IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Edmond A. MAEBANE III Hospital Corpsmen Second Class (E-5) United States Navy, Appellant	BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 202200228 USCA Dkt. No. 24-0196/NA

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

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Issue Presented

Does an accused have a Sixth Amendment right to present evidence of a third party's recorded and written confessions to the crime for which the accused is on trial?

Introduction

*"It was a stupid f*cking thing. It was a mistake. I didn't mean to do it. I f*cking killed somebody."*

These were not the words of HM2 Maebane. They were the words of another man in the room when the victim in this court-martial was shot in the head. This confession was made by a man who held the gun that evening in that room, had been drinking all night, and made this confession later—while sober and aware that he was suspected of murder. But the members did not consider that. They were not allowed to. And the government was allowed to argue to the members that no evidence supports that another person shot the victim.

The military judge did not allow this confession to be considered as substantive evidence. Thus, HM2 Maebane was denied his Sixth Amendment right to present a complete defense that someone else committed the crime he was on trial for. Justice failed.

Statement of Statutory Jurisdiction

This case fell within the lower court's jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

A panel of officer and enlisted members sitting as a general court-martial convicted Appellant, contrary to his pleas, of reckless endangerment and involuntary manslaughter, in violation of Articles 114 and 119, UCMJ. The members sentenced him to be reduced to paygrade E-1, to forfeit all pay and allowances, to be confined for six years, and to be dishonorably discharged from the service.[1] The Convening Authority took no action on the findings and approved the sentence as adjudged, which the military judge entered into judgment on 13 September 2022.

The lower court affirmed the findings and sentence on 3 May 2024.[2] Appellant timely petitioned this Court for review on 1 July 2024 and received an extension until 22 July 2024 to file his Supplement. On 27 September 2024, this Court granted Appellant's petition on the issue presented.

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[1] J.A. at 0381-82.
[2] J.A. at 0001-25; *United States v. Maebane*, No. 202200223, slip op. (N-M. Ct. Crim. App. May 3, 2024).

Statement of the Facts

A. Hospital Corpsman Third Class (HM3) Williams confessed to shooting HM3 M.D. less than twenty-four hours after HM3 M.D.'s death.

Within a few hours of the shooting, Naval Criminal Investigative Services (NCIS) interviewed everyone who was present at the party, including HM3 Williams. The special agents did not provide HM3 Williams Article 31(b) rights at before this first interview.[3] The next day, NCIS interviewed HM3 Williams again.[4] HM3 Williams waived his Article 31(b) rights and confessed to killing HM3 M.D. the previous evening.[5] HM3 Williams told NCIS Special Agent (SA) Katelyn Thompson, "[i]t was a stupid fucking thing. It was a mistake. I didn't mean to do it. I fucking killed somebody."[6] NCIS SA Thompson asked if he did it while attempting to dry-fire the pistol at HM3 M.D., to which HM3 Williams said, "yes, I shot him."[7]

HM3 Williams provided these additional details: (1) he used the black Springfield to shoot HM3 M.D.;[8] (2) he either picked up the Springfield from the coffee table or somebody handed it to him;[9] and (3) HM3 M.D. was talking or

