---

[9] *Pyron I, 81 M.J. at 645*.

[10] *Id. at 645 n.47*.

[11] *Id.*

[12] *Id. at 645* ("Due to the lack of additional questioning to clarify and provide instructional guidance on the issue, an objective member of the public cannot be confident LT Alpha was able to do what he himself said was 'hard' to do. We decline to guess whether LT Alpha was able to focus on the evidence and not his daughters during [Appellee's] case, as such speculation flies in the face of the liberal grant mandate.").

[13] R. App. Ex. XVII at 4 (citing *Harrison, 392 U.S. at 222*).

[14] Rules for Court-Martial [R.C.M.] 905(c).

[15] *See* R. App. Ex. XVII at 1-8, encl. 1-4.

collection of his DNA after making several admissions, including that: he placed his penis inside the 6-year-old's mouth after asking her if she "wanted to taste it;" he asked the 6-year-old if he could perform oral sex on her; he touched his penis against the 8-year-old's leg; and, that he believed the children were between the ages of 3-and 5-years old.[16]

At his first trial, Appellee took the stand in his own defense. He stated that he was "[p]retty drunk" and did not remember doing what the accusations alleged.[17] After he was confronted with the existence of DNA evidence and testimony from the named victims, Appellee stated that he lied to NCIS.[18] Appellee testified that he remembered "waking up to a hand on my penis ... Like my boxers are pulled down and then I look over and I see ... two smaller **[*7]** fingers and I ... push that away and ... I'm trying to push my penis down and I say no and roll over."[19] Appellee explained that he did not tell this to NCIS because it "wasn't the same as everything they were saying,"[20] and he had no memory of it during his interrogation.[21] Appellee explained that he sent incriminating text messages to his wife because he "was so convinced that [he] was a child rapist."[22] Appellee stated that went to sleep wearing pants with a belt and that for a hand to get to his penis, his belt would have to be unbuckled, his pants unbuttoned and unzipped.[23] Appellee also testified that the victims reached into his boxers and pulled out his penis while he was sleeping.[24]

At his second trial, Appellee opposed a Government motion to admit his testimony from his first trial, arguing that the Government failed to meet its burden to show that the prior testimony was not induced by the illegality of the first trial—referring to the structural error resulting from the military judge's failure to grant the implied bias challenge which was the subject of this Court's prior opinion.[25] After consideration of "all legal and competent evidence presented by the parties, the parties' asserted **[*8]** facts, all reasonable inferences to be drawn from the evidence, allied papers and documents, and after ha[ving] resolved any issues of credibility,"[26] the military judge found:

> [T]he government has not shown their actions from the first trial did not induce the accused's testimony in his first trial in July 2019. In its opinion, the NMCCA made it very clear that the error they found in the accused's case was due in large part to the government's error in asserting inaccurate facts about a member during the voir dire process. The government's inaccurate recitations of the facts then led the trial judge to make inaccurate findings of fact — which resulted in the error NMCCA found in the case. There is no evidence the government's error was done with malice or done intentionally, however, it was, at the very least, grossly negligent and was highly prejudicial to the accused. The defense has provided some evidence to the Court that the accused did testify at this first trial due in some part to the error that led NMCCA to conclude that his first trial was unfair. And, while the

[16] R. App. Ex. XVII at 3; R. App. Ex. XVII, encl. 1.

[17] R. at 829.

[18] R. at 831-33.

[19] R. at 834.

[20] R. at 835-36.

[21] R. at 835.

[22] R. at 836.

[23] R. at 854-55.

[24] R. at 855-856.

[25] App. Ex. XLV, at 4.

[26] App. Ex. LV, at 1.

government's error may not rise to the level of "illegal action" articulated in *Harrison*, the Court finds the government **[*9]** should not benefit from their error in the accused's first trial by getting to introduce his testimony from his first trial at his second trial.

The government's error during the accused's first trial highly contributed to NMCCA declaring his first trial unfair. Because of this, the Court finds that NMCCA's rationale in *Murray* also applies to this case, and that the introduction of the accused's prior testimony in this case under M.R.E. 801(d)(2) would bring the "taint" of the first trial into the second.[27]

II. Discussion

1. Standard of Review and the Law

"In an *Article 62, UCMJ*, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial," which in this case is Appellee.[28] "A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard."[29] Whether a military judge abuses his discretion is "far more than a difference of opinion,"[30] and occurs only where his findings are "clearly erroneous or if his decision is influenced by an erroneous view of the law."[31] In our review, we are bound by the military judge's factual determinations "unless they are unsupported by the record or clearly erroneous." **[*10]** [32] The abuse of discretion standard "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."[33]

In *Harrison*, the Supreme Court promulgated the general evidentiary rule that a criminal defendant's testimony from a prior trial is admissible in evidence against him at a later proceeding.[34]

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.[35]

This general principle is not a bright-line rule, however. Where a defendant's prior testimony was induced after the prosecution put into evidence confessions or admissions that were illegally obtained, the testimony becomes the fruit of the proverbial poisonous tree and cannot be used against the accused at later proceedings.[36]

In *Harrison*, the petitioner was convicted in his initial criminal trial after the government

---

[27] *Id.* at 3-4.

