IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. JUSTIN D. STEEN Boatswain's Mate Third Class Petty Officer (E-4) U.S. Coast Guard, Appellant	BRIEF OF APPELLANT Crim. App. Dkt. No. 1464 USCA Dkt. No. 20-0206/CG

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

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ISSUE PRESENTED

MRE 404(b) PROTECTS THE ACCUSED'S RIGHT TO A FAIR TRIAL BY EXCLUDING PREJUDICIAL PROPENSITY EVIDENCE. THE MILITARY JUDGE ERRONEOUSLY ADMITTED PROPENSITY EVIDENCE AND INSTRUCTED THE MEMBERS TO CONSIDER EVIDENCE FOR AN IMPROPER PURPOSE. DID THIS ERROR PREJUDICE PETTY OFFICER STEEN?

Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction to review this case under 10 U.S.C. § 866(b), Article 66(b), UCMJ, because the convening authority approved a sentence that included a punitive discharge. This Court has jurisdiction under 10 U.S.C. § 867(a)(1), Article 67(a)(1), UCMJ.

Statement of the Case

A special court-martial panel of officers with enlisted representation convicted Petty Officer Justin D. Steen, contrary to his pleas, of one specification of wrongful distribution of marijuana and one specification of wrongful introduction of marijuana onto a military installation, both in violation of 10 U.S.C. § 912a (2018), Article 112a, UCMJ. The panel sentenced Petty Officer Steen to fifteen days of confinement, reduction to E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged, and, except for the punitive discharge, ordered the sentence executed.

The CGCCA affirmed the findings and sentence on January 15, 2020. Petty Officer Steen's request for *en banc* reconsideration was denied on February 19, 2020. Petty Officer Steen timely petitioned this Court for review on April 17, 2020. This Court granted review on May 29, 2020. Petty Officer Steen timely files this brief and joint appendix per this Court's order.

Statement of the Facts

This case was a "credibility contest between Seaman Apprentice Harris and Petty Officer Steen."[1] At trial, the members heard dueling accounts about what happened in November, 2017. Seaman Apprentice Harris alleged Petty Officer Steen sold him marijuana on Coast Guard Base Portsmouth. Petty Officer Steen, on the other hand, testified he did not sell Seaman Apprentice Harris marijuana and that they met at the Base so Petty Officer Steen could drop off a package. When Petty Officer Steen decided to mail the package instead, he gave Seaman Apprentice Harris a ride to the exchange. Both accounts could not be true, and therefore each witness' credibility was the question before the members.

1. <u>The defense impeached Seaman Apprentice Harris and called his credibility into question.</u>

The Virginia Beach Police Department pulled Seaman Apprentice Harris over

[1] J.A. at 327.

in early November 2017.[2] During the traffic stop, he admitted he had two grams of marijuana in his car and that he was trying to solicit a prostitute.[3] The Virginia Beach police released Seaman Apprentice Harris but asked him to email them additional information concerning the prostitute.[4]

The day after police pulled Seaman Apprentice Harris over, he told Coast Guard Investigative Services (CGIS) that he purchased the marijuana from Petty Officer Steen.[5] Seaman Apprentice Harris alleged that Petty Officer Steen sold him four grams of marijuana for sixty-five dollars.[6] After this interview, Seaman Apprentice Harris tested positive for marijuana, while Petty Officer Steen tested negative for all drugs.[7] Seaman Apprentice Harris was deliberately smoking marijuana because he was trying to be discharged from the Coast Guard.[8]

Seaman Apprentice Harris testified he sent text messages to Petty Officer Steen asking to buy marijuana a few days before the Virginia Beach Police stopped him.[9] The Coast Guard Investigative Service (CGIS) tried to get text messages to corroborate this testimony by searching Seaman Apprentice Harris' and Petty

[2] J.A. at 77.
[3] J.A. at 77-78.
[4] J.A. at 78.
[5] J.A. at 79.
[6] J.A. at 95-96.
[7] J.A. at 59-60.
[8] J.A. at 82, 107.
[9] J.A. at 66, 84, 218.

