IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Carolyn Bray
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
Appellate Defense (Code-45)
Tel: 202-685-8588
carolyn.bray@navy.mil
USCAAF Bar Number 37253

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Summary of Argument

The military judge abused his discretion and erroneously admitted text messages where Petty Officer Steen discusses marijuana. Specifically, Petty Officer Steen told a friend and his sister that he needed “green,” he wanted to “smoke,” asked for “bud,” and stated that he needed to stop smoking but he “truly enjoy[ed] it.”[1] The messages were admitted under M.R.E. 404(b) for the purpose of supporting the inference that Petty Officer Steen needed to re-stock a supply of marijuana he depleted when he allegedly sold marijuana to Seaman Apprentice Harris. The military judge erred because he assumed Petty Officer Steen had a phantom stock of marijuana, or intended to sell marijuana to others, and any minimal probative value was highly outweighed by substantial prejudice of the irrelevant and inflammatory evidence.

The text messages could not have been admitted under an alternative theory pursuant to M.R.E. 608(c). The text messages did not contradict Petty Officer’s Steen’s testimony on direct examination that he never tested positive for drugs or sold marijuana. They were not evidence of a motive to misrepresent. The text messages were specific extrinsic evidence not admissible under *United States v. Trimper*. And the government was not allowed to elicit a broader assertion that

[1] J.A. at 454-61.

Petty Officer Steen was not involved with marijuana in order to bootstrap the inadmissible evidence through cross-examination.

The erroneous admission of the text messages and accompanying instructions caused prejudice by inducing the members to improperly presume Petty Officer Steen was in regular possession of marijuana. All four *United States v. Kerr* factors weigh in favor of a determination that Petty Officer Steen was prejudiced. The government's case was not overwhelming, the defense case was strong, and the text messages were material and high quality evidence.

Argument

1. The military judge abused his discretion when he erroneously admitted the text messages under M.R.E. 404(b)

The government argues the text messages were admissible under M.R.E. 404(b) because the messages, in conjunction with a google search, demonstrate a plan to continually acquire and distribute marijuana.[2] The evidence does not support this conclusion. At best, the text messages and the search show an interest in marijuana and interest in purchasing marijuana for personal use.[3] But they do not demonstrate 1) that Petty Officer Steen successfully obtained marijuana; or 2) that Petty Officer Steen intended to sell marijuana.[4] Exacerbating the inflammatory text messages, the military judge's instruction invited the members to suppose that Petty Officer

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[2] Appellee Br. at 13.
[3] J.A. at 456, 459.
[4] *Id*.

Steen had a regular stockpile of marijuana, despite his inability to obtain the product.[5] The text messages and accompanying instructions induced the members to make an improper inference that Petty Officer Steen maintained a steady supply of marijuana for personal use or distribution. And because he was seeking more marijuana it tended to show he had depleted his supply by allegedly selling marijuana to Seaman Apprentice Harris.

In applying the three factor analysis from *United States v. Reynolds*, the Coast Guard Court of Criminal Appeals (CGCCA) was correct in determining the text messages were inadmissible under M.R.E. 404(b).[6] Factor one was met because it reasonably supports the notion that Petty Officer Steen sought marijuana for personal use.[7] Factor two and three, however, were not met, making the text messages inadmissible.[8]

Factor two is not met because the text messages do not make it more or less probable that Petty Officer Steen sold marijuana to Seaman Apprentice Harris. Without evidence, the military judge presumed that Petty Officer Steen possessed a phantom stock of marijuana before the alleged sale to Seaman Apprentice Harris.[9] The government argues the text messages, along with a google search for

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[5] J.A. at 337.
[6] J.A. at 4-5; *United States v. Reynolds*, 105, 109 (C.M.A. 1989).
[7] J.A. at 456, 459.
[8] J.A. at 5.
[9] *Id*.

marijuana dealers, is proof of a pattern of acquiring marijuana for sale.[10] But the google search and the text messages were not evidence that Petty Officer Steen sold or intended to sell marijuana, or that he even knew where to find marijuana for his phantom stock. It was improper to invite the members to assume Petty Officer Steen was a drug dealer in need of restocking his supply based on the personal use text messages and the internet search. The evidence was not probative of the alleged charges.[11]

