IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Private (E-1) TYLER WASHINGTON, United States Army, *Appellant*.	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 19-0252/AR Crim. App. Dkt. No. 20170329

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY PERMITTING THE UNIT'S SHARP REPRESENTATIVE TO TESTIFY THAT "WHEN A PERSON SAYS 'NO' IT MEANS STOP, WALK AWAY."

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On June 1, 2017 a general court-martial panel with enlisted representation convicted Private (PVT) Tyler Washington, contrary to his pleas, of two specifications of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). (JA 13). The trial court subsequently merged the two specifications into one and instructed the panel it was to sentence PVT Washington accordingly. (JA 14–15, 198). The panel sentenced PVT Washington to be confined for thirty days and to be discharged from the service with a bad-conduct discharge. (JA 16). The convening authority approved the adjudged findings and sentence. (JA 7).

On February 14, 2019, the Army Court summarily affirmed the findings and sentence in a *per curiam* decision while merging Specifications 1 and 2 into The Specification.[1] (JA 2). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure petitioned this honorable Court to grant review. On September 16, 2019, this Court granted appellant's petition for review.

[1] This was done in accordance with the military judge's ruling granting merger for findings and sentencing. (JA 14–15, 198).

Statement of Facts

1. The night of the incident.

Private Washington and PFC AF, the named victim, arrived at Ft. Bragg in early September 2016 and met while assigned to the reception company. (JA 55). The two Soldiers met PVT Macias and PVT Thomson in reception and the four became fast friends. (JA 55). On September 17, 2016, the four Soldiers ate dinner at Hooters and returned to PFC AF's barracks room. (JA 59). Private Macias left soon after and, because PFC AF's roommate was gone, just the three Soldiers were present. (JA 60).

Private Thomson stayed in the barracks kitchen, part of the common room, while PVT Washington went into PFC AF's bedroom and laid on her bed. (JA 60–61). When PFC AF joined PVT Washington in her bedroom, PVT Washington asked her if she wanted to cuddle and she agreed. (JA 62, 81). Private Washington began rubbing PFC AF's waist, chest, and eventually her vaginal area. (JA 62, 83). When PFC AF observed, "Someone is being grabby," PVT Washington returned his hands to her waist. (JA 62, 83). Private AF did not otherwise say or do anything to express a lack of consent to PVT Washington touching her vaginal area. (JA 83).

Shortly thereafter, PVT Washington began tickling PFC AF and the two began kissing. (JA 63, 84). Private AF was "ok" with the kissing and took her

own shirt off as the two continued kissing. (JA 84). At some point, PFC AF put her shirt back on and returned to the kitchen to check on PVT Thomson. (JA 63, 84). Private Thomson then "carried" PFC AF back to her bed, laid her in bed with PVT Washington, and turned off the lights as he left the room. (JA 85, 89, 134–35

Private Washington and PFC AF continued kissing and PFC AF again took her own shirt off while PVT Washington caressed her. (JA 89–90). During trial, PFC AF testified she was "not really" ok with her shirt coming off" and was "hesitant" about the kissing, (JA 65), but admitted that she was the one who took her shirt off and that her reluctance was never conveyed to PVT Washington. (JA 89–93).

As the two continued consensually kissing, Private Washington "gentl[y] push[ed]" PFC AF on her back and got on top of her. (JA 92). As the kissing grew increasingly "intense," PFC AF did not object to the kissing but was "thinking things in [her] head that maybe [she] didn't want to do this." (JA 91). At this time, PFC AF asked PVT Washington "why were we doing this?" and he replied, "Shh, just let it happen." (JA 67, 93–94).[2] Their unambiguously consensual kissing and touching lasted somewhere between 20 and 30 minutes. (JA 116).

[2]According to PFC AF, she asked PVT Washington why they were "doing this." During her interview, however, she told the agent she thought that to herself but did not mention actually asking that question to PVT Washington. (JA 104).

Private Washington kissed down PFC AF's body, first kissing her chest, then stomach, and finally her vaginal area. Once PVT Washington began kissing down PFC AF's body, she "knew this was his intention" to perform oral sex on her. (JA 95). It was then that PFC AF told PVT Washington she was "uncomfortable" because she would be "loud" or "noisy" during oral sex. (JA 95–96).

In response to PFC AF's concern that she would be "noisy," PVT Washington placed his hand over PFC AF's mouth. (JA 97–98). Private Washington continued kissing between PFC AF's legs and she testified she twice more asked him to stop but PVT Washington would not have been able to understand her because her voice was muffled by his hand. (JA 69, 97–98). Despite this, PFC AF never testified that she attempted to remove his hand. (JA 97). Private AF testified that she "wiggled" in an attempt to get away from PVT Washington, (JA 69, 98), but during cross-examination she admitted that she had omitted this fact when she originally spoke to investigators. (JA 100).

