**IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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**UNITED STATES,**
*Appellee,*

v.

**JONEL H. GUIHAMA**
Master Sergeant (E-7), United States Air Force
*Appellant*.

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Crim. App. No. 40039
USCA Dkt. No. 23-0085/AF

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***REPLY BRIEF ON BEHALF OF APPELLANT***

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

COMES NOW Master Sergeant Jonel H. Guihama, Appellant, who, by and through counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, submits this Reply to the United States' Answer (Gov. Ans.), submitted on October 27, 2023. Appellant stands by the arguments advanced in his initial opening brief submitted to this Court on September 27, 2023. He further submits the following for the Court's consideration:

## Argument

### 1. *This Court should expand* United States v. Whiteeyes[1] *to consider the circumstances under which a confession is made in order to assess its trustworthiness.*

The Government contends that this Court should not consider the circumstances of an alleged confession in determining if it is trustworthy or adequately corroborated. (Gov. Ans. at 26). MSgt Guihama acknowledges that this Court's current framework for analyzing Mil. R. Evid. 304(c) does not require such analysis. As such, MSgt Guihama expressly requests that this Court incorporate a requirement for a military judge to consider the circumstances under which the confession materialized in their determination as to whether the confession was trustworthy and, therefore, sufficiently corroborated. The facts of MSgt Guihama's

[1] 82 M.J. 168 (C.A.A.F. 2022).

case are illustrative of why this analysis is so critical. MSgt Guihama's confession came about only after nine hours of FBI interrogation in four different locations with repeated denials that he had ever inappropriately touched a child. At trial, this confession was used as the sole evidence of the convicted offenses. To date, there is no person even identifying as a victim of these offenses, or any peripheral witnesses to the crimes. The admission of his uncorroborated confession led to this legally untenable result.

***2. Independent evidence must "tend to establish the trustworthiness of the . . . confession" or "acknowledgement of guilt."***

A confession may only be used against MSgt Guihama as evidence against him on the question of guilt or innocence if independent evidence tends to establish the trustworthiness of his confession. See Mil. R. Evid. 304(c)(1). A confession is defined as "acknowledgment of guilt." Mil. R. Evid. 304(a)(1)(B). It follows that corroboration requires the acknowledgment of guilt be trustworthy. MSgt Guihama is not guilty of simply having nieces and a nephew nor of having watched movies with them in the living room. Instead, the acknowledgment of guilt here is that he touched one of his nieces and his nephew inappropriately while they were underage. Corroboration must be corroboration of the criminality of the alleged conduct amounting to guilt and not merely corroboration of collateral facts contained in the confession.

Notwithstanding the circumstances of the confession, even under the standards used at trial and in *Whiteeyes*, the confession in this case was not adequately corroborated and should not have been admitted and used as the sole evidence of MSgt Guihama's guilt at trial. There was no independent evidence, direct or circumstantial, offered that tends to establish the trustworthiness of the confession that MSgt Guihama had inappropriately touched his niece or nephew. Neither child testified that he had (direct evidence) nor that either of them felt uncomfortable around him or that he expressed a sexual interest in either of them (circumstantial evidence). As for uncorroborated confessions, Mil. R. Evid. 304(c)(2) requires that each piece of independent evidence "raises an inference of the truth of the admission or confession." The literal language in the rule is critical, as it requires that the evidence put forth as corroboration raise an inference of the truth of the confession—not simply confirm collateral facts contained in the confession itself. This distinction is vital and clearly reveals how the military judge abused her discretion in admitting MSgt Guihama's wholly uncorroborated confession using this method instead of strictly adhering to the rule.

The evidence of corroboration that the military judge used was collateral, inconsistent, and often contradictory to MSgt Guihama's own words. While Mil. R. Evid. 304(c) provides that, "not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be

admitted into evidence in its entirety," in a case that relies exclusively on the confession of the accused, it is clear why a corroboration analysis cannot give way to shortcuts and approximations that overlook gaping holes in the confession's narrative.

The Air Force Court of Criminal Appeals (AFCCA) and now the Government on appeal seek to expand the corroboration evidence with other collateral facts that were not considered by the military judge to find corroboration of the confession. Even if this Court were to consider the additional evidence proffered as "independent evidence of corroboration," it does little to alleviate the significant concerns that MSgt Guihama's confession was not adequately corroborated as to its truth of guilt and not just corroborated as to inconsequential facts that he provided. This is particularly true given the extenuating circumstances under which the confession arose, and which the Government fails to even acknowledge in its Answer.