Factor three is not met because any minimal probative value of the text messages was outweighed by substantial prejudice. "The danger of unfair prejudice in painting [Petty Officer Steen] as a person who used marijuana, as well as confusion of the issues, was high."[12] Conversely, the probative value of the text messages was low because they were irrelevant, inflammatory and risked impermissible propensity use based on unproven facts not in evidence.[13] Under *Reynolds*, the text messages should not have been admitted.[14]

2. <u>The text messages were not admissible under M.R.E. 608(c)</u>

The CGCCA found that "the military judge admitted and instructed on the text messages as substantive evidence under M.R.E. 404(b), not as impeachment

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[10] Appellee Br. at 14.
[11] J.A. at 5.
[12] *Id*.
[13] J.A. at 5, 10.
[14] *Reynolds*, 29 M.J. at 109.

evidence under M.R.E. 608(b)," nor did trial counsel try to admit the text messages under M.R.E. 608(c) at trial.[15] The government now argues the text messages were admissible under M.R.E 608(c) to show a motive to misrepresent.[16] But the instruction to the members did not say they could use the text messages in considering a motive to misrepresent Petty Officer Steen's involvement with marijuana.[17] The instruction told the members they could use the evidence in support of the government's unproven assertion that Petty Officer Steen regularly stocked a supply of marijuana.[18]

Still, Petty Officer Steen's testimony did not open the door to the text messages under M.R.E. 608(c). The Court of Military Appeals explained that the "idea [of a motive to misrepresent evidence] is to show a hostility of emotion or partiality of the mind of the witness from which the fact-finder can infer that the witness' testimony is distorted."[19] The text messages do not distort Petty Officer Steen's testimony that he did not sell marijuana, that Seaman Apprentice Harris messaged him asking about marijuana without prompting, and that he never tested positive for marijuana while in the Coast Guard.[20] The messages took place *after* the

[15] J.A. at 5.
[16] Appellee Br. at 13.
[17] J.A. at 337.
[18] *Id*.
[19] *United States v. Banker*, 15 M.J. 207, 210, (C.M.A. 1983).
[20] J.A. at 456, 459.

alleged sale and they have no relevance to Petty Officer Steen's testimony about the charged conduct.[21]

3. <u>The text messages were not admissible under *United States v. Trimper.*</u>

The text messages were inadmissible extrinsic evidence of specific conduct that the government wanted to use to establish Petty Officer Steen's alleged character to stock marijuana.[22] "Broad collateral assertions," however may open the door to extrinsic evidence if made in response to narrow cross-examination.[23] This is not the case here.

The government cites *Trimper* in arguing an accused that testifies he has never engaged in conduct "like that for which he is being charged," allows the government to rebut the statement with "similar misconduct." The government claims Petty Officer Steen's testimony on cross-examination that he was never involved with marijuana while in the Coast Guard permits admission of the text messages to rebut the statement. *Trimper* explains that if the testimony has been "extracted from" the accused on cross-examination, it would be different and the evidence is likely inadmissible. [24]

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[21] *Id*.
[22] M.R.E. 608(b); J.A. at 36-38.
[23] *United States v. Trimper*, 28 M.J. 460, 467 (C.M.A. 1989).
[24] *Id*. at 467.

Petty Officer Steen testified on direct that he did not test positive for marijuana.[25] On cross-examination, the government asked "is it your testimony that you had no involvement with marijuana during your time in the Coast Guard?"[26] Petty Officer Steen answered in the affirmative.[27]

In *Trimper*, the accused offered character evidence by testifying he *never* used drugs during direct examination, a gratuitous statement, which opened the door for a logically related rebuttal.[28] But in *United States v. Maxwell*, where the accused testified on cross-examination he was a peaceful person, the character testimony did not open the door to extrinsic evidence because the government extracted it from the accused, rather than rebut gratuitously offered testimony.[29]

In this case, the government extracted evidence of the character trait "non-involvement with marijuana" from Petty Officer Steen.[30] The military judge permitted the government to impermissibly turn the accused witness into a character witness through cross-examination to "bootstrap otherwise inadmissible evidence into the case."[31] The only evidence Petty Officer Steen opened to attack

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[25] J.A. at 240-41.
[26] J.A. at 258.
[27] *Id*.
[28] *Trimper*, 28 M.J. at 462.
[29] 21 M.J. 229, 230 (C.M.A. 1986).
[30] J.A. at 258.
[31] *Maxwell*, 21 M.J. at 230.