Critically, there was no testimony that PVT Washington tried to actually perform oral sex. (JA 101). Private AF's pants remained on throughout the incident. (JA 101). Private AF candidly admitted that she never tried to close her legs, PVT Washington never tried to take off her pants, PVT Washington never tried to put his hands in her pants, never reached for her belt, and never reached for

her underwear. (JA 101). The entire incident—from the first time PFC AF expressed her concern about being loud to the time it ended—lasted two minutes. (JA 69).

The episode ended when PVT Thomson knocked on the door to get his possessions from the room and PFC AF used the opportunity to put her clothes back on and text message PVT Thomson to say, "Help" and then "I told him to stop and he didn't." (JA 71). At this point, PVT Thomson returned to the door a second time and PVT Washington stepped out of the room to answer a phone call. (JA 71–72). Private Thomson and PFC AF then drove PVT Washington back to his barracks room. (JA 73).

2. Voir dire.

During group voir dire, the prosecution's final question brought up the Army's Sexual Harassment and Assault Response Prevention ("SHARP"). (JA 31). In doing so, it asked the members, "Does anyone here think that the Army SHARP program and its training programs will interfere with their ability to apply the legal standards set forth by the military judge?" (JA 31). All members answered it would not.

3. The prosecution's theory of admissibility for testimony from the SHARP representative.

Before trial, defense counsel moved to exclude reference to any SHARP training that the accused may have received. (JA 17, 192). The defense motion argued that this training would "cause unfair prejudice and may confuse the issues for the panel," was not relevant because all Soldiers receive SHARP training and all members know that, and any marginal probative value is far outweighed by the prejudice stemming from the likelihood the members would conflate SHARP with the law. (JA 193).

The prosecution's principal argument was that the defense's motion was "not ripe" because no evidence of a mistaken belief had been introduced at that point. (JA 196). Moreover, the prosecution argued it was relevant to PVT Washington's objective belief because "the class involved materials detailing consent and best practices when a sexual partner says 'no'…." (JA 197). The prosecution further asserted it was relevant to PVT Washington's actual belief because SHARP instructed Soldiers that "consent could exist and then end[,]" *i.e.*, that people can say "yes" to some things but "no" to others. (JA 197).

The military judge agreed with the prosecution and informed the parties that she would take up the issue again if the defense made mistake of fact an issue. (JA 17–18). As the prosecution neared completion of its case, it informed the court it

intended to call Sergeant First Class Wilfredo Rivera (the "SHARP representative"). (JA 136). Defense, having previously objected to testimony about SHARP training, maintained its objection. (JA 137).

The prosecution, in response to the military judge's request for proffered testimony, explained that the SHARP representative "could testify to the fact that he was the company SHARP representative and that he provided the requisite quarterly training, and that on the week of 12 September 2016, he did, in fact, conduct one of those classes." (JA 137). Specifically, "the message of this class…was consent and that his message to the troopers was that if someone says 'no' or 'stop' is uncomfortable, that it's best to 'walk away and live to fight again another day….'" (JA 137). "'Live to fight another day," exclaimed the military judge, "I don't even know what that means, but all right. So go ahead." (JA 137). The prosecution explained that it anticipated a mistake of fact instruction and that PVT Washington's troop "received training as to consent and what to do if someone said 'no' or if they were uncomfortable." (JA 139). Further clarifying, the prosecution specified, "[T]he fact that they were also instructed goes to what their—a reasonable person in his shoes would potentially do under the same facts…." (JA 140). In other words, in the prosecution's view, this evidence was relevant because it established the duty of care for a reasonably prudent person.

Notably, the prosecution never argued that it was relevant to appellant's subjective, *i.e.*, his actual, belief that PFC AF had not revoked consent. In fact, by this time the prosecution itself had admitted into evidence pre-textual text-messages wherein PVT Washington told PFC AF, "I thought the [sic] was one of those like keep going moment sorry" and amidst repeated apologies, further explained, "Yeah I thought that was one of those moments when the person says stop but they want you to keep going. Been with people like that before sorry…." (JA 187–88).

In response, the defense argued this was irrelevant and unduly prejudicial stating, "[T]his would create unfair prejudice and confusion for the members. Talking about SHARP is going to confuse the issues." When pressed further by the military judge, the defense neatly summarized its objection: "The panel's going to, we believe, transfer that the SHARP is the standard." (JA 141).

"Nah," responded the military judge. (JA 141). Instead, she stated, "I'm going to give them instructions that it's not that. It's not that. I don't understand that confusion. I'm going to give them a bunch of instructions about reasonable doubt and mistake of fact and elements." (JA 142). Expanding further, the military judge reiterated the portions of the mistake of fact instruction directing the members to consider the accused's education and found, "The word 'education' seems to indicate to me that training the week of would fall under that penumbra."

