IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 62(a)(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(B) (2016), because the United States timely appealed the Military Judge's Ruling excluding evidence that is substantial proof of a fact material in the proceeding. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

A panel of members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of rape of a child, attempted

rape of a child, and sexual abuse of a child, and sentenced him to thirty-nine years of confinement, reduction to pay grade E-1, and a dishonorable discharge. The Navy-Marine Corps Court of Criminal Appeals set aside the findings and sentence and authorized a rehearing. *United States v. Pyron* (*Pyron I*), 81 M.J. 637, 645 (N-M. Ct. Crim. App. 2021).

The Convening Authority re-referred two Charges against Appellant to a general court-martial, alleging two Specifications of attempted rape of a child, one Specification of rape of a child, and four Specifications of sexual abuse of a child in violation of Articles 80 and 120b, UCMJ, 10 U.S.C. §§ 880, 920b (2016). (Charge Sheet A, July 23, 2021.)

On rehearing, the Military Judge excluded the transcript of Appellant's testimony from his previous trial. (R. Appellate Ex. LV at 4.)[1] The United States filed a timely Notice of Appeal. (R. Appellate Ex. LVIII at 4.) The lower court found the Military Judge abused his discretion. *United States v. Pyron* (*Pyron II*), No. 201900296R, 2022 CCA LEXIS 410, at *12 (N-M. Ct. Crim. App. July 15, 2022). The lower court vacated the Ruling and remanded the case for further proceedings not inconsistent with its holding. *Id.*

[1] For ease of reference, citations to the first trial record of trial are denoted as "R." and citations to the rehearing Record of Trial are denoted as "RR." Citations to the first trial Prosecution Exhibits and Appellate Exhibits are "Pros. Ex." and "Appellate Ex." Citations to the rehearing Prosecution Exhibits and Appellate Exhibits are "R. Pros. Ex." and "R. Appellate Ex."

Appellant petitioned this Court for review and filed a Supplement to his Petition. (Pet., Sept. 12, 2022; Supp. Pet., Oct. 3, 2022.)

Statement of Facts

A. At his first trial, members convicted Appellant of rape, attempted rape, and sexual abuse of a child. Appellant testified in his own defense.

1. The United States charged Appellant.

The United States charged Appellant with rape of a child, attempted rape of a child, and sexual abuse of a child. (Charge Sheet B, Mar. 22, 2019.)

2. Lieutenant Alpha's voir dire.[2]

a. During general voir dire, Lieutenant Alpha affirmed there were no reasons he could not give Appellant a fair trial.

In Appellant's first trial, the military judge instructed the members they would determine if Appellant was guilty or not guilty "based solely upon the evidence presented here in court and upon the instructions I will give you." (R. 297.) Then the military judge asked the members whether "anyone believe[d] that you cannot give the accused a fair trial for any reason?" (R. 304.)

Lieutenant Alpha responded in the negative. (R. 304.)

Lieutenant Alpha disagreed that "victims should be believed." (R. 317–18.)

Lieutenant Alpha had heard of false confessions and believed false confessions exist. (R. 318.)

[2] The United States adopts the pseudonyms used by the Court in *Pyron I*.

b. During individual voir dire, Lieutenant Alpha indicated it would be hard not to think of his daughters when he heard the evidence in the case.

During individual voir dire, trial defense counsel noted that Lieutenant Alpha had an eight-year-old daughter and an eleven-year-old daughter. (R. 357); *Pyron*, 81 M.J. at 640. The following exchange occurred:

> DC: . . . When you read [the charge sheet], did you think of your girls?
>
> MBR [LT Alpha]: Absolutely.
>
> DC: Okay. In what kind of capacity?
>
> MBR [LT Alpha]: Not in a good way, personally.
>
> DC: Do you think as you hear the evidence you're gonna think about your girls maybe when you see the witnesses come in and testify?
>
> MBR [LT Alpha]: It would be hard not to.

(R. 357); *Pyron*, 81 M.J. at 640.

Neither the trial counsel nor the military judge asked Lieutenant Alpha any additional questions. (R. 357–58); *Pyron I*, 81 M.J. at 640. The trial defense counsel challenged Lieutenant Alpha for cause and, while arguing against the challenge, the trial counsel incorrectly suggested a rehabilitation colloquy had been conducted with Lieutenant Alpha. *Pyron I*, 81 M.J. at 641, 645. The Military Judge denied the challenge for cause. *Id*. at 641.

3. During Appellant's first trial, the United States presented evidence that Appellant raped and sexually abused the victims.

At the first trial, the United States presented evidence that Appellant raped six-year-old P.H. and sexually abused eight-year-old R.H. (R. 593–95, 605–07; Pros. Exs. 22–23.) The United States "introduced into evidence Appellant's interview with NCIS, text messages, DNA evidence, the accused's Article 31(b) rights waiver and associated Permissive Authorizations for Search and Seizure." (R. Appellate Ex. XVII at 4.)

a. The Victims' mother brought the Victims to a police station within an hour of the girls waking up.

The Victims' mother identified Appellant, (R. 433), and testified her husband invited Appellant to their house to watch the Super Bowl, (R. 445, 458). Appellant slept downstairs that night. (R. 452–53.) When the Victims' mother woke up, she saw a text from her teenage daughter saying, "Mom you realize that guy is downstairs without pants on right?!??" (R. 453; Pros. Ex. 3.) The Victims' mother woke up her six and eight-year-old daughters, P.H. and R.H. (R. 454.) P.H. told her "that man downstairs told me to suck his dupey." (R. 455.) The family used the term "dupey" for "penis." (R. 458.) S.M., the teenage daughter, said Appellant "came to my room like three times." (R. 456.) She found the blanket used by Appellant on her six-year-old's bed. (R. 457; Pros. Ex. 2.) They went to the police station within an hour of the girls waking up. (R. 470.)

b. The Victims' teenage sister testified that Appellant repeatedly came to her room in the night.