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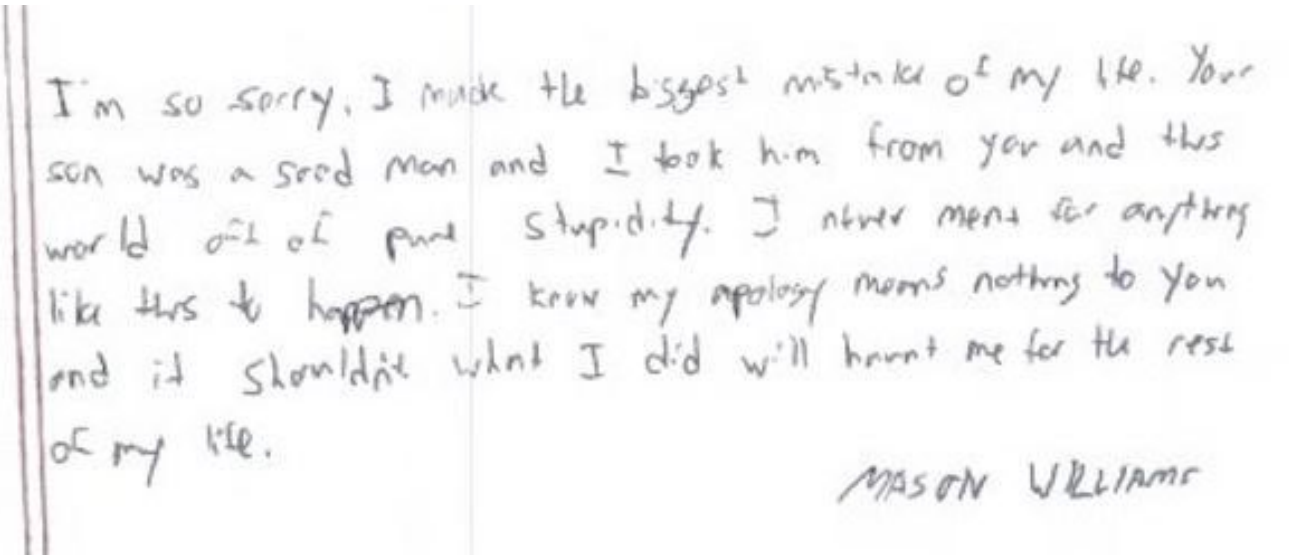
[3] J.A. at 0278.
[4] J.A. at 0479.
[5] J.A. at 0479, 0524.
[6] J.A. at 0479 (at approximately 38:40).
[7] *Id*. (at approximately 39:50).
[8] *Id*. (at approximately 40:48).
[9] *Id*. (at approximately 41:14).

wrestling with HM2 Maebane when HM3 Williams shot him.[10] HM3 Williams stated he had a beer in his dominant hand (not the gun) when the shot went off, prompting SA Thompson to ask for clarification.[11] HM3 Williams then provided a detailed narrative of the shooting, explaining, "when I put down my beer, I picked up the gun, pointed it at [HM3 M.D.], expecting it to dry fire again, boom, hands went up because it scared the fuck out of me and that's when I saw [HM3 M.D.] slump."[12]

Following his confession, HM3 Williams contemplated what to say to HM3 M.D.'s family. He said, "… I don't know if I can make it right, what I did. I took a man's life."[13] Ultimately, he wrote a letter to HM3 M.D.'s family confessing again and admitting responsibility:[14]

[10] *Id*. (at approximately 41:40).
[11] *Id*. (at approximately 43:10).
[12] *Id*. (at approximately 46:10).
[13] J.A. at 0479 (at approximately 1:05:56).
[14] J.A. at 0481.


I'm so sorry. I made the biggest mistake of my life. Your son was a good man and I took him from you and this world out of pure stupidity. I never meant for anything like this to happen. I know my apology means nothing to you and it shouldn't what I did will haunt me for the rest of my life.

MASON WILLIAMS

Later during the interview, SA Thompson attempted to get HM3 Williams to confess that, after shooting HM3 M.D., he moved the Springfield to disguise what had just happened. Yet HM3 Williams capably and repeatedly declined to adopt her assertions that he or another partygoer obstructed justice by moving the Springfield.[15]

B. HM3 Williams's confession and admissions concerned his behavior at a party HM2 Maebane hosted at his residence onboard Marine Corps Air Ground Combat Center Twentynine Palms.

HM3 Williams, HM1 Dini, HM2 Wold, and HM3 Humes attended the party where HM3 M.D. was killed. The Sailors drank alcohol, ate dinner, talked, played a game, and handled HM2 Maebane's pistols (a Springfield and a 1911).[16] HM3

[15] J.A. at 0479 (at approximately 1:15-1:30).
[16] J.A. at 0293-0300.