Officer Steen's phones. No messages were ultimately retrieved because Seaman Apprentice Harris deleted his phone's memory when he was stopped in Virginia Beach and Petty Officer Steen had deleted several text messages from his phone by the time of the search.[10]

According to Seaman Apprentice Harris, he met Petty Officer Steen in the parking lot on Base Portsmouth near the Coast Guard Cutter FORWARD a day after sending the text messages.[11] Petty Officer Steen drove Seaman Apprentice Harris to the ATM at the exchange where he retrieved eighty dollars and then back to the parking lot near the cutter.[12] Seaman Apprentice Harris alleged Petty Officer Steen gave him marijuana after driving him to the ATM.[13]

At trial, the government introduced video clips from security cameras to show this meeting.[14] The first video showed Seaman Apprentice Harris getting into Petty Officer Steen's car;[15] the second shows Seaman Apprentice Harris at the ATM;[16] final clip shows Seaman Apprentice Harris get out of Petty Officer Steen's car and put something in his own car.[17] None of the clips showed what happened in the car.

[10] J.A. at 113, 323.
[11] J.A. at 91-96, 98-99.
[12] J.A. at 94-95.
[13] J.A. at 96.
[14] J.A. at 91-95, 98-99.
[15] J.A. at 91-94.
[16] J.A. at 94-95.
[17] J.A. at 98-99.

Seaman Apprentice Harris was given prosecutorial immunity for testifying against Petty Officer Steen.[18] Seaman Apprentice Harris understood that if he testified against Petty Officer Steen, the court-martial charges pending against him would be dropped and he would be administratively separated.[19] Seaman Apprentice Harris believed it was likely he would receive a general discharge.[20]

At trial, Seaman Apprentice Harris testified that Petty Officer Steen was the only person he knew in Virginia who could get him marijuana.[21] This was false. On cross-examination, Seaman Apprentice Harris admitted he had used marijuana several times the week before the alleged sale with Petty Officer Steen.[22] He also admitted he texted his girlfriend and told her the police had stopped him when he tried to buy more marijuana from a local civilian in Virginia.[23] He testified he told his girlfriend he had previously bought marijuana from the same civilian.[24]

2. Petty Officer Steen testified he never sold marijuana to Seaman Apprentice Harris. His testimony was corroborated by other witnesses.

Petty Officer Steen testified in his own defense. He testified that while deployed on the USCGC FORWARD, Petty Officer Steen's friend, Seaman Hind (who was

[18] J.A. at 119-120; 440-46.
[19] *Id*.
[20] *Id*.
[21] J.A. at 83.
[22] J.A. 108-09.
[23] J.A. at 117, 447.
[24] J.A. at 117.

also aboard), asked if he could ship a package to Petty Officer Steen's apartment off-base.[25] One month before the alleged offense, Petty Officer Steen flew back to Norfolk, Virginia ahead of the FORWARD's scheduled return from deployment because he was about to start terminal leave.[26] Petty Officer Steen received Seaman Hind's package at his apartment and planned to deliver it to him when the cutter returned to port.[27]

In late October, the FORWARD returned to Norfolk, Virginia.[28] Petty Officer Steen and Seaman Hind were unable to coordinate a time to hand over the package.[29] Seaman Hind spent time at his grandmother's house in rural Virginia during his stand-down period and did not have cell phone service.[30] He also testified that he remembered discussing the package with Petty Officer Steen in early November and asked Petty Officer Steen to ship it to his parents' house in Florida.[31]

The day before the alleged marijuana sale, Petty Officer Steen still had Seaman Hind's package.[32] Meanwhile, Seaman Apprentice Harris texted Petty Officer

[25] J.A. at 204.
[26] J.A. at 205-06.
[27] J.A. at 208-09.
[28] J.A. at 311.
[29] J.A. at 180-81, 215.
[30] J.A. at 181, 314.
[31] J.A. at 318.
[32] J.A. at 216-17.