S.M. testified that Appellant came into her room several times that evening. (R. 487.) His jeans were unbuckled and flapped open so she could see his underwear. (R. 489.) First, he told S.M. he was checking on her, backed out slowly, and ran into her door on the way out. (R. 490.) She next saw him "pacing below the stairs" in his Patriots jersey and underwear. (R. 492.) S.M. texted her boyfriend and mother about Appellant. (R. 498–500; Pros. Exs. 3–4.) Appellant came to S.M.'s room a second time, said he was looking for the bathroom, and asked if he could sit with S.M. (R. 502.) P.H. told S.M. "[t]hat the mean man had asked her to suck his dupe[y]." (R. 507.)

c. Eight-year-old R.H. testified that Appellant rubbed his penis on her leg and Appellant asked P.H. to suck his penis.

R.H., the eight-year-old Victim, testified that after going to bed, her sister woke her up and told her Appellant was there. (R. 593.) Appellant picked her up out of her bed and took her downstairs. (R. 593.) He laid on the couch and put her next to him. (R. 593.) P.H. was on the other side of the couch sitting down. (R. 593.) Appellant took off his pants, rubbed his "sticky and disgusting" private parts on R.H.'s leg, and R.H. walked upstairs and went back to bed. (R. 594.) P.H. then came upstairs and told R.H. that Appellant told her to "suck his bad

parts." (R. 595.) R.H. drew a picture of her lying next to Appellant and her sister sitting on the other side of the couch. (R. 596; Pros. Ex. 7.)

d. Six-year-old P.H. testified that Appellant made her suck his penis and told her to pull off her pull-up diaper.

P.H., the six-year-old Victim, testified that after going to bed she went downstairs, R.H. came down, and Appellant took his underwear off. (R. 605.) He made her "suck his dupe[y]," which was slimy and touched "In [her] mouth in the top." (R. 606.) She ran upstairs and hid under her blankets. (R. 607.) Appellant told her to wake up, he took off his underwear again, and said she "had to put [her] mouth on his dupe[y]." (R. 607.) Appellant told P.H. to pull off her pull-up diaper. (R. 613.) She told her mother and father in the morning. (R. 608–09.)

e. The trial counsel called law enforcement witnesses to establish chain of custody and entered interviews of P.H., R.H., and Appellant in evidence.

The trial counsel called law enforcement witnesses, established chain of custody over DNA samples, and entered the Victims' forensic interviews as prior consistent statements. (R. 620–708; Pros. Exs. 21–23.)

f. In Appellant's law enforcement interview, he admitted to having oral sex with P.H. and asking to perform oral sex on her, rubbing his penis on R.H.'s thigh, and asking P.H. not to tell anyone.

The trial counsel entered Appellant's law enforcement interview in evidence. (R. 673–77; Pros. Ex. 20.)[3] In his interview, Appellant stated that at the end of the night the Victims' father "gave me a blanket, and I was set up on the couch, and I went to sleep, and I woke up this morning." (Appellate Ex. XCIV at 17.) Appellant stated the youngest girl "came downstairs and said she couldn't sleep," she laid on the couch with him and took his blanket, and once she fell asleep he picked her up and walked her back up to her room. (*Id.* at 77, 87–88, 103, 110.) While the six-year-old was lying with him on the couch, Appellant's pants were unbuckled. (*Id.* at 98, 117.) Appellant remembered the girls' bedroom. (*Id.* at 111.)

Appellant said when he took the six-year-old to her room she "accidentally" rubbed his penis. (*Id.* at 117, 120.) She asked "what was that" and Appellant "just pulled it out." (*Id.* at 118.) He asked the six-year-old Victim to "taste it" or "put her mouth on it," and she "put[] her mouth" on his penis for "15 seconds." (*Id.* at 118, 121.) Appellant asked P.H. if he could "reciprocate," and "went back

[3] Appellate Exhibit XCIV is the transcript for Prosecution Exhibit 20, Appellant's NCIS interview. For ease of reference, Appellate Exhibit XCIV is cited throughout this pleading when referencing Prosecution Exhibit 20.

downstairs." (*Id.* at 124.) The six-year-old Victim "came back down at one point later" and wanted to put her mouth on his penis but Appellant "didn't want it to happen again." (*Id.* at 121, 123.) Appellant next remembered that R.H. was also on the couch next to him, climbed next to him, and he swiped his penis on her thigh. (*Id.* at 122, 129.)

Appellant told P.H. "not to say what happened." (*Id.* at 123.)

g. A forensic DNA examiner testified that DNA consistent with P.H.'s DNA profile was found on Appellant's penis.

A forensic DNA examiner testified she found DNA consistent with P.H.'s DNA profile on Appellant's penile, public mound, and scrotum swabs. (R. 745, 753–55; Pros. Ex. 19.) Due to the significant amount of DNA detected, she expected the DNA was "from a body fluid like saliva or vaginal secretions from P.H." (R. 760.)

4. Appellant testified in his own defense at his first trial, during trial on the merits for findings.

Appellant took the stand in his own defense. (R. 828–62.) Appellant gave no explanation for taking the stand, specifically he never mentioned the member selection process as his motivation. (*See* R. 827–62.)