Williams had a small measure of animosity towards HM3 M.D. during this party.[17] He also admitted and was seen dry-firing the Springfield at HM3 M.D. before HM3 M.D.'s death.[18]

The partygoers moved throughout the first floor of the Maebane house and patio during the party.[19] When they were seated, HM3 Humes, HM2 Wold, HM1 Dini, and HM3 Williams recall the seating arrangement on the family room's sectional couch from left to right (facing the couch) generally as: HM3 Humes, HM2 Wold, HM2 Maebane, HM3 M.D., and HM3 Williams with HM1 Dini not having a seat on the couch.[20]

HM3 Williams moved from his seat on the couch to place his dinner plate with a steak on the coffee table. This put him to the left of HM3 M.D. (facing the couch).[21] NCIS found HM3 Williams's dinner plate with the steak immediately adjacent to where NCIS believes the Springfield was fired, killing HM3 M.D.[22]

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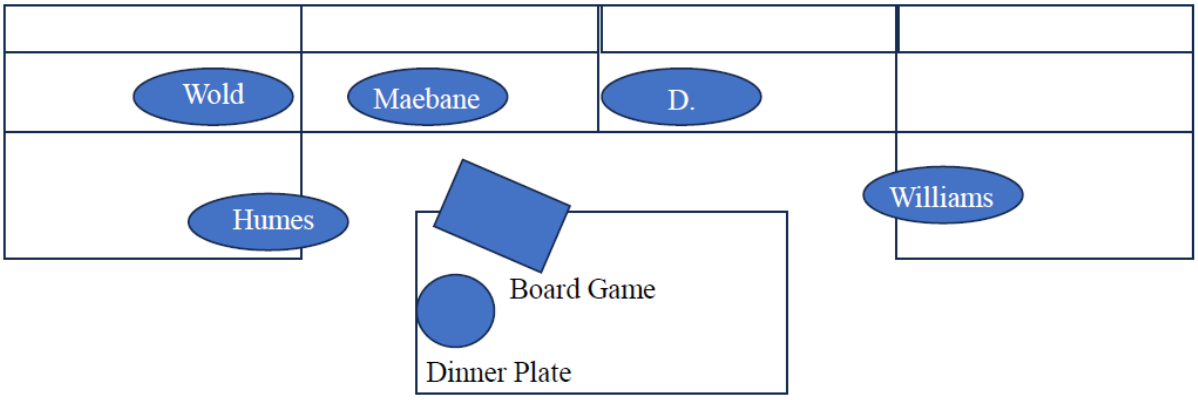
[17] J.A. at 0507; 0571. (HM3 Williams sent a text message while at the party proclaiming, "being slight drunk around [HM3 M. D.] is hell").
[18] J.A. at 0331-32; 0500.
[19] J.A. at 0329-30.
[20] J.A. at 0386-89.
[21] J.A. at 0502-03; J.A. at 0650-51; 0654.
[22] *Compare* J.A. at 0650-51; 0653 *with* J.A. at 0433 and J.A. at 0438-39.



NCIS also found gunshot residue on HM3 Williams' clothing, which indicated he was "in contact with a discharged firearm, was in close proximity to a discharging firearm, or otherwise [in] an environment of gunshot residue" the night of the shooting.[23] Finally, at trial, a forensic expert testified that he would expect to see blood spatter on a person's clothing if he had been sitting on the right side of the couch (where HM3 Williams claimed to be sitting when the fatal shot was fired), but no such splatter was found.[24]

C. HM3 Williams recanted his admission after spending approximately ten days in pretrial confinement

After spending approximately ten days in pretrial confinement, HM3 Williams recanted his confession and intimated to investigators that HM2 Maebane was the likely shooter.[25]

[23] J.A. at 0368-71; 0395.
[24] J.A. at 0343-0345; 0380; 0446.
[25] J.A. at 0499-0502, 0536-37.

D. The military judge denied the defense's motion to admit HM3 Williams's recorded confession and letter to M.D.'s family into evidence.