(JA 143). The military judge concluded that "looking at the subjective" the SHARP testimony was relevant and its probative value was not substantially outweighed by its prejudice.[3] (JA 144).

4. The SHARP representative's testimony.

At trial, the SHARP representative testified that SHARP training is normally regularly scheduled but that on this occasion, a Sunday, "I was told to conduct [it] that day…." (JA 146, 149). One of the Soldiers in the troop had been arrested for driving under the influence and in response, at 0800 the following day, the command recalled the entire troop and "smoked" them until mid-afternoon. (JA 151). After three hours of physical exhaustion, the command decided it would be appropriate to brief SHARP. (JA 151–52). On direct examination, the SHARP representative recognized PVT Washington, confirmed that PVT Washington did attend this instruction, and that the topic of his instruction was "consent." (JA 147). Following some foundational questions, the following exchange occurred:

> Q: Is there any sort of a bottom line or, kind of, take away that you try and give the troopers with the class?
>
> A: Just—I tell them it's not worth their career or someone else's career or life to put themselves in a situation, sir.

[3] The military judge stated she reserved the right to attach written findings of fact and conclusions of law prior to authentication of the record—but did not do so. (JA 144).

> Q: What do you mean by when you tell them it's not worth it?
>
> A: Worth it, ruin somebody's life. You're going to jail, the other person going to jail, stuff like that, sir.
>
> Q: Do you teach them anything about what happens if someone says "stop" or "no" or if they're uncomfortable?
>
> A: One of the slides, it talks about when a person says no it means stop, walk away, sir.

(JA 148–49). On redirect, the prosecution repeatedly confirmed that the SHARP representative's instruction was the "standard training package," that he used the "standard training package for consent," and that it was not something the representative just made up "on the fly." (JA 154). After the SHARP representative's testimony, the prosecution rested.

5. Closing arguments and instructions.

During its closing argument, the prosecution repeatedly called the members' attention to the fact the PFC AF said "stop." (JA 161–64, 166). In doing so, the prosecution portrayed two mutually-exclusive scenarios for the members: (1) that what PFC AF was "saying isn't true. That she didn't say stop, that she didn't cease her consent with [PVT Washington;]" or (2) that PFC AF did say "stop" and that PVT Washington is therefore guilty. (JA 163–64). In other words, according to the prosecution this case hinged on whether PFC AF said "stop" at any point in any context. If she did, PVT Washington was guilty, no matter how objectively

reasonable his belief was that she had not fully revoked consent, because that is what the command dictated through its SHARP instruction.

The defense, recognizing this false dichotomy, proffered a third possibility: that PFC AF did say stop but that PVT Washington mistakenly believed this was limited to precluding him from actually performing oral sex. (JA 178). In rebuttal, the prosecution admitted that PVT Washington may have honestly believed PFC AF consented to continued sexual contact but argued this belief was objectively unreasonable. (JA 182). In doing so, it suggested the members' "number one" consideration should be that PVT Washington was "trained by his unit before the assault about the importance of consent, about the importance of listening to other people if they say 'no' or 'stop' or express discomfort in a sexual situation [and] he kept going." (JA 182).

When the time came for the military judge to instruct the members, she gave no tailored instructions about the relevance of SHARP training to PVT Washington's mistake of fact. The military judge did, however, provide the standard instruction informing the members, *inter alia*, that for a mistake of fact to be "reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented." (JA 158–59).

Standard of Review

Appellate courts review a military judge's evidentiary rulings for abuse of discretion. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Under the abuse of discretion standard, "[f]indings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011).

Law

Military Rule of Evidence [Mil. R. Evid.] 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See United States v. Schlamer*, 52 M.J. 80, 96 (C.A.A.F. 1999). Under Mil. R. Evid. 402, "Evidence which is not relevant is not admissible."

Military Rule of Evidence 403 states that the military judge should exclude otherwise relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, or misleading the members. "Probative value entails the sound logical process favored by the law." S.

Saltzburg, Et. Al., Military Rules of Evidence Manual (hereafter Saltzburg), § 403.02[2] at p. 4-35 (8th ed., Matthew Bender & Co. 2015) (citing *United States v. Hood*, 12 M.J. 890 (C.M.A. 1982)). On the other hand, "unfair prejudice means an unwelcome or disfavored influence on the logical process." *Id*. (citing *United States v. Owens*, 16 M.J. 999 (A.C.M.R. 1983)).

One particularly disfavored form of influence on the logical process has been that of command policy. This Court has "condemned references to departmental or command policies made before members." *United States v. Kropf*, 39 M.J. 107, 109 (C.A.A.F. 1994); *see also United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991) (finding the military judge's un-objected to instruction that members "consider all the time and money and expenses the Army spends to combat marijuana" was plain error); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1984) (finding the military judge's failure to sua sponte interject in references by both parties to the appellant's unit's strict treatment of drug offenses was plain error). In *Kirkpatrick*, this Court's predecessor succinctly explained:

> What is improper is the reference to such policies before members in a manner which in effect brings the commander into the deliberation room. It is the spectre of command influence which permeates such a practice and creates the appearance of improperly influencing the court-martial proceedings which must be condemned.