Steen asking about marijuana.[33] Petty Officer Steen replied he knew someone that might be able to help and said he would give Seaman Apprentice Harris' number to that person.[34]

The morning he met Seaman Apprentice Harris, Petty Officer Steen still had not heard from Seaman Hind, so he decided to drop the package off with someone on the FORWARD.[35] Because Seaman Apprentice Harris had recently texted, Petty Officer Steen asked Seaman Apprentice Harris if he could give him the package instead.[36] Seaman Apprentice Harris obliged. Petty Officer Steen drove to Base Portsmouth and called Seaman Apprentice Harris to come and get the package.[37] After parking, Petty Officer Steen saw that Seaman Hind had finally texted him, asking him to mail the package to his parents in Florida.[38]

When Seaman Apprentice Harris approached the car, Petty Officer Steen apologized and said he did not need to leave the package with him after all.[39] Seaman Apprentice Harris said he was going to go to the exchange anyway. Petty Officer Steen offered to give him a ride to make up for troubling him about the

[33] J.A. at 218.
[34] *Id*.
[35] J.A. at 222.
[36] J.A. at 221.
[37] J.A. a 223-24.
[38] J.A. at 225.
[39] J.A. at 225, 227-28.

package.[40] Petty Officer Steen drove Seaman Apprentice Harris to the exchange and back to the parking lot.[41]

3. The text messages that purportedly showed Petty Officer Steen bought marijuana were admitted under MRE 404(b) and MRE 608. The military judge then instructed the members to consider that evidence in deciding whether Petty Officer Steen sold marijuana to Seaman Apprentice Harris.

Petty Officer Steen testified the video footage showing he drove Seaman Apprentice Harris to the exchange was accurate,[42] but that he did not sell Seaman Apprentice Harris marijuana.[43] He explained he had never failed a drug test while in the Coast Guard.[44] In response to this testimony, the military judge granted the trial counsels' request to admit text messages under MRE 404(b), which purported to show Petty Officer Steen's interest in marijuana.[45]

Petty Officer Steen sent text messages to his sister and a friend a few days *after* the meeting with Seaman Apprentice Harris.[46] In those messages, Petty Officer Steen asked about obtaining "bud" and "green."[47] Before Petty Officer Steen testified, trial counsel argued that the messages were admissible under MRE 404(b). The government claimed they were not using the messages for propensity

[40] J.A. 227-29
[41] *Id*.
[42] J.A. at 228.
[43] J.A. at 238.
[44] J.A. at 234-35.
[45] J.A. at 248.
[46] J.A. at 456, 459.
[47] *Id*.

but instead to show that Petty Officer Steen needed to resupply himself with marijuana after selling to Seaman Apprentice Harris. Trial counsel argued this made the alleged sale more probable.[48] Initially, the military judge excluded these text messages under MRE 404(b), reasoning that their unfairly prejudicial effect substantially outweighed their probative value.[49]

After Petty Officer Steen testified, the military judge reconsidered and admitted the text messages under MRE 404(b) because: (1) the text messages reasonably supported a prior act; (2) they were relevant to the question of whether Petty Officer Steen sold marijuana to Seaman Apprentice Harris because the members could reasonably infer Petty Officer Steen was trying to resupply his marijuana; and (3) the probative value outweighed the prejudice now that Petty Officer Steen had testified. In other words, the messages were admitted under MRE 404(b) because they went to some purpose other than propensity.[50] The military judge also admitted the messages under MRE 608 because they purportedly contradicted Petty Officer Steen's testimony he had never failed a drug test.[51]

[48] J.A. at 36-38.
[49] J.A. at 43-44.
[50] J.A. at 240-41.
[51] *Id.*

The military judge instructed the members that they could:

> consider evidence that Petty Officer Steen may have texted about purchasing or smoking marijuana in the days following the alleged misconduct for the limited purpose of its tendency, if any, to prove the Government's allegation that Petty Officer Steen allegedly needed to replenish his supply of marijuana based on their allegation that [Petty Officer] Steen had sold marijuana to Seaman Apprentice Harris.
>
> You may not consider this evidence for any other purpose and you may not conclude from this evidence that Petty Officer Steen is a bad person or has general criminal tendencies and that he therefore committed the offenses charged[52]

4. The CGCCA ruled the military judge had erroneously admitted the text messages under MRE 404 (b) but there was no prejudice because the military judge's instruction "probably did not amplify the problematic nature of the evidence."[53]

The CGCCA unanimously found error. The panel agreed the evidence was "irrelevant, inflammatory, and risked its impermissible use for propensity purposes."[54] It concluded the evidence "had little or no bearing on the case logically" and that "the evidence was not material to the case."[55] The government did not prove Petty Officer Steen ever possessed a supply of marijuana that he needed to replenish and therefore the evidence was immaterial.[56]

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[52] JA at 337.
[53] The CGCCA found that the military judge admitted and instructed on the text messages as substantive evidence under MRE 404(b), not as impeachment evidence and ultimately rejected the alterative theory of admissibility under MRE 608.
[54] J.A. at 8.
[55] J.A. at 9.
[56] J.A. at 8-9.