The Government argues MSgt Guihama's confession was corroborated by the use of broad-brush references to certain relationships and activities over imprecise time frames. But the reality is that much of what MSgt Guihama confessed to was never corroborated at all. To be sure, not every element or fact contained in the confession must be independently proven for the confession to be admitted into evidence. While the standard is low, there must still be some evidence that corroborates the truth of the confession or acknowledgement of guilt before it is

admitted into evidence. The alleged corroborating evidence in this case fell short of even this standard.

The Government's forgiveness for discrepancies between the evidence and the confession is found throughout its Answer. As a prime example, the Government opens its Answer claiming, "One activity everyone remembered was [']movie night[']" . . . and [t]he only part that the children did not remember is that once they had fallen asleep, and unbeknownst to them, Appella[nt] would molest them." (Gov Ans. at 2-3). But the Government's position suffers from the same fatal flaws as the military judge and the AFCCA's analysis—they adopt collateral facts as "independent evidence of corroboration" that do not relate to the charged timeframe or actual elements of the offenses charged—or, most importantly, to the criminality that he had confessed to. Again, the rule does not require an inference of a truth of a matter *related* to the confession—its requirement is for an inference of the truth of the confession or acknowledgement of guilt; namely, the criminality itself.

This issue was even further highlighted during testimony at trial. Again, while the children broadly acknowledged that at some unspecified points in their lives at unspecified locations, they had watched movies with MSgt Guihama, I.M., MSgt Guihama's nephew, testified that he had **no memory** of MSgt Guihama either visiting his family, watching movies with him, or falling asleep in the same room in

Missouri during the charged timeframe—the very place MSgt Guhiama had confessed to allegedly molesting him.

> Q. So, still talking about this same timeframe in Missouri when your mom is stationed in Korea and you and your sisters are living there, you don't remember Sergeant Guihama visiting your family during that particular time?
>
> A. I do not.
>
> Q. You don't remember watching movies with him during that particular time?
>
> A. I do not.
>
> Q. Don't remember watching a movie and falling asleep with him during that time?
>
> A. No, ma'am.

(JA at 150).

Notably, the military judge found that the timeframe in which MSgt Guihama was alleged to have committed the fondling was corroborated by family-member testimony establishing MSgt Guihama was in Missouri. (JA at 618). Yet, neither of the named victims recall MSgt Guihama ever visiting them in Missouri at all, let alone committing the alleged offenses. (JA at 144; 157).

In addition, while the Government referred to movie night as a "routine" occurrence, again, the evidence does not substantiate this characterization. (Gov. Ans. at 2). Not only does I.M. not recall a movie night in the timeframe, or at the location in which MSgt Guihama confessed to abusing him, I.M. struggled to

remember *any* specific instance of a movie night sufficient to corroborate the nature of the events to which MSgt Guihama confessed.

The Government expressly acknowledges the discrepancies between the corroborating evidence and the confession in terms of which living room the fondling occurred and the timeframe of its occurrence, which they referred to as "minor details that do not make the confession less trustworthy such that the confession should be excluded from evidence." (Gov. Ans. at 28). They go on to argue that "these minor discrepancies were more properly considered by the trier of fact in determining the weight, if any, to be given the confession." *Id*. (referencing Mil. R. Evid. 304(c)(4)). Clearly, the military judge in this case gave MSgt Guihama's confession *immense weight,* as there were no other witnesses, victims, or evidence presented at trial to prove these offenses had occurred outside of MSgt Guihama's confession.

Surprisingly, the Government also cites as support in its Answer the confession of MSgt Guihama relating to charges for which he was found not-guilty—specifically, he was acquitted of all conduct charged on or after June 28, 2012. Even so, the Government states—as a fact—that MSgt Guihama admitted to fondling I.M. in the "summer of 2012." (Gov. Ans. at 10). According to MSgt Guihama's confession, this would have been the second sexual abuse of I.M. Without clear evidentiary support, the court found MSgt Guihama guilty of conduct

on one side of June 28, 2012, but not-guilty of conduct on the other side of June 28, 2012, despite the requirement that every element—to include the charged timeframe—be established beyond a reasonable doubt. In this instance, the military judge cobbled together a corroboration narrative where the only evidence presented—MSgt Guihama's confession—was sufficiently vague to have a meaningful legal impact as to the timeframe and location in which it occurred. Relatedly, the military judge's reliance upon the testimony of other family members as to the timeframe and location is equally misplaced, as the family members were split in their testimony regarding when and where MSgt Guihama visited them, what activities they did, and who was involved in each trip.