Kirkpatrick, 33 M.J. at 133.

Kropf and *Grady* affirm three principles that remain as true today as they were at the time these cases were decided: (1) Reference to command policies is inappropriate in light of concerns with unlawful command influence (UCI); (2) even when not objected to, the military judge is responsible for guarding against such influence, and (3) it is critical to provide immediate limiting instructions to prevent exacerbating the error. *See Kropf*, 39 M.J. at 108–110; *Grady*, 15 M.J. at 276. Put simply, "Each case is to be considered on the law and facts applicable to it alone and the policies of a particular commander have no place in the trial itself." *United States v. Estrada*, 7 U.S.C.M.A. 635 (C.M.A. 1957). "There is only one reason that the commander's policies are brought to the attention of the court. That reason is to influence the members in their decisions of the case before it." *Id.* at 638.

"The exercise of command influence tends to deprive servicemembers of their constitutional rights." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) (finding that Commanding General's announcement that he found it paradoxical for a subordinate commander to recommend court-martial but serve as a character witness of the accused to be UCI). "If the target is a court member…the tendency is to deprive the accused of his right to a forum where impartiality is not impaired because the court personnel have a personal interest in not incurring reprisals by the convening authority due to a failure to reach his

intended result." *Id*. "Thus…an appellate court may not affirm the findings or sentence 'unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence.'" *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *Thomas*, 22 M.J. at 394).

For non-constitutional evidentiary errors, "In determining whether the erroneous admission of evidence over defense objection was harmless error, the appellate court considers the question in light of the record of trial and the criteria for determining evidentiary harmlessness." *United States v. Baumann*, 54 M.J. 100, 105 (C.A.A.F. 2000). "The burden is on the government to persuade the appellate court that such error did not materially prejudice the substantial rights of appellant." *Id*. (citing *United States v. Armstrong*, 53 M.J. 76 (C.A.A.F. 2000)).

In doing so, courts should consider: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *United States v. Roberson*, 65 M.J. 43, 47–48 (C.A.A.F. 2007) (quoting *United States v. Barnett*, 63 M.J. 388, 397 (C.A.A.F. 2006)).

Summary of the Argument

This case presents a perfect storm of nuance—a twenty to thirty minute consensual sexual encounter between two Soldiers who had been at their first duty station for less than a month; an attempt by PVT Washington to perform oral sex

on PFC AF; her denial because she would be "loud" or "noisy" and their friend was in the next room; and then approximately two minutes of PVT Washington attempting to get her to change her mind without actually escalating the sexual contacts beyond that to which she had already consented. Even the prosecution admitted it was likely PVT Washington subjectively believed PFC AF consented. (JA 182). Accordingly, PVT Washington's guilt or innocence turned singly on whether he reasonably interpreted PFC AF's statement that she did not want to be "loud" or "noisy" as a denial only of oral sex, or whether he should have recognized it as a full revocation of consent to any and all further sexual activity.

To answer this question, the government successfully admitted, over defense counsel's objection, testimony from the unit's SHARP representative that "when a person says no it means stop, walk away[.]" (JA 149). The mandate to "stop and walk away" was if anything, a "best-practice" and provided no greater factual understanding of the objective intrapersonal dynamic between two people. The SHARP program's recommendation of a best-practice—removed from the complex and emotionally charged interplay when two people engage in intimate acts—was irrelevant and had no place in any criminal trial. (JA 140).

More problematic, this evidence was likely to confuse the members as to the legal standard of objective reasonableness. By introducing this testimony—in a case where the fact-pattern included a victim who used the word "stop"—it is all

too likely that this testimony would import a negligence *per se* standard anytime the putative victim says the words "stop" or "no." After all, in an organization where disobedience can be criminal,[4] it is all too plausible the members would impermissibly consider any junior-Soldier who failed to strictly abide by Army training as negligent.

Most problematic, the prosecution's SHARP training evidence was uniquely likely to impress upon the members that senior leadership in the Army expected that, no matter what, when someone says stop, the only objectively reasonable thing to do is "walk away." The not so subtle implication to the members was that this is the standard the command demands, and to otherwise find PVT Washington's actions reasonable, despite the talismanic word "stop," would itself undermine the command's intent to rid the Army of sexual assault. This testimony served to remind the members that the entire chain of command, from the Chief of Staff of the Army to the troop commander, expected that "when a person says no it means stop, walk away[.]" (JA 149). Private AF said "stop" and PVT Washington did not "walk away." And that is all the members needed to know regardless of any other evidence to suggest that in some cases, "no" is actually much more nuanced than just cease everything and leave.