Having unanimously found error, the panel divided over whether the error prejudiced Petty Officer Steen. Even though the military judge instructed the members that the evidence was relevant and invited them to "assume facts not in evidence," two judges found the members gave the evidence no weight.[57] The panel found that the "instructions and argument on the evidence probably did not amplify the problematic nature of the evidence" because the military judge's instruction stopped the members from considering the texts for propensity.[58]

The dissent determined that the error prejudiced Petty Officer Steen because the messages dramatically attacked Petty Officer Steen's credibility and were highly prejudicial. The error was further exacerbated by the military judge's instruction to members to use improper evidence in an improper way:

> As the majority concedes, the military judge's instructions and the trial counsel's argument "invited the members to presuppose that Appellant had a 'supply of marijuana' and that the fact that he was seeking more tended to show that he had depleted this ghost supply by selling it to Seaman Apprentice Harris" [] This invitation to make such a damning – and unsupported – presupposition exacerbated the error rather than limiting it. The presumption that the members follow the military judge's instructions, then, actually works against the Government and "we must presume that the court members considered the evidence . . . *for an improper purpose*."[59]

The dissent would have set aside the findings and sentence.[60]

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[57] *Id*.
[58] J.A. at 8.
[59] J.A. at 10 (internal citation omitted) (emphasis in original).
[60] J.A. at 10-11.

Summary of Argument

The military judge's admission of propensity evidence and instruction to the members to consider facts not in evidence prejudiced Petty Officer Steen's right to a fair trial.

The dissent correctly found that the military judge's instructions improperly informed the members to consider facts not in evidence. The government did not prove Petty Officer Steen had a previous supply of marijuana to sell, or that he needed to "resupply" his marijuana after allegedly selling to Seaman Apprentice Harris. The members are presumed to follow the military judge's instruction, and likely used these irrelevant, prejudicial facts during deliberations.

The evidence prejudiced Petty Officer Steen because it unfairly undermined his credibility. The military judge allowed the government to argue Petty Officer Steen was trying to buy marijuana after selling to Seaman Apprentice Harris. This argument called for an impermissible inference that Petty Officer Steen's lifestyle included being a drug trafficker in the marijuana business. Therefore, the government argued, it was more likely he sold marijuana to Seaman Apprentice Harris. This error requires reversal and a new trial without impermissible evidence.

Argument

MRE 404(b) PROTECTS THE ACCUSED'S RIGHT TO A FAIR TRIAL BY EXCLUDING PREJUDICIAL PROPENSITY EVIDENCE. THE MILITARY JUDGE ERRONEOUSLY ADMITTED PROPENSITY EVIDENCE AND INSTRUCTED THE MEMBERS TO CONSIDER EVIDENCE FOR AN IMPROPER PURPOSE. THIS ERROR PREJUDICED PETTY OFFICER STEEN.

Standard of Review

The CGCCA's decision that the military judge's error was harmless is reviewed *de novo*.[61]

Analysis

Petty Officer Steen only appeals the CGCCA's decision that the military judge's error was harmless. "The test for nonconstitutional error is whether the error had a substantial influence on the findings."[62] The government bears the burden of showing the error was harmless.[63]

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[61] *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010) (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)).
[62] *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017) (quoting *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001)(internal quotation marks omitted)).
[63] *Id*.

1. The military judge erred when he instructed the members that they could consider facts not in evidence and could use that evidence to convict Petty Officer Steen. The members are presumed to have followed that instruction and therefore considered improper evidence.