During his testimony, he stated he was "[p]retty drunk," and he did not remember doing what he was accused of. (R. 829.) After being told law enforcement had "DNA evidence" and "testimonies from five different people," he

began to question his own memory and trust what law enforcement said. (R. 831.) He said he lied to NCIS. (R. 831–33.)

Appellant testified, "I remember waking up to a hand on my penis . . . . Like my boxers are pulled down and then I look over and I see, like, two smaller figures and I push that—and I push that away and I put—I'm trying to push my penis down and I say no and I roll over." (R. 834.) He did not tell this to NCIS because "It wasn't the same as everything that they were saying," (R. 835–36), and "At that point I still had no memory of it," (R. 853).

Appellant sent incriminating text messages to his wife because he "was so convinced that I was a child rapist." (R. 835.)

Appellant denied intentionally putting his penis in P.H.'s mouth, asking for oral sex, telling P.H. to give him oral sex, intentionally exposing himself to R.H. and P.H., rubbing his penis on R.H.'s leg, and having sexual intent to gratify his desires that night. (R. 836.)

On cross-examination, Appellant confirmed he woke up to a small hand on his penis. (R. 837.) Appellant confirmed that despite being intoxicated he used proper punctuation and grammar in text messages with his wife. (R. 841–43; Pros. Ex. 24.) Appellant also remembered several conversations with the Victims' father and specific details from the date of the offenses. (R. 844–51.) He went to sleep

wearing pants with a belt and in order for the hand to get on his penis it would have to unbuckle his belt and unbutton and unzip his pants. (R. 854–55.)

Appellant's penis was exposed "through the top" of his boxer briefs "like a hand reached in and pulled up." (R. 855.) Trial Counsel asked, "So one of these girls reached into your boxers and pulled your penis out of them, correct?" Appellant responded, "That's what I could see, yes, sir." (R. 855.) All of this happened while Appellant was asleep and he woke up midway through it. (R. 856.)

On redirect, Appellant again stated that during his interrogation he "was trying to fill in the holes," and his testimony was "everything that's in my memory that I know for a fact now." (R. 860.)

5. The members convicted and sentenced Appellant.

The members found Appellant guilty of two Specifications of attempted rape of a child under twelve years old, one Specification of rape of a child under twelve years old, and four Specifications of sexual abuse of a child under twelve years old. (R. 1065.) The members sentenced Appellant to thirty-nine years of confinement, reduction to pay grade E-1, and a dishonorable discharge. (R. 1214.)

B. During the first direct review, the lower court set aside the findings and sentence after finding the military judge abused discretion by failing to grant an implied bias challenge after trial counsel incorrectly suggested a rehabilitation colloquy was conducted.

On appeal, the lower court set aside and dismissed the findings and sentence, reasoning that the military judge abused discretion by denying Appellant's implied bias challenge for cause against Lieutenant Alpha. *Pyron I*, 81 M.J. at 645. Lieutenant Alpha's response that "[i]t would be hard not to" think of his daughters when seeing witnesses testify" would leave "an objective member of the public" to infer Lieutenant Alpha's "deliberations and votes on findings and sentence in the case were conducted while he viewed the evidence through that impermissible lens." *Id.*

The lower court noted that the trial counsel made matters worse by "suggest[ing] a rehabilitation colloquy had been conducted," *id.*, although this was an "honest mistake," *id.* at 645 n.47.

The lower court found the "implied bias challenge for cause at issue was, at best, a very close call," but under the totality of the circumstances the military judge abused discretion. *Id.* at 645.

C. At Appellant's second trial, the United States moved to pre-admit Appellant's testimony from his first trial. The Military Judge ruled Appellant's testimony was inadmissible.

1. On remand, the United States re-referred charges against Appellant for rape of a child, attempted rape of a child, and sexual abuse of a child.

On remand, the United States re-referred charges against Appellant for attempted rape of a child, rape of a child, and sexual abuse of a child. (Charge Sheet A.)

2. The United States moved to pre-admit Appellant's testimony from his first trial under Mil. R. Evid. 801(d)(2).

The United States moved for a preliminary ruling on the admissibility of Appellant's testimony from his first trial and enclosed the trial and appellate exhibits from the first trial for the Military Judge's consideration. (R. Appellate Ex. XVII at 1–8, Enclosure (3).) This evidence included:

> (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 [Appellant] rubbed his penis on her leg and asked her to perform oral sex; (3) testimony from the 6-year-old that [Appellant] 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 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 [Appellant]'s penile, pubic mound, and scrotum swabs; (7) and [Appellant]'s trial testimony.

Pyron II, at 2022 CCA LEXIS 410, at *5. The Parties also filed other Motions and enclosed additional portions of the record from *Pyron I*. (*See* Appellate Exs. X–XII, XVII, XX–XXV, XXVIII–XXXI, XXXVI–L.)

3. The United States argued Appellant's testimony was admissible at his rehearing under *Harrison* and Mil. R. Evid. 801(d)(2).

The United States argued Appellant's testimony was admissible as a statement of a party opponent under Mil. R. Evid. 801(d)(2), and based on *Harrison v. United States*, 392 U.S. 219 (1968): "an accused's testimony from a former trial is admissible in evidence against the accused at a later proceeding." (R. Appellate Ex. XVII at 4.)

4. Appellant moved to exclude his statements from the first trial.

Appellant opposed the United States' Motion, arguing his testimony "could have been induced by the Government's actions," and his trial testimony was highly prejudicial. (R. Appellate Ex. XLV at 4–5.)