[4] Articles 90–92, UCMJ.

Argument

The introduction of the Army's SHARP training at trial was probative of nothing, likely to confuse the members as to the legal "reasonableness" standard, and unfairly prejudiced PVT Washington by "injecting the spectre of command" at his trial. *Kropf*, 39 M.J. at 109. The SHARP training invited the members to heighten the standard of "reasonableness" by suggesting a *per se* rule that if someone utters the word "stop" during an otherwise consensual sexual encounter, an individual is necessarily unreasonable if he pursues continued sexual contact. And it made clear that the Secretary of the Army and Chief of Staff of the Army[5] expected as much. Given the facts of this case, this constituted prejudice under any analysis.

The military judge's conclusory statement that SHARP training was relevant to PVT Washington's "education," and was not otherwise substantially outweighed by its prejudicial effect, was erroneous. (JA 144). The determinations of relevancy and prejudice, as legal conclusions, are subject to *de novo* review. Ultimately, the judge assessed SHARP training as probative to PVT Washington's

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[5] *E.g.*, Secretary of the Army Mark T. Esper & Chief of Staff of the Army General Mark A. Milley, *Senior Leaders tell troops, 'don't be a bystander'*, Fort Lee Traveller (Mar. 14, 2019), https://www.fortleetraveller.com/commentary/senior-leaders-tell-troops-don-t-be-a-bystander/article_6b22c53a-466e-11e9-801a-d3f45a550105.html ("Across the Total Army, we continue to focus on eradicating sexual harassment and sexual assault from our ranks. We must do everything within our power to rid the Army of these crimes.")

subjective belief, and otherwise provided no alternative explanation of how specifically the testimony served to shape objective reasonableness.

1. Private Washington's subjective belief was not at issue and the testimony was otherwise irrelevant to the objective reasonableness.

While Mil. R. Evid. 404(b) presents a slightly different context, useful parallels can be drawn between it and Mil. R. Evid. 401 and 403. Where Mil. R. 401(a) reflects the common law understanding of relevance,[6] *i.e.*, it has a tendency to make a fact more or less probable with the fact than without it, prong one of the *Reynolds* test requires the Mil. R. Evid. 404(b) evidence to "reasonably support a finding…appellant committed prior crimes, wrongs or acts…." *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). Both require the evidence in question to support a factual finding. Prong two of the *Reynolds* test and Mil. R. Evid. 401(b) require materiality as it was originally understood at common law,[7] *i.e.*, the fact is of consequence to the ultimate issue. *Id*. Thus, the "other purpose" under Mil. R. 404(b) or the fact under Mil. R. Evid. 401(b) must be of consequence to the ultimate issue.

Accordingly, Mil. R. Evid. 401, read as a whole, is now understood to require "logical relevance" of any fact, while the first two prongs of the *Reynolds*

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[6] Saltzburg, § 401.02[2] at p. 4-11.
[7] *Id*.

test require logical relevance for a purpose other than propensity. *See United States v. McDonald*, 59 M.J. 426, 429 (C.A.A.F. 2004). Finally, prong three of the *Reynolds* test and Mil. R. Evid. 403 require that the evidence be legally, as well as logically, relevant. *Id*.

As such, this Court can readily look to its Mil. R. Evid. 404(b) jurisprudence for additional authority in resolving this issue. In *McDonald*, for example, the Court considered whether the fact McDonald had sexually abused his younger sister when he was thirteen years old was relevant and admissible to his charged offense of sexually abusing his daughter when he was thirty three years old. 59 M.J. at 429. The lower court found it was relevant to a common plan and intent. *Id*. at 429–30. This Court, however, found the uncharged misconduct logically irrelevant, thereby failing prong two of the *Reynolds* test, because of the ages of the victims, the remoteness in time of the events, the relationships between the parties, and the details of the acts. *Id*. at 430.

The SHARP training here similarly fails even the logical relevance threshold. As an initial matter, PVT Washington's subjective belief was not at issue. In arguing for the admissibility of the SHARP representative's testimony, the prosecution repeatedly insisted it went to the objective reasonableness of PVT Washington's belief. (JA 139–40). Not once during argument did the prosecution suggest it went to his subjective belief. In fact, the prosecution admitted PVT

Washington seemed to honestly believe PFC AF consented to his continued efforts. (JA 182).