was his testimony that he never tested positive for marijuana while in the Coast Guard.[32] The text messages do not logically rebut or relate to that evidence.[33]

4. The four-part balancing test in *United States v. Kerr* weighs in favor of finding the inadmissible text messages prejudiced Petty Officer Steen.[34]

Because the text messages were inadmissible propensity evidence under M.R.E. 404(b), the government bears the burden of demonstrating the erroneous admission was harmless.[35] This Court evaluates prejudice by weighing: 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 questions.[36]

a. *The government's case was not overwhelming*.

The government argues that their case was overwhelming because the video evidence substantiated Seaman Apprentice Harris's testimony.[37] But there was "no direct corroboration that [Petty Officer Steen] sold marijuana to Seaman [Apprentice] Harris."[38] While the surveillance videos partially corroborated Seaman Apprentice Harris's version of events, the government concedes they did

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[32] J.A. at 234-35.
[33] J.A. at 456-59.
[34] *United States v. Kerr*, 51 M.J. 401 (C.A.A.F. 1999)
[35] *United States Fetrow*, 76 M.J. 181, 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)).
[36] *Kerr*, 51 M.J. at 405.
[37] Appellee Br. at 18
[38] J.A. at 10.

not capture the alleged sale of marijuana (the key fact at issue).[39] What specifically happened in the car, was a credibility battle between Seaman Apprentice Harris and Petty Officer Steen. The text messages unfairly undermined Petty Officer Steen's credibility just like the evidence in *United States v. Yammine* unfairly undermined the accused.[40]

The government insists that the text messages were not new ammunition. But an "interest in marijuana" is not the same thing as a regular drug dealer in need of resupply.[41] The google search in conjunction with the text messages makes the erroneous admission even more prejudicial. What would have been merely a google search with no evidence that it was connected to selling marijuana, was turned into a "pattern" of Petty Officer Steen's propensity to buy, stock, and sell marijuana.[42] Without the text messages, the members would not have had that pattern to suggest this was recurring behavior for Petty Officer Steen.

b. <u>The defense case was strong.</u>

Seaman Hind's testimony was sufficient to inject reasonable doubt into the minds of a reasonable member. There was evidence that Petty Officer Steen and Seaman Hind spoke "at the critical time" during the alleged marijuana sale from

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[39] Appellee Br. at 20.
[40] 69 M.J. 70, 78 (C.A.A.F. 2010).
[41] Appellee Br. at 27.
[42] J.A. at 262-66.

Petty Officer Steen's testimony.[43] That testimony was unfairly undermined when Petty Officer Steen was painted as a drug dealer and regular supplier of marijuana by the erroneously admitted text messages.

This case was a battle of credibility. It turned on the balance of Seaman Apprentice Harris's motive to fabricate versus Petty Officer Steen's testimony in his own defense.[44] The government claims Seaman Apprentice Harris had no motive to lie because lying would mean Court-Martial prosecution.[45] But lying gave him the general discharge from the Coast Guard he wanted, and allowed him to avoid prosecution.[46] Also, Seaman Apprentice Harris sent text messages to his girlfriend describing his attempt to buy marijuana in Virginia Beach, which impeached his claim he did not know where else to acquire marijuana.[47]

On the other hand, Petty Officer Steen's defense was corroborated by the package that was admitted, Seaman Hind's testimony, and the matching video footage.[48] This credibility battle was enough for reasonable doubt, and should have been left to the members for determination. Instead, the military judge improperly instructed the members to start from the presumption that Petty Officer Steen had a

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[43] Appellee Br. at 20; J.A. at 225.
[44] *See generally* J.A. at 356-85.
[45] Appellee Br. at 20.
[46] J.A. at 82.
[47] J.A. at 108-09, 117, 447.
[48] *See generally* J.A. at 177-89, 230, 438.

supply of marijuana. Therefore, the members were assessing a defense which was unfairly handicapped by improper evidence.

c. <u>The text messages were material evidence.</u>

The text messages unfairly strengthened the government's case because of the crucial nature of credibility.[49] The government claims that Petty Officer Steen admitted to sending the text messages on the stand, and therefore the text messages were not material or new ammunition.[50] But, Petty Officer Steen was only forced to admit on the stand that he sent the messages after the military judge erroneously decided the line of questioning was admissible and relevant.[51]