5. The Military Judge denied the United States' Motion to introduce Appellant's prior testimony.

The Military Judge "considered all legal and competent evidence presented by the parties, the parties' asserted facts, all reasonable inferences to be drawn from the evidence, allied papers and documents," (R. Appellate Ex. LV at 1), and denied the United States' Motion (R. Appellate Ex. LV at 4). The Military Judge found:

(1) "[T]he government has not shown their actions from the first trial did not induce the accused's testimony in his first trial";

(2) "In its opinion, 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";

(3) "The government's inaccurate recitation of the facts then led the trial judge to make inaccurate findings of fact—which resulted in the error NMCCA found in the case";

(4) "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";

(5) "The defense has 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"; and

(6) "[W]hile the government's error may not rise to the level of 'illegal action' articulated in *Harrison*, the Court finds the government 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."

(*Id.* at 3–4.)

The Military Judge concluded "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." (*Id.* at 4 (citing *United States v. Murray*, 52 M.J. 671, 675 (N-M. Ct. Crim. App. 2000).)

D. On appeal by the United States under Article 62, the lower court vacated the Ruling and remanded for further proceedings.

1. Due to an administrative oversight, the record of trial from *Pyron I* was not included in the certified Record.

When a case is remanded for a rehearing, R.C.M. 1112(f)(1)(C) requires that "the record of any former hearings" be attached for appellate review. On appeal by the United States, Trial Counsel compiles the Record "to the extent necessary to resolve the issues appealed." R.C.M. 908(b)(5). The same rule empowers the Court of Criminal Appeals to "direct that additional parts of the proceeding be included in the record." *Id.*

The United States moved to attach the Record of Trial from *Pyron I* after it was not included, by Trial Counsel, in the certified Record when the case was docketed with the lower court on appeal by the United States. (Appellee's Mot. Attach, June 9, 2022.) The lower court granted the Motion. (Order, June 28, 2022.)

2. The lower court found the Military Judge abused his discretion by excluding Appellant's testimony from his prior trial.

The lower court vacated and remanded the Ruling because "the [M]ilitary [J]udge made conclusions of law which fell outside the 'range of choices' available to him." *Pyron II*, 2022 CCA LEXIS 410, at *10. The lower court held the Military Judge wrongfully expanded the holding of *Harrison* to punish the United States for an "honest mistake." *Id.* at *10–12.

E. Appellant petitioned this Court for review of two issues.

Appellant petitioned this Court for review of two issues: (1) whether the lower court exceeded the scope of review by attaching the record of trial from *Pyron I*; and (2) whether the Military Judge erred in excluding Appellant's testimony from his first trial. (Supp. Pet. at 2.)

Argument

I.

THERE IS NO GOOD CAUSE TO GRANT REVIEW AND NO BASIS TO REVERSE: THE LOWER COURT DID NOT EXCEED THE SCOPE OF ITS REVIEW BY ATTACHING THE RECORD OF THE FIRST TRIAL, WHICH WAS REQUIRED TO BE ATTACHED. UNLIKE *VANGELISTI*, THE RECORD OF APPELLANT'S FIRST TRIAL WAS NOT NEW EVIDENCE—IT WAS AVAILABLE TO THE MILITARY JUDGE, AND THERE IS EVIDENCE HE CONSIDERED IT. REGARDLESS, EVEN WITHOUT THE RECORD OF APPELLANT'S FIRST TRIAL, THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO VACATE THE MILITARY JUDGE'S RULING.

A. For this Court to grant a petition for review, Appellant must show good cause and state with particularity the prejudicial errors.

"Review on petition for grant of review requires a showing of good cause." C.A.A.F. R. 21(a); *see also* Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016). The Appellant needs a "direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors

assigned are materially prejudicial to [his] substantial rights." C.A.A.F. R. 21(b)(5). Examples of good cause include when the lower court: (1) addressed unsettled law; (2) ruled in conflict with precedent; (3) adopted a law materially differently than civilian courts; (4) addressed a military custom, regulation, or statute; (5) ruled en banc or non-unanimously; (6) deviated from the accepted course of judicial proceedings; or (7) inadequately addressed an issue on remand. *See* C.A.A.F. R. 21(b)(5)(A)–(G).

B. There is no good cause to grant review and no basis to overturn the lower court. The lower court did not exceed the scope of its review when it attached materials R.C.M. 1112(f)(1)(C) required be attached.

1. The record of trial from *Pyron I* is part of the Record for appellate review under Article 62.

In an Article 62 appeal, "trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed." R.C.M. 908(b)(5); *see also* J. R. App. P. R. 6(a)(3) (defining Article 62 appeal record as "that described in R.C.M. 908(b)(5)").

Under R.C.M. 908(b)(5), "[t]he record shall be certified in accordance with R.C.M. 1112." And R.C.M. 1112(f)(1)(C) requires that "[i]f the trial was a rehearing . . . the record of any former hearings" shall be attached for appellate review. R.C.M. 908(b)(5) also empowers a Court of Criminal Appeals to "direct that additional parts of the proceeding be included in the record."

In *United States v. Staten*, 21 C.M.A. 493 (C.M.A. 1972), the Court stated: "Rehearings under the [UCMJ] and its predecessors have long been treated as a continuation of the first trial, largely because of our automatic appellate system and double jeopardy considerations." *Id.* at 495.

Although the Court also stated that "rehearings are to be treated as if a new court-martial has been convened," *id.* at 495; (Appellant's Answer at 24; Supp. Pet. at 15–16), this meant only that an accused in a rehearing receives all his procedural rights back anew—not that the previous trial never happened. *See United States v. Howell*, 75 M.J. 386, 391 (C.A.A.F. 2016) (finding service member, pending rehearing, is entitled to pay at their rank at the time of original court-martial); *United States v. Von Bergen*, 67 M.J. 290, 294 (C.A.A.F. 2009) (restoring appellant's right to an Article 32 investigation, even though it was waived at his first trial); *see also Staten*, 21 C.M.A. at 495.