This concession was necessitated by the prosecution's own evidence—pre-textual text-messages wherein PVT Washington told PFC AF, "I thought the [sic] was one of those like keep going moment sorry" and amidst repeated apologies, further explained, "Yeah I thought that was one of those moments when the person says stop but they want you to keep going. Been with people like that before sorry…." (JA 187–88). As such, the fact that PVT Washington subjectively believed PFC AF continued to consent to some forms of sexual activity, if not all, was not a fact of consequence to the ultimate determination of guilt or innocence. *See United States v. Thompson*, 63 M.J. 228, 229–30 (C.A.A.F. 2006) (holding that evidence of uncharged marijuana use failed the *Reynolds* test because the matters for which it was admitted—"knowledge of marijuana use" and "knowledge and absence of mistake"—were never raised by the appellant).

With only objective reasonableness of PVT Washington's actions at issue, the heart of the SHARP representative's testimony focused on a slide that "talks about when a person says no it means stop, walk away[.]" (JA 149). If his testimony had included information that he provided PVT Washington and his

troop with *factual* instruction—*e.g.*, the prevalence of soft-rejections[8] or other aspects of human psychology—perhaps it would have been at least marginally probative of the subjective reasonableness of PVT Washington's actions.[9] This training did not. There was nothing factually instructive about this testimony. The mandate to "stop and walk away" was if anything an Army standard, and one too readily conflated with the legal standard for mistakes of fact. It provided no greater understanding of the intrapersonal dynamic between two people that would properly lead the members to conclude PVT Washington, and any other similarly situated young adult, reasonably should have known PFC AF had fully revoked consent. The SHARP program's recommendation of a "best-practice"—woefully removed from the real-world conundrum posed when one person says no but I'd like to—was irrelevant and, on this basis alone, had no place in any criminal trial. (JA 140).

Inadvertently, it was the prosecution that demonstrated precisely how irrelevant this testimony was. During voir dire, the prosecution's final question asked the members, "Does anyone here think that the Army SHARP program and

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[8] Where one person rejects the sexual advances of another in a way that minimizes rejection of that person. For example, here, PFC AF may not have wanted to explicitly tell PVT Washington she did not want to engage in oral sex and in a misguided attempt to spare his feelings, left open the possibility that she actually did want to but merely did not want to do so if other people would hear them.
[9] Whatever probative value existed would nevertheless still be substantially outweighed by its likelihood of unfair prejudice.

its training programs will interfere with their ability to apply the legal standards set forth by the military judge?" (JA 231). All members responded negatively. The prosecution's failure to challenge any member on the basis of their answer to this question reflects the fact that even the prosecution recognized that SHARP was at best irrelevant, and at worst extremely prejudicial, to the proceedings. Because SHARP should not "interfere" with the application of the law to the facts of this case, the prosecution had no basis for calling the SHARP representative in the first place. But this is exactly what they did.

2. At best, SHARP training was likely to confuse members by conflating "best-practices" with objective reasonableness.

Beyond being irrelevant, the injection of SHARP policy was likely to prejudice the members and confuse issues by inviting them to substitute SHARP's "stop and walk away" standard with actual reasonableness. *McDonald* is similarly helpful in this analysis when it emphasized that the admission of his two decade old misconduct involving his younger sister was "irrelevant and highly inflammatory evidence… and could not help but be powerful, persuasive, and confusing." *Id*. at 431.

The same is true here. It is foreseeable, after all, for commissioned and noncommissioned officer members to conclude that if the Army instructs a Soldier to do something in SHARP, and he chooses not to follow that guidance, his act is

in itself unreasonable. In other words, by failing to precisely follow SHARP training, PVT Washington was *per se* negligent. The members, consciously or otherwise, could then import the framework set forth by the Army's SHARP training as an easily grasped standard in lieu of a fact-based, amorphous assessment of reasonableness in a highly complex social interaction.

This testimony is akin to another SHARP best-practice—"If someone has had even one drink, that person cannot consent to sexual activity."[10] It would be unfathomable that a military judge would allow a SHARP representative to testify that an appellant received this instruction in an alcohol-involved sex assault case. *Cf. United States v. Flesher*, 73 M.J. 303 (C.A.A.F. 2014); *United States v. Rogers*, 75 M.J. 270, 274 (C.A.A.F. 2016). And yet this is precisely analogous to what took place in this case.

The fact that the prosecution wanted to introduce this testimony at all is proof that even they knew this SHARP standard did not accord with the greater

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[10] Todd C. Lopez, *Army Secretary: SHARP needs to increase focus on prevention* (Sep. 29, 2016) https://www.army.mil/article/175944/army_secretary_sharp_needs_to_increase_focus_on_prevention ("Mansfield also said there is a 'myth' in the Army, which should be dispelled, that once somebody has consumed one drink of alcohol, they are no longer legally capable of consenting to sexual activity. 'That's not true,' she said. She said that information has been added to training material, but she hears that out in the field, not all trainers are using the training materials, so they miss it. 'Or worse, we have trainers who put that slide up and then say that it's not true,' she said").

societal standard. If the Army continues its assertive SHARP training program, one day the "stop and walk away" standard may indeed become the objectively reasonable standard. But when societal standards are broadly adopted, the prosecution does not have to remind the members as much. Until then, there is absolutely no place at trial for the prosecution to remind the members of what SHARP training would consider reasonable or not.