The government claims that it did not rely on the text messages in making its case because they only mentioned them once in closing argument.[52] This ignores that the government used cross-examination to paint Petty Officer Steen as a consistent drug dealer familiar with marijuana;[53] that the government was able to introduce evidence of Petty Officer's Steen familiarity with marijuana through the text messages use of words like "bud" and "green;"[54] that the military judge instructed the members they could use the messages for propensity purposes;[55] that

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[49] Appellee Br. at 27.
[50] *Id*. at 28.
[51] J.A. at 285-86.
[52] Appellee Br. at 28.
[53] J.A. at 258-66.
[54] J.A. at 258-66, 456, 459.
[55] J.A. at 337.

the members were given a written copy of the instructions stating they could consider the messages for propensity purposes;[56] and that a paper copy of the text messages was admitted into evidence.[57] The text messages were a material part of the case.

The use of the text messages in a myriad of ways perpetuated the fundamental unfairness of injecting the assumption that Petty Officer Steen had a phantom stock of marijuana without any evidence in the record. The improper admission of the text messages is the central cause of the erroneous instructions and the prejudicial slanting of the court-martial. The text messages were a material part of the case because they changed the proceeding from a credibility contest between Petty Officer Steen and Seaman Apprentice Harris, into a credibility contest between drug dealer Steen and Seaman Apprentice Harris. The improper evidence unfairly tipped the case in the government's favor.

The military judge's instruction made the texts even more material to the government's case. He told the members that they could consider Petty Officer Steen as having a regular stock of marijuana for use and sale, without any evidence supporting that fact, severely undermining Petty Officer Steen's testimony.[58] The government argues the military judge told the members they should not consider

[56] J.A. at 329.
[57] J.A. at 449-61.
[58] J.A. at 337.

the evidence for propensity purposes.[59] But the instruction admitted propensity evidence, and facts not in evidence, for a propensity purpose.[60] The limiting instruction given by the military judge was immediately after the military judge invited the members to assume Petty Officer Steen had a phantom stock of marijuana and was insufficient in the face of highly inflammatory evidence. Any attempt to discourage propensity use by the members was unlikely to succeed and the evidence pointed directly to the improper inference that Petty Officer Steen was acting in concert with a character trait to buy and sell marijuana.

d. *The quality of the evidence was powerful because it was admitted in both written and testimonial form*.

The government argues the quality of the evidence was low, and that *United States v. Fetrow* does not apply, because the text messages were admitted in a cellphone extraction.[61] Just because evidence is not testimonial does not mean it cannot be powerful and impactful like that in *Fetrow*. The casual and familiar way Petty Officer Steen talked about marijuana in the text messages colored the way the panel would have viewed his credibility.[62] And the members were not limited to just hearing what the text messages said, but were provided hard copy evidence

[59] Appellee Br. at 29-30.
[60] J.A. at 337.
[61] Appellee Br. at 31.
[62] J.A. at 456, 459.

to reread in the deliberation room.[63] The highly inflammatory, improper evidence was not limited to passing mention by a witness, but followed the members into the deliberation room.

All four factors for determining prejudice weigh in Petty Officer Steen's favor. The erroneous admission of the text messages was prejudicial.

Conclusion

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

BRAY.CAROLYN.MURRAY.1538175885 Digitally signed by BRAY.CAROLYN.MURRAY.1538175885 Date: 2020.08.10 14:35:13 -04'00'

Carolyn Bray
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
Appellate Defense (Code-45)
Tel: 202-685-8588
carolyn.bray@navy.mil
USCAAF Bar Number 3725

[63] J.A. at 449-61.

CERTIFICATE OF FILING AND SERVICE

I certify that on August 10, 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(d) and 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitation of Rule 24(c) because it contains 3,238 words; and 2) this reply 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.

BRAY.CAROLYN.MURRAY.1538175885 Digitally signed by BRAY.CAROLYN.MURRAY.1538175885 Date: 2020.08.10 14:38:15 -04'00'

Carolyn Bray
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
Appellate Defense (Code-45)
Tel: 202-685-8588
carolyn.bray@navy.mil
USCAAF Bar Number 37253