The trial defense counsel moved to admit HM3 Williams's recorded confession and his letter to HM3 M.D.'s family into evidence under Military Rule of Evidence (M.R.E.) 807.[26] The trial defense team intended to use HM3 Williams's confession as evidence to formulate a defense of third-party guilt.[27] The military judge denied the defense's motion because he (1) found the government's forensic evidence was strong and (2) determined the confession was false and thus untrustworthy.[28] He ruled, "[t]he *Defense may impeach* HM3 Williams with his confession on cross-examination but may not offer the confession for its truth."[29] The military judge later instructed the members that, with the exception of HM2 Wold and HM2 Humes, any prior inconsistent statements made by the witnesses-HM3 Williams included – could be considered solely for assessing the credibility of their testimony in court.[30] However, the military judge explicitly instructed the

[26] J.A. at 0247; 0460-74; 0541.
[27] *Id*.
[28] J.A. at 0274-75; 0572-78. The military judge began his analysis on the defense motion by concluding the forensic evidence "suggest[s]that HM3 Williams did not shoot the victim." J.A. at 0576.
[29] J.A. at 0287; 0577. (emphasis added).
[30] J.A. at 0380-83.

members that this testimony could not be considered by the members as evidence of the truth of the matters asserted in those statements.[31]

The military judge denied the admission of HM3 Williams' confessions after considering: (1) forensic evidence, (2) what the military judge categorized as NCIS suggestively questioning HM3 Williams, and (3) HM3 Williams's mental state at the time of the event and when he confessed.[32]

1. The forensic evidence.

The forensic evidence consisted of an autopsy report and NCIS analysis of the bullet's path after it left HM3 M.D.'s head.[33] The autopsy conclusively revealed HM3 M.D. was shot in the head from front to back.[34] Additionally, the trajectory analysis revealed the 9mm bullet that killed HM3 M.D. traveled across the couch (left to right as you face the couch) and into a wall.[35] NCIS admitted, however, several limitations to its trajectory analysis.[36] These include: (1) an inability to determine the bullet's trajectory before entering HM3 M.D.'s head; and (2) an inability to determine the "position of anyone else present at the time of the shooting."[37]

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[31] *Id*.
[32] J.A. at 0285-87; 0576-77.
[33] J.A. at 0640; 0400-0437.
[34] J.A. at 0640.
[35] J.A. at 0425-36.
[36] J.A. at 0401.
[37] *Id*.

2. The military judge's assessment of NCIS's questioning of HM3 Williams.

The military judge related SA Thompson's questioning of HM3 Williams to "coaching."[38] In his analysis, the military judge pointed to HM3 Williams's failure to confess until his second NCIS interview, where the questions became "suggestive" and "repetitive."[39] The military judge also found as a fact that during the second interview, SA Thompson "repeatedly, directly, and through inference" referred to HM3 Williams' earlier unwarned statements.[40] However, the military judge explicitly found SA Thompson did not use unlawful inducements, coercion, or influence to garner a confession from HM3 Williams.[41]

3. The military judge's assessment of HM3 Williams's mental state.

The military judge found that HM3 Williams was "unstable from grief, fear, and lack of sleep" during his confession.[42] The military judge further noted that HM3 Williams "was intoxicated during the events surrounding [HM3 M.D.'s] death."[43] These considerations led the military judge to conclude that HM3 Williams's "mental state was not reliable."[44]

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[38] J.A. at 0576.
[39] *Id*.
[40] J.A. at 0573.
[41] J.A. at 0574.
[42] J.A. at 0576.
[43] *Id*.
[44] J.A. at 0577.

4. HM3 Williams recanted his confession twelve days later.

HM3 Williams recanted his confession after spending time in pretrial confinement. The military judge concluded that this recantation and other "circumstances of the second interview," made HM3 Williams's confession at that second interview "false."[45]

Summary of Argument

The military judge erred when he excluded critical hearsay evidence that should have been admitted under M.R.E. 807. HM3 Williams' recorded confession that he killed HM3 M.D. and his letter to M.D's family admitting to the shooting were critical to HM2 Maebane's defense. The military judge violated HM2 Maebane's Sixth Amendment right to present a complete defense when he excluded these confessions from evidence. The military judge did so without considering two critical Supreme Court cases. One prevents judges from relying on the government's evidence used to prove guilt of the accused. The other requires judges to assess the trustworthiness of the third-party confession.