[28] *United States v. Becker, 81 M.J. 483, 488 (C.A.A.F. 2021)*.

[29] *United States v. Michael, 66 M.J. 78, 80 (C.A.A.F. 2008)*; *see also United States v. Czachorowski, 66 M.J. 432, 434 (C.A.A.F. 2008)* (evidentiary rulings on hearsay are reviewed for abuse of discretion).

[30] *United States v. Mosley, 42 M.J. 300, 303 (C.A.A.F. 1995)*.

[31] *United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)*.

[32] *Becker, 81 M.J. at 489*.

[33] *Gore, 60 M.J. at 187* (citing *United States v. Wallace, 964 F.2d 1214, 1217 n.3, 296 U.S. App. D.C. 93 (D.C. Cir. 1992)*).

[34] *Harrison, 392 U.S. at 222*.

[35] *Id.*

[36] *Id.*

introduced three confessions and the petitioner took the stand to testify in response **[*11]** to his prior admissions.[37] On appeal, the reviewing court found that all three confessions had been illegally obtained by law enforcement and were thus inadmissible against the petitioner.[38] On rehearing, the prosecution read the petitioner's prior testimony from his first trial to the jury and he was again convicted."[39] While it was true that the petitioner "waive[d] his privilege against compulsory self-incrimination with respect"[40] to his prior testimony, the Supreme Court observed that "[t]he question is not whether the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained ... then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible."[41] Accordingly, the burden is placed on the government, by a preponderance of the evidence, to show that its illegal actions did not induce the testimony of the criminal defendant.[42]

In the decades since *Harrison*, some jurisdictions, including our own,[43] have expanded the logic of *Harrison* to other due process concerns, namely cases in which ineffective assistance of counsel directly results in an accused's testimony. In *Murray*, **[*12]** this Court reversed a military judge's decision to allow the admission of prior trial testimony in the appellant's court-martial.[44] There, at his initial trial the appellant had expressed to his civilian defense counsel that he wished to take the stand and testify in his own defense denying the allegations of rape he was charged with having committed.[45] Instead, at the behest of his civilian defense counsel, he took the stand and testified consistent with a purported legal defense based on a claim of sleep deprivation.[46] We found that the appellant was prejudiced by ineffective assistance of counsel, and that the suggested testimony contributed to a defense that was "not a legal defense."[47] We reasoned that allowing the government to introduce testimony which "was the direct result of the denial of the appellant's *Sixth Amendment* right to effective assistance of counsel . . . brought the taint of the constitutional error of the first trial into the second trial."[48]

---

[37] *Id. at 220*.

[38] *Id. at 222* ("...the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby -- the fruit of the poisonous tree, to invoke a time-worn metaphor.").

[39] *Id. at 221*.

[40] *Id. at 222*.

[41] *Id. at 223*.

[42] *See id. at 225*. Both the Fifth and Tenth Circuits have recognized that *Harrison* does not preclude the use of prior testimony where that testimony was compelled by improperly *admitted* evidence, but rather only evidence that was improperly *obtained. See Guidry v. Lumpkin, 2 F.4th 472, 483 (5th Cir. 2021)* (citing *Littlejohn v. Trammell, 704 F.3d 817, 849 (10th Cir. 2013)*).

[43] *Murray, 52 M.J. at 675* (excluding appellant's prior testimony from trial where ineffective assistance of counsel led appellant to take the stand and testify to establish a defense which "CAAF found was not a legal defense"); *see also* ***Rolon v. State, 72 So. 3d 238, 242 (Fla. Dist. Ct. App. 2011)*** (citing *Murray, 52 M.J. at 672*); *People v. Duncan, 173 Ill. App. 3d 554, 527 N.E.2d 1060, 123 Ill. Dec. 422 (Ill. App. 1988)*.

[44] *Murray, 52 M.J. at 675*.

[45] *Id. at 671*.

[46] *Id. at 675*.

[47] *Id. at 676*.