***3. The independent evidence offered as corroboration did not raise an inference of the truth of MSgt Guihama's admission or confession.***

With regard to each piece of independent evidence upon which the Government asks this Court to rely, MSgt Guihama asks that the following be considered:

*(a) MSgt Guihama's relationship with his nieces and nephews corroborated a collateral matter, not the truth of the confession itself.*

The Government argues that "[t]he existence of [MSgt Guihama's] nieces and nephews, in the sexes and ages he described and the relationship they shared independently raised an inference of truth with regard to [MSgt Guihama's]

confession because the nature of their relationship allowed him to get close enough to the children to commit the fondling offenses." (Gov. Ans. at 36).

In reality, this evidence does not raise an inference of the truth of the confession; instead, it is simply corroboration of a collateral matter. Had the investigators uncovered medical records from the timeframe revealing that his niece had suffered, for example, from a urinary tract infection after her uncle's visit, or had the children been known to complain of uncomfortable feelings when around their uncle, this evidence would have properly served of corroboration of the truth of his confession—not simply corroboration of a collateral fact (i.e. that he had a niece and nephew vice that he molested his niece and nephew). The Government goes so far as to suggest a virtual burden shift where the Defense would have to prove that MSgt Guihama, for example, did *not* have a niece and nephew, was *not* with his niece and nephew at any time, or was *not* in a certain state at a certain time. But these matters are collateral to whether his confession to molesting his niece and nephew is true. While it may be true that MSgt Guihama does, in fact, have a niece and nephew, this fact does not corroborate—in any way—the truth of whether he *molested* his niece and nephew (again, <u>the truth</u> of the *confession* or acknowledgment of guilt). This claim is akin to saying that, because MSgt Guihama has two hands, this evidence would properly serve as corroboration of his confession because he said he used his hands to molest his niece and nephew. Under this

standard, literally any evidence that is not disproven by the Defense could be considered corroboration—even if it does not bear on the truth of the confession or acknowledgment of guilt itself. But the law requires something much more specific: the independent evidence must raise an inference of the truth of the *confession*.

Instead, the Government asks this Court to create a new rule, one different than the plain language of Mil. R. Evid. 304, which would allow the corroboration of any fact to allow admissibility of the confession. Under the Government's analysis, if any fact in the accused's confession is corroborated, this equates to corroboration of the confession. But that is not the standard. The independent evidence must be corroboration of the truth of the confession or acknowledgment of guilt itself. Even if the Government concedes that there are some facts that are too peripheral to amount to corroboration, it then places this Court in the role of creating a new rule that would set a standard of the degree of connection to a fact of consequence.

*(b) Falling asleep while watching movies on the living room floor is not sufficient corroboration of an actual crime.*

The Government next contends that the inconsistent evidence that MSgt Guihama had at some points watched movies with his niece and nephew serves as corroboration of his confession to abusing them. (Gov. Ans. at 36). The Government cites to *United States v. Baldwin*, 54 M.J. 464, (C.A.A.F. 2001), for the

proposition that method and opportunity may be considered as independent evidence of corroboration of a confession. But the facts of the confession in *Baldwin* stand in stark contrast to the confession at issue in this case. In *Baldwin*, the military judge "described a specific interaction between appellant and his wife on the night of April 24, which began when she found him in the child-victim's bedroom, and which culminated with appellant revealing to his wife his own history of being molested as a child. This finding sufficiently corroborates the truth of appellant's own statement that his wife "walked in on" him while he was molesting the child in the child's bedroom on April 24." *Id.* at 465–66. Here, there was no close in time confession to the alleged acts, discovery of the accused at the scene of the crime, or any other evidence tending to suggest the truth of the confession. Again, in this case, we see corroboration of collateral facts and not corroboration of the truth of the criminality (aka confession or acknowledgment of guilt).

The Government next cites to *United States v. Melvin*, 26 M.J. 145, 147 (C.M.A. 1988), another case in which the independent evidence of corroboration stands in stark contrast to the evidence here. In *Melvin*:

> [I]ndependent evidence in the record showed that at the time of his arrest, appellant was in possession of heroin, the very drug he confessed to using earlier. Moreover, the heroin was contained in cigarettes, the very method of consumption he admitted to employing on the earlier dates. Also, the straws found in his car clearly suggest a familiarity with the drug culture consistent with the number of acts he admitted. Finally, evidence of his friendship with Dudu, a known drug dealer, and his

> leaving Dudu's apartment at the time of his arrest dovetails with his description of the situs and circumstances of his earlier acts.

*Id*. at 147. The corroboration evidence used in these cases is all indicative of illegal, criminal activity and is clearly an inference of the truth of the confessions or acknowledgement of guilt—not just the truth of collateral facts. In contrast, the act of having a niece and nephew, taking leave, and watching movies with your nieces and nephew is not of itself indicative of illegal or criminal activity in any way, and does not meet the standard articulated in Mil. R. Evid. 304(c). Said differently, proof of the possibility that the crime could have occurred is much different than evidence inferring the truth of the confession or acknowledgment of guilt itself.