Because R.C.M. 908(b)(5) requires certification under R.C.M. 1112—and R.C.M. 1112(f)(1)(C) requires attachment of "any former hearings" for appellate review of a rehearing—the Record from Appellant's first court-martial was required to be attached to the Record on appellate review.

This approach aligns with established practice in military courts. In addressing the *Harrison* exception, military courts have cited to the record of the

first trial—attached to the record for the purpose of full appellate review—to develop facts relevant to the issue on appeal. *See, e.g.*, *Murray*, 52 M.J. at 675.

Appellant's cites *Howell* out of context for the proposition that "no vestiges of the former court-martial should linger." (Supp. Pet. at 16.) The issues in *Howell* revolved around whether an appellant awaiting a rehearing is entitled to pay to his or her rank prior to the adjudged reduction for the reverse sentence. 75 M.J. at 388 n.2. Rather than suggest that the first Record of the Trial cannot be used in the rehearing, *Howell* is better understood as meaning that any lingering punishment from a set aside sentence cannot remain. *See* 75 M.J. at 392.

Thus, the lower court did not exceed the scope of review—neither by attaching the record of trial from Appellant's first court-martial under R.C.M. 908(b)(5) and R.C.M. 1112(f)(1)(C), (Order, June 28, 2022), nor by considering it in finding the Military Judge abused his discretion.

2. <u>There no evidence the Military Judge either lacked access to or did not review the record of trial from *Pyron I* before making his Ruling. In fact, there is evidence he did</u>.

Appellant's reliance on *United States v. Vangelisti*, 30 M.J. 234, 236 (C.M.A. 1990) is inapt. (Supp. Pet. at 11–15.) There, this Court found the lower court exceeded the scope of Article 62 by considering extra-record matters not presented to the military judge before he made the ruling that the government appealed. *Id*. at 237–38. The extra-record materials the lower court considered

were affidavits from the law enforcement agents that interrogated the appellant. *Id.* at 236. In the affidavits, the agents asserted the appellant expressly waived his right to counsel. *Id.* These assertions were not part of the same agents' testimony or presented to the military judge at the suppression hearing. *Id.* Because under Article 62 review is limited to questions of law, "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." *Id*. at237–38. The extra-record materials in *Vangelisti* were entirely new information. *Id.*

Here, unlike in *Vangelisti*, the materials in question do not contain new information that was unavailable to the Military Judge because the record of trial from Appellant's previous court-martial was remanded to the convening authority. *See Pyron I*, 81 M.J. at 645. And there is no evidence that it was not before the Military Judge.

In fact, there is evidence the Military Judge considered the record from *Pyron I*. In his Ruling, the Military Judge noted: "[T]he Court has considered . . . [the] allied papers and documents . . . ." (R. Appellate Ex. LV at 1.) "Allied papers" are defined "as 'matters attached to the record' in accordance with R.C.M. 1103(b)(3)," *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020), which has since been moved to R.C.M. 1112(f)(1)(C), *compare* R.C.M. 1103(b)(3) (2016), *with* R.C.M. 1112(f)(1)(C) (2019). When the lower court set aside

Appellant's first conviction, it authorized a rehearing and remanded the record of trial to the convening authority. *Pyron I*, 81 M.J. at 645. Thus, the record of trial from *Pyron I* is part of the "allied papers" because they are matters attached to the Record in *Pyron II* in accordance with R.C.M. 1112(f)(1)(C). *See Jessie,* 79 M.J. at 440.

This Court should not assume, as Appellant suggests, that the Military Judge failed to consider all the evidence available to him before making his Ruling. (*See* Supp. Pet. at 11, 14–17.)

Because the record of trial from *Pyron I* constituted "evidence of record" before the Military Judge, the lower court was empowered under R.C.M. 908(b)(5) to direct its attachment. The lower court did not exceed the scope of its review under Article 62 by exercising its authority under the rules: it did not attach extra-record materials unavailable to the Military Judge. *See Vangelisti*, 30 M.J. at 237–38.

Consequently, this Court should decline to grant review or reverse.

C. Even assuming attachment and consideration of the first record exceeded the scope of review, the lower court had sufficient evidence to find the Military Judge abused his discretion in excluding Appellant's previous testimony.

In its Motion, the United States presented the Military Judge with sufficient evidence for the lower court to conclude he abused his discretion in excluding Appellant's previous testimony. In addition to Appellant's statement to law

enforcement, (Appellate Ex. XVII, encl. 1), the United States included DNA evidence, the immediate outcry of the victims, the victims trial testimony and forensic interviews, and Appellant's trial testimony, *Pyron II*, 2022 CCA LEXIS 410, at *5.

In fact, the *Pyron I* opinion—which the Military Judge reviewed, (R. Appellate Ex. LV at 1)—characterized Appellant's "substantial [pretrial] admissions to the charged conduct [as] tantamount to a confession," discussed the victims immediate outcry to their mother, and mentioned the DNA evidence. *See Pyron I*, 81 M.J. at 640.

Even without the record of the original trial, the evidence presented to the Military Judge showed Appellant was "motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." *See Harrison*, 392 U.S. at 222.

This evidence included: (1) the Victims' mother's statement to NCIS that the Victims made an immediate outcry, she found Appellee's blanket on P.H.'s bed, and they went to the police station immediately; (2) the NCIS summary of P.H.'s forensic interview, where she reported Appellant had her perform oral sex, told her to take off her pull-up diaper, and asked to perform oral sex on her; and (3) the NCIS summary of R.H.'s forensic interview, where she reported Appellant rubbed his penis against her leg. (R. Appellate Ex. XI encls. 1, 6.)