Accordingly, even if this testimony had some marginal probative value, which it did not, this was substantially outweighed by the danger of misleading the members into substituting the reasonableness of PVT Washington's abidance of SHARP training for the reasonableness of his belief that PFC AF had not revoked consent in full. *See* Mil. R. Evid. 403.

3. At worst, this testimony served to remind the members that the highest echelons of the Army insist that continuing to engage in *any* sexual activity after a person says stop is facially unreasonable.

Beyond confusing the issues and misleading the members by proffering SHARP training as the reasonableness standard, the imprimatur of command attendant with SHARP policies infringes upon PVT Washington's due process rights, constituted UCI, and transcends this case from evidentiary to constitutional error. *See Biagase*, 50 M.J. at 151 (reaffirming claims of unlawful command influence are tested for harmlessness beyond a reasonable doubt); *Thomas*, 22 M.J. at 393–94 (C.M.A. 1986). As Judge Sullivan once quipped, "command influence

was not only in the air but on the ground…." *Biagase*, 50 M.J. at 152 (Sullivan, J., concurring).

In a moment all too reminiscent of *Kirkpatrick*, the SHARP representative's testimony served to inform the members that the entire chain of command, from the highest echelons of leadership to the troop commander, expected that "when a person says no it means stop, walk away[.]" (JA 149). In *Kirkpatrick*, the military judge reminded the members of "all the time and money and expense that the Army consumes each year to combat marijuana, and here we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army…." 33 M.J. at 133. Here, the SHARP representative reminded the members of the paramount role that combatting sexual assault has taken in the Army and that, in order to do so, Soldiers are expected to "stop and walk away" when someone says "stop" or "no." Private AF said stop and PVT Washington did not walk away.

As a SHARP representative, SFC Rivera was the command's representative, and his testimony unambiguously reminded the members that every echelon of command—from the Secretary of the Army to the convening authority—believed that what PVT Washington did violated SHARP standards. And the prosecution left no doubt that the SHARP representative was speaking for the command, rather than himself, when it confirmed that the SHARP representative's instruction was

the "standard training package[,]" that he used the "standard training package for consent[,]" and that it was not something he had "to create on the fly…." (JA 152).

All servicemembers are entitled to an individualized assessment based on "the law and facts applicable to [his case] alone and the policies of a particular commander have no place in the trial…." *Estrada*, 7 U.S.C.M.A. at 635. As such, PVT Washington was deprived of this right when the prosecution introduced, over defense objection, the SHARP representative to inject the command policy into the trial.

4. The standard instruction on mistake of fact exacerbated the error.

This Court has long recognized that pattern instructions are often insufficient to remedy error from erroneously admitted evidence even when reviewed under plain error. *See United States v. Kasper*, 58 M.J. 314, 319 (C.A.A.F. 2003) (failure to provide tailored instructions constituted plain error where military judge permitted human lie-detector testimony); *see also United States v. Baker*, 57 M.J. 330, 335–36 (C.A.A.F. 2000) (standard instructions failed to appropriately apprise members on the legal standard for indecency, did not correct misstatements of the law by the prosecution, and constituted plain error). Here, of course, defense objected to the SHARP testimony and the military judge expressly overruled their

objection by citing the fact that the pattern mistake of fact instruction would remedy any confusion. (JA 142–43).

As in *Kasper*, "the present case does not involve a stray remark on a secondary matter. This case involves a central issue at trial." 58 M.J. at 320. In fact, it was the only issue at trial—the entire case turned on whether PVT Washington's honestly held belief was objectively reasonable. And under these circumstances, the mere fact that the military judge instructed the panel to follow the law and disregard extra-legal information was simply too little, too late.

Even more problematic under these circumstances, the pattern instruction on mistake of fact exacerbated the likelihood that the members would inadvertently allow SHARP training to dictate reasonableness. Specifically, the military judge instructed the panel "ignorance or mistake must have been based on *information*, or lack of it, that would indicate to a reasonable person that the other person consented." (JA 159) (emphasis added). The instruction, albeit unintentionally, encouraged the members to consider "information," presumably including information from SHARP training admitted as evidence, to establish a *per se* rule of reasonableness. And unfortunately, when this instruction came on the heels of testimony that the SHARP program tells Soldiers that "stop" means "walk away," even if all other signs make doing so objectively unreasonable, the instruction was

all too likely to encourage the members to invoke SHARP as the relevant standard of reasonableness.