In *United States v. Matthews*,[64] the military judge erroneously admitted evidence of a second, uncharged positive urinalysis to show proof of knowing ingestion for the first positive test. The military judge instructed the members they could consider this second test without any further explanation.[65] This Court followed the presumption that the members followed the military judge's instructions and considered the evidence for an improper purpose.[66] The conviction was vacated.[67]

In *United States v. Humphreys*,[68] the military judge properly admitted evidence of the accused's prior statements to establish sexual intent and gave appropriate limiting instructions.[69] This Court concluded that the limiting instruction prevented the members from using the evidence improperly.[70]

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[64] *United States v. Matthews*, 53 M.J. 465, 470 (C.A.A.F. 2000).
[65] *Id*. at 471.
[66] *Id*.
[67] *Id*.
[68] *United States v. Humphreys*, 57 M.J. 83, 89 (C.A.A.F. 2002).
[69] *Id*. at 90.
[70] *Id*. at 91.

"It has long been held that a court-martial must reach a decision based only on facts in evidence."[71] The instructions here, though, "gave a judicial nod to the members to assume facts not in evidence"[72] — namely, Petty Officer Steen was a habitual drug dealer who needed to resupply a stock of marijuana. As both the majority and dissent agreed, the members considered this unsupported theory when the text messages were admitted. As the dissent correctly explained, the instruction actually aggravated the problem by giving judicial imprimatur to the government's unsupported theory.

As *Matthews* states, the Court should presume the members followed the military judge's instruction allowing consideration of facts not in evidence.[73] And a court-martial *must* decide guilt based *only* on facts in evidence.[74] The improperly admitted evidence was a "damming – unsupported presupposition" that allowed members to assume Petty Officer Steen maintained an inventory of marijuana he regularly resupplied without any evidence that this was true.[75] It also unfairly provided the government with evidence that Petty Officer Steen was familiar with marijuana through his use of slang like "bud" and "green."[76] The military judge

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[71] *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005) (citing *United States v. Bouie*, 26 C.M.R. 8, 13 (C.M.A. 1958)).
[72] *Id*.
[73] *Matthews*, 53 M.J. at 470.
[74] *Fletcher*, 62 M.J. at 183.
[75] J.A. at 10.
[76] J.A. at 456, 459.

then specifically instructed the members they could consider these unsupported facts in determining whether Petty Officer Steen sold Seaman Apprentice Harris marijuana.

Furthermore, unlike *Humphreys*, the military judge did not give an appropriate limiting instruction in this case.[77] The limiting instruction was vague and informed the members not to assume Petty Officer Steen was a bad person with general criminal tendencies but still allowed the members to consider Petty Officer Steen likely acted in accordance with a trait to resupply marijuana after a sale.[78] As a result, the members could assume Petty Officer Steen regularly maintained a supply of marijuana to sell (in other words, a character trait, or "crime, wrong, or other act: prohibited by MRE 404(b)) and that he was acting in conformity with that trait when he sold marijuana to Seaman Apprentice Harris.[79] It is likely that the members considered these unproven allegations and unfairly judged Petty Officer Steen as a drug dealer when assessing his testimony.

2. The military judge erred in admitting the text messages under MRE 404(b) and MRE 608.

Petty Officer Steen agrees with the CGCCA that the military judge abused his discretion in admitting the text messages under MRE 404(b) and MRE 608.[80]

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[77] *Humphreys*, 57 M.J. at 91.
[78] J.A. at 337.
[79] *Id*.
[80] J.A. at 10-11.

3. The text messages concerning Petty Officer Steen's pursuit of marijuana after the alleged sale to Seaman Apprentice Harris were prejudicial.

The government now bears the burden of demonstrating the erroneous admission was harmless.[81] The government has not met this burden. The CGCCA reasoned the error was not prejudicial because the military judge's instruction prevented the members from considering the text messages for propensity and because the messages were irrelevant.[82] This reasoning is faulty because the military judge's instruction allowed for an inference of propensity to sell marijuana, it made irrelevant evidence material, and it allowed the members to consider facts not in evidence.

This Court evaluates prejudice by weighing the strength of the government's case; the strength of the defense case; the materiality of the evidence in question; and the quality of the evidence in question.[83] When applied to this case, all four factors reveal there was harmful prejudice to Petty Officer Steen.

a. The text messages were new ammunition the government unfairly used to bolster its weak case.