Most damaging, the United States entered Appellant's NCIS interview in evidence, in which he confessed to rubbing his penis against P.H., telling her to "taste it" and "put her mouth on it," receiving oral sex from P.H., asking if he could perform oral sex on P.H., rubbing his penis against R.H.'s thigh, and telling P.H. not to tell anyone. (R. Appellate Ex. XVII encl. 1 at 117–118, 121–24, 129); *cf. Neal v. Booker*, 497 F. App'x 445, 450 (6th Cir. 2012) (finding appellant chose to testify to exculpate himself and gain credibility, not to rebut evidence that should not have been admitted).

Given the strength of the United States presented to the Military Judge—and Appellant's obvious attempt to thread the needle while testifying—the United States met its burden by showing Appellant testified to offer an alternate version of events and refute the evidence against him. *See Harrison*, 392 U.S. at 222; *Neal*, 497 F. App'x at 450.

Indeed, Appellant used his testimony to rebut the evidence already admitted against him—especially his own confession—by stating that he woke up to a small hand on his penis and "two small figures" whose advances he rebuffed. (R. 834, 837.) He also explained he lied to NCIS "about doing these things" because "[the agents] just kept pushing and pushing and pushing" and he "need[ed] to tell them something." (R. 833.) He explained he was drunk at the time of the offenses. (R. 831–36.)

Thus, substantial circumstantial evidence shows Appellant's testimony was voluntary. Appellant "had been in law enforcement for approximately ten years," agreed to a permissive search of his cell phone, previously agreed to "waive his Article 31(b) rights," gave consent to collect DNA swabs, and consented to a SAFE exam. (*See* R. Appellate Ex. XVII at 3.) The Military Judge clearly erred in finding "the government has not shown their actions from the first trial did not induce the accused's testimony in his first trial." (R. Appellate Ex. LV at 3.)

The lower court found nothing in the Record to support Appellant's suggestion that "his decision to testify arose from the inclusion of LT Alpha as a member in his original court-martial." *Id*. at 11. Even without reviewing the record from Appellant's first trial, the lower court could have determined Appellant's decision to testify was not induced by any illegal action and the Military Judge abused his discretion in denying the United States' Motion. *Pyron II*, 2022 CCA LEXIS 410, at *12.

Therefore, this Court should deny Appellant's Petition.

II.

APPELLANT FAILS TO SHOW GOOD CAUSE TO GRANT THE PETITION OR REVERSE. THE LOWER COURT PROPERLY FOUND THE MILITARY JUDGE ABUSED DISCRETION BY (1) FINDING GOVERNMENT ACTION DURING VOIR DIRE CAUSED APPELLANT TO TESTIFY; AND, (2) EXPANDING *HARRISON* AND *MURRAY* TO SUPPRESS STATEMENTS NOT DIRECTLY RESULTING FROM ILLEGAL ACTION.

A. Appellant must show good cause for this Court to grant review.

See supra Section I.A.

B. Exclusion of an accused's prior testimony is only warranted where the testimony was compelled by illegal action by the United States.

1. Under *Harrison* and *Murray*, prior testimony is generally admissible unless it directly results from illegal action. Appellate courts conduct fact-specific inquiries to determine causation.

In *Harrison v. United States*, 392 U.S. 219 (1968), the Supreme Court acknowledged the general rule that an accused's prior testimony is admissible against him in later proceedings; however, if an accused is compelled to testify because the United States introduces wrongfully obtained evidence, his subsequent testimony may become "fruit of the poisonous tree" that cannot be admitted against him at a later proceeding. *Id.* at 222.

At the first trial, the *Harrison* defendant announced in opening he would not testify. But after the prosecution introduced three illegally obtained custodial

confessions, the defendant took the stand and testified as to his version of the matters in the confession. *Id.* The defendant's testimony placed him "at the scene of the crime and holding the gun when the fatal shot was fired"—testimonial admissions, *Harrison* held, that would not have been made "if the prosecutor had not already spread the Appellant's confessions before the jury." *Id.* at 225–26.

In *United States v. Murray*, 52 M.J. 671 (N-M. Ct. Crim. App. 2000), rather than apply a blanket rule that any constitutional violation at the accused's first trial precluded the use of testimony at a future proceeding, the court permitted suppression only when ineffective assistance of counsel directly led the accused to testify to a defense—specifically, where deficient advice of counsel directly led to an accused's testimony about an issue "that CAAF found was not a legal defense." *See id.* at 675; *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*, 527 N.E.2d 1060, 1062 (Ill. App. 1988) (precluding testimony from first trial where counsel was ineffective and "the defendant's statements were not made with any degree of particular advice").

Given the difficulty of "unravel[ling] the many considerations that might have led the Appellant to take the witness stand at his former trial," analysis of the *Harrison* exception is fact-specific. *Harrison*, 392 U.S. at *224–25*; *Murray*, 52 M.J. at 675. This exception is rarely expanded beyond situations where the United

States has offered illegally obtained evidence, and courts have declined to extend it where the causation becomes increasingly tenuous, and the exception becomes progressively unwieldy. See, e.g., Neal, 497 F. App'x at 449–50 (Miranda violation); Humphreys v. Gibson, 261 F.3d 1016, 1023 (10th Cir. 2001) (instructional error); United States v. Pelullo, 177 F.3d 131, 138–44 (3d Cir. 1999) (Brady violation); United States v. Bohle, 475 F.2d 872, 875–76 (2d Cir. 1973) (improper expert testimony); United States v. DeWitt, 3 M.J. 455, 455–57 (C.M.A. 1977) (inadmissible hearsay).