5. The error is not harmless under any standard.

"Unlawful command influence [is] an error of constitutional dimension. Thus… an appellate court may not affirm the findings or sentence 'unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence.'" *Biagase*, 50 M.J. at 150 (citing *Thomas*, 22 M.J. at 394). It is difficult to conceive of a more troubling case when the dispositive issue comes singularly down to the objective reasonableness of a junior-Soldier's actions in a highly complex social interaction. That belief is compounded when the government, in voir dire, disclaims the relevance of SHARP training. Then after watching their case, calls as their final witness the SHARP representative for that unit to put on training as evidence of objective reasonableness.

Private Wilson and PFC AF had been at their first duty-station for just weeks, PFC AF commendably admitted that she originally said she did not want to because she would be "loud" or "noisy," and PVT Washington never actually did anything beyond the boundaries of their initial consensual sexual behavior. This case presents the nuance—where one person may not have subjectively consented but the other objectively believed she did—with which rote SHARP training is

simply not equipped to deal. SHARP training necessarily adopts heuristics to teach our Soldiers, but these best-practices have no place at trial; and when the prosecution introduces, and the military judge allows, such testimony, it is all too likely to supplant objective reasonableness with one strictly defined by the Army. Even if the members ignored the fact this directive came down from the highest echelons of the Army, it would at best confuse the issue. For those who remembered as much, as they all inevitably would, it amounts to patent adjudicatory unlawful command influence.

Moreover, the prosecution's arguments magnified the gravity of this error. During its closing argument, the prosecution repeatedly called the members' attention to the fact the PFC AF said "stop." (JA 161–64, 166). The prosecution argued that either PFC AF never said "stop," or that she did and PVT Washington was guilty of the crime. (JA 163–64). In other words, the prosecution invited the members to ignore the possibility PFC AF did say "no" or "stop" but that PVT Washington reasonably understood it to not be a full revocation of consent. If PFC AF said "stop," PVT Washington was guilty, no matter how objectively reasonable his belief was that she otherwise consented—because that is what SHARP instruction demanded.

And when the defense pointed out this false dichotomy and suggested the two scenarios were not mutually exclusive, (JA 178), the prosecution explicitly

invoked the SHARP training and told the members that their "number one" consideration should be that PVT Washington was "trained by his unit before the assault about the importance of consent, about the importance of listening to other people if they say 'no' or 'stop' or express discomfort in a sexual situation [and] *he kept going*." (JA 182) (emphasis added).

Even under a non-constitutional error analysis, the government cannot meets its burden of demonstrating the error was harmless. *See Baumann*, 54 M.J. at 105. The government's case was weak enough that defense counsel rested without presenting any evidence. The government conceded PVT Washington subjectively believed PFC AF consented to his conduct. (JA 182). And the testimony suggests it is likely that PVT Washington reasonably understood her revocation as applying to progressively intimate sexual conduct while not revoking wholesale consent to any or all sexual contact. Private AF's stated concern was being loud (JA 95), therefore she did not consent to things that would make her loud; she would be loud if he performed oral sex, and therefore she did not consent to oral sex. Viewed in the context of twenty to thirty minutes of consensual sexual contact leading up to this moment, (JA 116), it is quite possible that absent the inadmissible SHARP testimony, the members would have concluded PVT Washington reasonably mistook PFC AF's non-consent as limited only to oral sex. The command's SHARP representative, however, made sure this was not the case.

And if PVT Washington believed the non-consent applied only to increasingly intimate acts, he abided by that understanding. Private Washington never attempted to actually perform oral sex on PFC AF. (JA 67). Private AF's pants remained on throughout the incident. (JA 101). Private AF candidly admitted that she never tried to close her legs, PVT Washington never tried to take off her pants, PVT Washington never tried to put his hands in her pants, never reached for her belt, and never reached for her underwear. (JA 101). And PFC AF's declination to engage in further sexual activity was anything but a clear revocation of consent to *all* sexual contact, including that in which the two Soldiers had immediately previously engaged.

Nor was PVT Washington the only one to fail to perceive any reluctance on the part of PFC AF. Despite the fact PFC AF testified she was "not really" ok with her shirt coming off and was "hesitant" about the kissing, (JA 65), this reluctance did not translate to PVT Thompson—PFC AF's "close friend"—who in the minutes before the offense, "carried" PFC AF back to the room, laid her in bed with PVT Washington, and turned off the lights. (JA 85, 89, 134–35).

Under these circumstances, there is an unacceptably high risk the members invoked this SHARP standard not only to impermissibly shape the reasonableness standard, but to set that standard. As such, this constituted prejudicial error under any standard.

Conclusion

WHEREFORE, Private Washington respectfully requests this Honorable Court set aside the Charge and Specification, and the sentence in this case.

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I certify that a copy of the foregoing in the case of *United States v. Washington*, Crim. App. Dkt. 20170329, USCA Dkt. No. 19-0252/AR was electronically filed with the Court and Government Appellate Division on October 23, 2019.

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