[48] *Murray, 52 M.J. at 675*. (citing *Harrison, 392 U.S. at 224* ("The exclusion of an illegally procured confession and of any testimony obtained in its wake deprived the Government of nothing to which it had any lawful claim and created no

2. The Military Judge Abused His Discretion by Excluding Appellee's Testimony from the Prior Trial

Based upon our review of the record, the filings by the parties, and the relevant case law, we find that the military judge abused his discretion **[*13]** by denying the Government's motion to admit Appellee's testimony from his prior court-martial. Even viewing the evidence in the light most favorable to Appellee, we find that the military judge made conclusions of law which fell outside the "range of choices"[49] available to him.

a. The Decision Was Based on an Erroneous View of the Law

In his ruling, the military judge determined that the Government failed to meet its burden to establish that its own "actions from the first trial did not induce [Appellee's] testimony in the first trial."[50] The military judge also found that the Defense had "provided some evidence to the Court that the accused did testify at his first trial due in some part to this error that led NMCCA to conclude that his first trial was unfair."[51] In reaching his conclusion, the military judge expanded the holding of *Harrison* to the facts of Appellee's case, noting that while the Government's error in asserting inaccurate facts about LT Alpha during the voir dire process did not "rise to the level of 'illegal action,'" the Government should not benefit from the error in the accused's first trial.[52] In so doing, the military judge applied the rationale of *Murray* to the introduction of Appellee's **[*14]** prior testimony, ruling that the introduction of the prior statements would "bring the 'taint' of the first trial into the second."[53]

As a preliminary matter, we find no support in the record or filings before us for the proposition that Appellee has presented evidence indicating that his decision to testify arose from the inclusion of LT Alpha as a member in his original court-martial. Rather, the evidence introduced in Appellee's first trial by the Government, and attached to the record before us now, is sufficient to meet its burden of demonstrating that Appellee did not testify at his first trial due to the error in the member selection process. Accordingly, we find Appellee testified "in the first place only by reason of the strength of the lawful evidence against him"[54] - specifically, Appellee's prior admissions that were tantamount to confessions and corroborative victim testimony and DNA evidence.

Unlike the petitioner in *Harrison*, none of this evidence introduced by the Government in Appellee's first trial was illegally obtained. To the contrary, this Court's sole basis for setting aside and dismissing the findings and sentence in Appellee's prior trial was an error in the member **[*15]** selection process.[55] Under *Harrison*, in order for a criminal defendant's prior testimony to be excluded in a subsequent proceeding, *it is a requirement* that the accused have testified in order to "overcome the impact of confessions illegally

---

impediment to legitimate methods of investigating and prosecuting crime [and] ... no more than restored the situation that would have prevailed if the Government had itself obeyed the law.")).

[49] *Gore, 60 M.J. at 187* (citing *Wallace, 964 F.2d at 1217 n.3*).

[50] R. App. Ex. LV at 3.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Harrison, 392 U.S. at 222*.

[55] *Pyron I, 81 M.J. at 645*.

obtained."[56] Appellee's confessions to NCIS admitted into evidence in his first trial were not illegally obtained.

As the military judge recognized, the actions of the Government related to the member selection process did not rise to the level of illegal government action, nor did those actions relate in any meaningful way to the legality of Appellee's admissions to NCIS. While the standard of review may be the same, we are unwilling to equate a military judge's error in the member selection process with the erroneous admission of evidence illegally obtained by government agents. There are different public policy interests at stake. *Harrison* is ultimately a prohibition against (re)trials being tainted by the illegal actions of government agents, not the good-faith mistakes of trial judges.[57]

Accordingly, we find the military judge's application of *Harrison* to the circumstances of Appellee's prior testimony to be clearly erroneous. Even if reliable evidence were presented **[*16]** that Appellee testified as a result of the inclusion of LT Alpha on the member panel, the military judge abused his discretion in applying this Court's decision in *Murray* to exclude Appellee's prior testimony. *Murray* stands for the proposition that the Government should not benefit on rehearing from testimony that was the direct result of the denial of the accused's right to effective assistance of counsel.[58] We do not construe that decision to authorize the extension of *Harrison*'s exclusionary rule to an *error* (vice *illegal activity*) during the voir dire process. Because the Government met its burden in demonstrating by a preponderance of the evidence that Appellee did not testify at his initial court-martial due to any illegal action on the part of the Government, we find that the military judge abused his discretion in denying Appellant's motion to admit Appellee's prior testimony into evidence.

III. Conclusion

The ruling of the military judge is **VACATED** and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

Chief Judge MONAHAN and Senior Judge STEPHENS concur.

End of Document

[56] *Harrison, 392 U.S. at 223*. Our prior holding in *Murray* stands only for the proposition that the logic of *Harrison* may be expanded to instances where ineffective assistance of counsel *directly* results in the criminal defendant's testimony. *Murray, 52 M.J. at 675*.

[57] Moreover, although the TC was mistaken when he asserted to the military judge in Appellee's first trial that LT Alpha had been rehabilitated, we previously opined that this blunder was an "honest mistake." *Pyron I, 81 M.J. at 645 n.47*. To the extent that the military judge for Appellee's rehearing found that the TC's actions were, "at the very least, grossly negligent," App. Ex. LV, at 3, we find that finding of fact to be clearly erroneous. Indeed, based on the circumstances, including the large venire consisting of 14 members and the length of time it took to conduct general and individual voir dire, we find TC's misstep was the product of simple negligence.

[58] *Murray, 52 M.J. at 675*.