If this Court were to accept Appellant's arguments, the *Harrison* exception would envelop every stage of the case, thus undermining the general rule that an accused's prior testimony is admissible against him in later proceedings. *See Harrison*, 392 U.S. at 222. It would create a windfall for appellants whose convictions are overturned—even if for unintentional errors.

Like Appellant attempts to do here, an accused could trigger the *Harrison* exception by offering hypothetical justifications—with no evidence—for choosing to testify at a prior trial. For example, he could claim he testified to rebut an improperly preferred specification, because discovery was incomplete, or because a witness request was erroneously denied. Under such circumstances, the United States would be left with the near-impossible burden of disproving the accused's

internal motivations, despite no explicit or implicit proof of those motivations in the record of trial.

C. The lower court correctly held the Military Judge abused his discretion by finding actions by the United States during the member selection process led to Appellant's testimony: Appellant testified at his first trial to overcome the evidence against him.

1. The lower court appropriately limited the scope of its review and only answered questions of law.

In finding the Military Judge abused his discretion the lower court specifically noted the evidence they relied on to make this finding, the same evidence that was before the Military Judge. *Pyron II*, at 2022 CCA LEXIS 410, at *5; *see also supra* Section I.C.

2. Trial Counsel did not concede the United States was unable to meet its burden.

a. Trial Counsel made no concessions. Trial Counsel properly argued the *Harrison* exception does not extend to errors in voir dire.

Appellant incorrectly asserts Trial Counsel conceded the United States was unable to meet its burden under *Harrison* by stating, "[I]t would be difficult to see how the government could ever meet its burden under those circumstances." (Supp. Pet. at 24–25.) The circumstances Trial Counsel was referring to include when the error "had nothing to do with the evidence in this case" and "was purely a member issue." (RR. 153.) Thus, Trial Counsel's statement was argument that the *Harrison* exception should not apply in situations other than the admission of

illegally obtained evidence and ineffective assistance of counsel—a legal position supported by case law.

Moreover, the Military Judge's Ruling made no reference to Trial Counsel's statement. (*See* Appellate Ex. LV at 1–4.) As such, Appellant draws no support from the Record for his assertion that the Military Judge used the "government's concession" to find United States failed to meet its burden. (*See* Supp. Pet. at 24–25.)

b. Even if Trial Counsel waived the factual argument that Appellant testified at his first trial due to the overwhelming evidence against him, the Military Judge erred by finding Appellant was induced to testify by the error in voir dire.

The *Harrison* exception has never been extended to errors in the member selection process. (Appellee's Art. 62 Br. at 24–29.) The only case applying the *Harrison* exception to jury selection errors found it "unlikely" that an accused would feel compelled to testify in such circumstances. *United States v. Nell*, 570 F.2d 1251, 1259 (5th Cir. 1978).

In *Nell*, the appellant appealed a second time after the court found reversible error in his first trial because his counsel failed to exercise peremptory challenges during voir dire. *Id.* at 1260. The appellant argued his testimony from his first trial "was inadmissible because the first trial was tainted not only by the jury selection process but by other evidentiary rulings." *Id.* at 1259. The Fifth Circuit

disagreed: "[W]e find it unlikely that a defendant would feel compelled to testify where, as here, the only reversible error in the original trial was that he was required to use two peremptory challenges" when the jurors should have been struck for cause. *Id.*

The court also considered the appellant (1) "did not claim on appeal that he was motivated to take the stand because of any illegally obtained evidence that was introduced," and (2) "cite[d] no authority in support of the proposition that the jury selection process tainted the entire trial." *Id.* Thus, admission of the prior testimony was proper. *Id.*

Other federal courts and this Court's predecessor have reached similar conclusions about other errors that are unlikely to induce an appellant to testify. *See, e.g.*, *Neal*, 497 F. App'x at 449–50 (*Miranda* violation); *Humphreys*, 261 F.3d at 1023 (instructional error); *Pelullo*, 177 F.3d at 138–44 (*Brady* violation); *Bohle*, 475 F.2d at 875–76 (improper expert testimony); *DeWitt*, 3 M.J. at 455–57 (inadmissible hearsay).

As in *Nell*, it is unlikely Appellant felt compelled to testify where the only reversible error in the original trial was that a member should have been struck. *See Nell*, 570 F.2d at 1259–60; *supra* Section I.C. Appellant never claimed he took the stand because of any illegally obtained evidence, and neither Appellant nor the Military Judge offered any authority holding errors in the jury selection

process implicate the *Harrison* exception. *See Nell*, 570 F.2d at 1259 ("Counsel cites no authority in support of the proposition that the jury selection process tainted the entire trial, and we find none."); (R. Appellate Ex. XLV at 1–5; R. Appellate Ex. LV at 1–4).

Thus, even assuming Trial Counsel waived the argument that Appellant testified at his first trial due to overwhelming evidence against him, the Military Judge erred by finding he was induced to testify by the error in voir dire. (*See* Appellate Ex. LV at 1–4.) Trial Counsel properly argued that voir dire errors do not preclude admission of an accused's first trial testimony at rehearing, (*see* RR. 152–53), where, as here, there is no evidence or plausible claim that the failure to strike LT Alpha induced Appellant to testify.

D. The probative value of Appellant's testimony is not substantially outweighed by the dangers of unfair prejudice.

Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. A military judge who conducted a proper balancing test under Mil. R. Evid. 403 will not be overturned absent a clear abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (citation omitted). The overriding concern of Mil. R.