In *United States v. Yammine*,[84] the prosecution admitted evidence in a child molestation case that the accused had computer file names with disturbing titles

[81] *Fetrow*, 76 M.J. at 187 (citing *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014); *United States v. Berry*, 61 M.J. 91, 97-98 (C.A.A.F. 2005)).
[82] J.A. at 9.
[83] *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).
[84] *Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010).

suggesting an interest in sex with young boys. This Court found the evidence was improperly admitted. When determining prejudice, this Court reasoned "when a 'fact was already obvious from . . . testimony at trial' and the evidence in question 'would not have provided any new ammunition,' an error is likely to be harmless."[85] But when the evidence provides "new ammunition," the error "is less likely to be harmless."[86] This Court found prejudice in *Yammine* because the case was one of "dueling facts" and the erroneous evidence unfairly gave "new ammunition" to the government's case.[87]

Petty Officer Steen's case was similar. The entire trial was a credibility battle between Petty Officer Steen and Seaman Apprentice Harris.[88] The government relied almost completely on Seaman Apprentice Harris' testimony and argued he was more credible than Petty Officer Steen.[89] But Seaman Apprentice Harris' testimony was undermined. For example, he claimed he had to buy marijuana from Petty Officer Steen because he did not know where else to get marijuana in

[85] *Id*. at 78 (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)) (internal quotation omitted).
[86] *Id*. at 78 (internal citation and quotations omitted).
[87] *Id*.
[88] J.A. at 326-27.
[89] J.A. at 345-55 (arguing in closing that Seaman Apprentice Harris' story was credible while Petty Officer Steen's testimony was fanciful conjecture).

Virginia, even though he told his girlfriend he previously purchased marijuana from a civilian in Virginia Beach.[90]

Additionally, Seaman Apprentice Harris had a strong motive to lie—in consideration for his testimony, the government dropped all charges against him and he received a general discharge. Seaman Apprentice Harris wanted a general discharge without a federal conviction and, with his testimony, he got his wish.[91] There was reasonable doubt regarding Seaman Apprentice Harris' testimony even without taking into consideration Petty Officer Steen's case-in-chief.

There was no other evidence about Petty Officer Steen's attempts to buy marijuana after the charged offense. The text messages were the government's "new ammunition" it would not have had without the error.[92] The trial counsel used this new ammunition to make the prejudicial argument in closing that "forty-eight to seventy-two hours after [the alleged distribution], [Petty Officer] Steen was seeking out more marijuana. Marijuana which he wouldn't need unless he was out from distributing what he had sold to Seaman [Apprentice] Harris."[93] This statement allowed the members to infer Petty Officer Steen was a habitual drug dealer or user. And since he wanted marijuana a few days after the alleged sale, he

[90] J.A. at 83, 112.
[91] J.A. at 118-19.
[92] *Yammine*, 69 M.J. 70, 78.
[93] J.A. at 352.

must have sold what he had to Seaman Apprentice Harris. This is the very reason propensity evidence is inadmissible.[94]

The text messages also provided the government with evidence that Petty Officer Steen was familiar with marijuana through his use of slang like "bud" and "green." Ammunition they would not have had if the text messages had been properly excluded.

Finally, part of the government's cross-examination and its entire re-cross was focused on undermining Petty Officer Steen's credibility with the text messages.[95] The government then argued in closing that Petty Officer Steen was seeking marijuana shortly after meeting Seaman Apprentice Harris because he needed to resupply.[96] This, combined with the military judge's instruction allowing consideration of facts not in evidence, unfairly tipped the battle of credibility in the government's favor.[97] Without the messages, the government's case was weak, and therefore this factor favors Petty Officer Steen.

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[94] *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017) (reasoning "the very nature of propensity evidence is to permit the trier of fact to infer that since the accused has acted previously in a certain fashion [for example trying to buy marijuana to re-supply], he was inclined to have acted in conformity with that conduct with respect to the charged offenses [selling the marijuana in the first place] . . . the result is that evidence of bad character had been improperly admitted").
[95] J.A. at 264-66, 286-87.
[96] J.A. at 352-353.
[97] J.A. at 337, 346-55.

b. The defense case was strong and presented a reasonable explanation of events.

Petty Officer Steen's testimony was corroborated with physical and testimonial evidence.[98] Seaman Hind's package—the one Petty Officer Steen was going to give to Seaman Apprentice Harris—was admitted into evidence.[99] Seaman Hind's testimony corroborated Petty Officer Steen's testimony about how the package would have gotten to Seaman Hind.[100] While the dates surrounding Seaman Hind's leave were confusing due to memory loss, Seaman Hind testified twice that he believed he talked to Petty Officer Steen about shipping the package as an alternative sometime in early November.[101] Petty Officer Steen's testimony was not fanciful conjecture.