*(c) The absence of corroborating evidence cannot be considered corroboration, i.e. the alleged victims' lack of memory of the offenses as evidence of corroboration of the confession.*

Perhaps most troublingly, the Government continues to insist that the alleged victims' lack of memory of the crimes corroborate that they occurred. As discussed in MSgt Guihama's opening brief, the Government's reliance on *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004), is misplaced. In *Seay*, the Court found that a confession to larceny of a wallet was corroborated by the lack of a wallet on the victim's body. *Id*. at 80. But a missing wallet is not the same thing as a denial of victimization, and this Court should be dubious of drawing any such comparison. In that case, the missing wallet is literally an element of the crime. It is akin to

establishing in a murder case that the murder victim is not alive. While, semantically, these facts could be described as a "lack of evidence," in reality they are independent elements of a crime that must be proven. Here, by comparison, the alleged victims' lack of memory is no evidence at all and certainly not an element of the charged offenses. As such, this Court should find the military judge and the AFCCA improperly used this fact as proper corroboration evidence.

*(d) MSgt Guihama's ambiguous emotional response during questioning hours before the confession was not indicative of a crime, especially when it was coupled with a denial of ever touching a child inappropriately.*

The Government cites to *State v. McGill*, 328 P.3d 554, 556 (Kan. Ct. App. 2014), for the proposition that an emotional reaction can be used as consciousness of guilt evidence. However, the evidence in that case bears no resemblance to the facts at hand here. In *McGill*, the appellant came into an office having what was characterized by a witness as an emotional breakdown. The appellant was tearful and pacing the floor. He would sit down, stand up, and then pace some more. The appellant said things like, "I'm in trouble" and "I need help." This behavior went on for about 35-40 minutes." *Id*. MSgt Guihama's ambiguous watery eyed reaction is a far cry from an "emotional breakdown" and lends itself very easily to alternate explanations under the circumstances. This evidence does not provide an inference of truth of the (much later in time) confession that ultimately materialized and should

not be considered by this Court as it is improper "consciousness of guilt" evidence. Rhetorically, what emotional reaction could he have had that would not imply his guilt? There is nothing that would prevent the Government from arguing that a stone-cold reaction was equally corroborative of the truth of the ultimate confession in this case.

*(e) MSgt Guihama's possession of child pornography does not corroborate his confession to molesting his niece and nephew because there is no evidence that links such conduct to the act of molesting children.*

The conflation between child pornography and child molestation was not adequately established through the testimony and evidence at trial in this case. In making this argument, the Government relies on an assumption that one who views child pornography must also have molested children—an assertion law enforcement pressured MSgt Guihama into admitting to for nine hours—without putting forth any evidence of that position in this particular case. This evidence should not be considered as corroboration of the particular confessions in this case because, aside from creative speculation, it bears no relation to the evidence actually adduced.

Lastly, in terms of the independent evidence that may be used as corroboration of a confession, this Court should take specific note of its use of the requirement that the independent evidence offered as corroboration must tend to establish the trustworthiness of the confession or acknowledgment of guilty. Further, for other

uncorroborated confessions, the independent evidence must raise an inference of "the truth of the admission or confession" under M.R.E. 304(c)(2). Notably, the Rule does not say an inference of a truth; instead, it requires that independent evidence establish an inference of the truth of the admission or confession. This should be read as requiring an inference of the *criminality* of the conduct alleged—just as in *Baldwin* and *Melvin*, cases cited by the government, in which the independent evidence used to corroborate the offenses was clearly tied to the specific acts of guilt confessed to. Again, while the fact that MSgt Guihama has a niece and nephew may be corroboration of a truth in his confession—namely, that he has a niece and nephew—it does not corroborate the truth of the confession or acknowledgment of guilt, as required under *Whiteeyes*, because it does not corroborate his criminality.

**WHEREFORE**, MSgt Guihama respectfully requests that this Honorable Court set aside the findings of guilt as to Charge I and the Additional Charge and the sentence.

Respectfully Submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Appellate Government on November 9, 2023.

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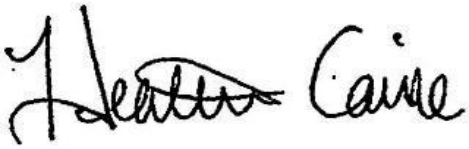
## CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

1. This reply brief on behalf of appellant complies with the type-volume limitation of Rule 24(b) because it contains 3,687 words.

2. This reply brief on behalf of appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

Respectfully Submitted,



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