Evid. 403 is that evidence could be used in a way that distorts rather than aids accurate factfinding. *Id.* at 236.

1. The lower court owed the Military Judge less deference because he did not place his Mil. R. Evid. 403 analysis on the Record.

The Military Judge's Ruling is entitled to less deference because he did not conduct a Mil. R. Evid. 403 balancing test on the Record. *See id.* at 235; (Appellate Ex. LV at 1–4).

2. Appellant's prior testimony has significant probative value and would not unfairly prejudice him.

In *Bohle*, the appellant argued the probative value of his prior testimony was substantially outweighed by its prejudicial effect. 475 F.2d at 875. The Second Circuit disagreed, noting the appellant's testimony was relevant to his state of mind and "was not prejudicial in the technical sense of introducing evidence of other crimes or extraneous inflammatory matters." *Id*

So too here. Contrary to Appellant's assertion, the probative value of his prior testimony is self-evident. (Supp. Pet. at 28–29.) The United States is required to prove Appellant exposed his penis to the Victims, committed lewd acts with an intent to gratify his sexual desire, and penetrated one of the Victims' mouths with his penis. (*See* Charge Sheet A at 1, 3.) Much like in *Bohle*, Appellant's testimony addressed essential elements of the charged offenses: it placed him at the scene of the offenses, demonstrated his state of mind, explained

his pants must have been unbuckled and unzipped, and described that his penis was exposed to the Victims and one of the Victims' hands was on his penis. (R. 834, 837.)

Likewise, as in *Bohle*, Appellant's testimony "was not prejudicial in the technical sense of introducing evidence of other crimes or extraneous inflammatory matters." 475 F.2d at 875. The fact that the testimony is inculpatory does not make it unfairly prejudicial, and any danger of unfair prejudice could be easily minimized by redacting portions of the prior testimony suggesting they came from court-martial testimony, and providing tailored instructions to the Members regarding the evidence. (Supp. Pet. at 28–29.)

Appellant's reliance on *United States v. Giles*, 59 M.J. 374 (C.A.A.F. 2004), is misplaced. (Supp. Pet. at 29.) In *Giles*, the United States re-tried the appellant for two drug-related specifications after his original conviction was set aside, but it also added a perjury charge alleging appellant "testif[ied] falsely" at his first court-martial. *Id.* at 375. The "interlocking evidentiary requirements" of the perjury and drug-related specifications "presented complications not present in a normal rehearing." *Id.* at 376. "[T]he separate perjury charge required the Government to introduce evidence of a trial in which Appellant was convicted." *Id.* The military judge erred in permitting "the United States to introduce evidence on the perjury charge under which the members could reasonably conclude the appellant had been

tried and convicted in the first trial of the same drug-related specifications that were before them in the second trial." *Id.*

Unlike *Giles*, admission of Appellant's testimony from his first trial will not lead the Members to conclude he was tried and convicted of the same Charges at the first trial. *See id.* *Giles* dealt with a fact-specific charging scheme of "interlocking evidentiary requirements" that the court stated were "not present in a normal rehearing." *See id.* at 376. No similar concerns exist here. As such, exclusion of Appellee's first-trial testimony is unwarranted. To hold otherwise would undermine the Supreme Court's holding in *Harrison* because nearly any previous testimony would be considered inadmissible as unduly prejudicial.

E. Appellate precedent cautions against piecemeal appellate litigation by an accused pending criminal trial. If Appellant is convicted, this Court can then review the issues on the merits.

"[A]ppellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court." *Will v. United States*, 389 U.S. 90, 96 (1967) (citing *Cobbledick v. United States*, 309 U.S. 323, 326 (1940)). The *Will* Court recognized a "general policy against piecemeal appeals" in criminal cases. *Id*. at 96-98 (acknowledging the limited exception by the Government under 18 U.S.C. § 3731).

In *United States v. Flanagan*, 465 U.S. 259 (1984), the Supreme Court identified the policy reasons for limiting an accused's ability to appeal until final

judgment on the merits: (1) "promptness in bringing a criminal case to trial;" (2) minimizing appellate court interference with trial courts; (3) society's interest in a speedy trial that exists separate from, and at times in opposition to, the interests of the accused; (4) witness memories; (5) government's ability to prove its case; and (6) risk of further misconduct by an accused. *Id.* at 264. Moreover, "in the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, 461 U.S. 1, 13 (1983).

Applying those principles here, weigh in favor of denying Appellant's Petition. If a factfinder convicts, this Court can review the petitioned issues raised on direct review after completion of trial. See, e.g., *United States v. Cote*, 72 M.J. 41, 43 (C.A.A.F. 2013) (evidentiary issue); *United States v. Thompson*, 68 M.J. 308, 309 (C.A.A.F. 2010) (speedy trial issue). Denial of the Petition fairly balances Appellant's rights with the public's—including the Victims'—interests in prompt and efficient administration of justice. *See Slappy*, 461 U.S. at 13.

Appellant's argument for "good cause" conflicts with appellate precedent discouraging review prior to a conviction. This Court should deny the Petition.

Conclusion

The United States respectfully requests this Court deny Appellant's Petition for Grant of Review.

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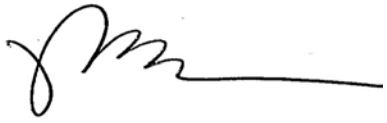

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I certify I delivered a copy of the foregoing electronically to the Court and opposing Counsel, Lieutenant Megan E. HORST, JAGC, U.S. Navy, on October 13, 2022.

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