There was a reasonable possibility the members would have believed Petty Officer Steen and acquitted him. Similar to *Yammine*, Petty Officer Steen's credibility and defense was unfairly undermined when the text messages were erroneously admitted.[102]

c. The text messages were a material part of the case.

Credibility was a material issue in this case. The text messages were material

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[98] J.A. at 438, 178-191.
[99] J.A. at 438.
[100] J.A. at 181, 318.
[101] *Id.*
[102] *Yammine*, 69 M.J. 70, 78.

evidence that attacked Petty Officer Steen's credibility, both as a witness generally and how they painted him as a habitual criminal. The military judge's instruction reinforced the government's improper argument when he told the members that they could consider Petty Officer Steen a drug dealer who was familiar with marijuana, without any evidence supporting that fact.[103]

The CGCAA held the military judge's instruction prevented the members from considering the evidence for propensity purposes. But the military judge allowed the members to infer that Petty Officer Steen was a habitual drug dealer and drug user who regularly resupplied in preparation for a sale, making it more likely he sold marijuana to Seaman Apprentice Harris.[104] That is an inference of propensity. His instruction encouraged the members to convict Petty Officer Steen because he had an unproven propensity to stock marijuana in preparation for sales.

The CGCCA found that the impermissible evidence was not material because it was irrelevant.[105] Therefore, the CGCCA "think the members gave it no weight."[106] But all that reasoning does is assume its own conclusion. According to that logic, irrelevant evidence that is admitted could never be material. Here, though, the

[103] J.A. at 337.
[104] *Id.*
[105] J.A. at 9.
[106] *Id.*

admission of damaging text messages that painted Petty Officer Steen as a criminal unfairly torpedoed Petty Officer Steen's defense.

The messages were used during cross-examination and re-cross to undermine Petty Officer Steen's credibility. Petty Officer Steen testified he never tested positive for marijuana while in the Coast Guard and that he did not sell marijuana to Seaman Apprentice Harris.[107] The government attacked this testimony by painting Petty Officer Steen as a liar and habitual drug dealer.[108] And the language in the text messages unfairly emphasized Petty Officer Steen's familiarity with marijuana.[109] The military judge's instruction then gave credence to the government's argument by telling the members they were allowed to make the improper inference that Petty Officer Steen was a habitual drug dealer without evidence it was true.[110] As a case of "dueling facts," this was material because it impacted the issue of Petty Officer Steen's credibility and was prejudicial.

d. The quality of the evidence was high. The government proved the text messages were from Petty Officer Steen and the date he sent them.

The fourth factor also favors Petty Officer Steen. The government introduced the Cellbrite extraction of the text messages that showed Petty Officer Steen likely

[107] J.A. at 234-35.
[108] J.A. at 217-18, 286-87.
[109] J.A. at 456, 459.
[110] J.A. at 337.

sent the text messages, who he allegedly sent them to, and when he sent them.[111] Petty Officer Steen was forced to admit on the stand he sent the messages and that the purpose of the messages was to procure marijuana.[112]

In *Fetrow*, the quality of the evidence was high because the witness' improper testimony was "powerful" and "emotional and heartfelt."[113] In addition, the evidence invited the members to make a propensity inference of bad character.[114] Similarly, seeing Petty Officer Steen's words to his confidants in black and white would be difficult for any defense to counter. There was simply no way for defense counsel to credibly undermine the text messages, and they were "powerful" propensity evidence against Petty Officer Steen.

With all four *Yammine* factors weighing in Petty Officer Steen's favor, the government has not met its burden to prove the error was harmless. Petty Officer Steen has suffered prejudice.

Conclusion

This Court should set aside the findings and sentence and remand this case for a new trial.

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[111] J.A. at 302-04, 453.
[112] J.A. at 285-86.
[113] *Fetrow*, 76 M.J. at 188.
[114] *Id.*

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CERTIFICATE OF FILING AND SERVICE

I certify that on June 29, 2020, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to the Appellate Government Division.

CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitation of Rule 24(c) because it contains 5,707 words; and 2) this supplement complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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