In *Holmes v. South Carolina*, the Supreme Court held that evidence of third-party guilt cannot be excluded because the government's evidence, if believed, supports a guilty verdict. Rather, to impermissibly exclude such evidence, the Supreme Court explained the evidence sought to be admitted must be unreliable.

[45] *Id*.

Here, the military judge engaged in the analysis the Supreme Court rejected in *Holmes*—he impermissibly based his ruling, in part, on the strength of the government's case against HM2 Maebane. As *Holmes* discussed, this is a question for the members.

In *Chambers v. Mississippi*, the Supreme Court held in favor of admitting third-party culprit evidence in the form of residual hearsay statements that were critical to the defense and bore assurances of trustworthiness—indicators of reliability included the presence of corroborating evidence, the statement was against penal interest, and the declarant was available to testify in front of jurors who could weigh the declarant's demeanor and responses. All those factors are present here.

While the military judge did engage in a trustworthiness analysis of HM3 Williams' confessions, he did not apply the proper case law. And he compounded this error by failing to consider important facts necessary to make his ruling.

HM3 Williams confessed to shooting M.D., against his penal interests, shortly after the incident, he codified that admission by writing an apology letter to M.D.'s family, and he provided details about how the incident transpired. HM3 Williams' statements confessing to the crime coupled with the trajectory analysis, among other corroboration discussed below, should have led the military judge to rule in favor of admission.

The military judge's error was not harmless.

Argument

An accused has a Sixth Amendment right to present evidence of a recorded third party's confession to the crime for which the accused is on trial where the evidence sufficiently connects the third party to the crime.

Standard of Review

"A military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion."[46] When the ruling involves mixed questions of fact and law, facts are reviewed for clear error and conclusions of law are reviewed de novo.[47] "An abuse of discretion occurs when a military judge's 'findings of fact are clearly erroneous or his conclusions of law are incorrect.'"[48] A military judge also abuses his discretion if he bases his ruling on facts that the record does not support, uses incorrect legal principles, applies correct legal principles to the facts in a way that is clearly unreasonable, or fails to consider important facts.[49]

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[46] *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000) (citing *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999); *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)).
[47] *United States v. Kelley*, 45 M.J. 275, 279-81 (C.A.A.F. 1996).
[48] *United States v. Blackburn*, 80 M.J. 205 (C.A.A.F. 2020) (quoting *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (internal quotation marks omitted)).
[49] *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010); *United States v. Solomon*, 72 M.J. 176, 180-81 (C.A.A.F. 2013)).

Discussion

A. Appellant has a fundamental constitutional right to present third-party culpability evidence.

The Supreme Court has long recognized that "[w]hether rooted directly in the . . . Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[50] That right is fundamental to due process of law.[51] "Few rights are more fundamental than that of an accused to present [evidence] in his own defense."[52]

Third-party culpability evidence can be—and in this case is—part and parcel of a complete defense. In *United States v. Woolheater*, the Court of Military Appeals recognized "[t]he right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental constitutional right."[53] Undeniably, the ability to present evidence of third-party guilt at a court-martial is an essential component of an accused's constitutional right to present a complete defense.

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[50] *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citing *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974)) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *see also* U.S. CONST. amend. VI.
[51] *See Washington*, 388 U.S. at 19 (discussing the right to offer the testimony of witnesses and to compel their attendance, if necessary to establish a defense).
[52] *Cf. Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).
[53] *United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A 1994) (citing *Chambers v. Mississippi,* 410 U.S. 284 (1973)).

The right to present a defense is subject to "reasonable restrictions."[54] The President has "broad latitude under the Constitution" to promulgate Military Rules of Evidence to exclude evidence from courts-martial.[55] Evidentiary restrictions that prevent exculpatory but unreliable evidence from getting to the factfinder do not violate an accused's constitutional right to present a complete defense.[56]

B. The new M.R.E. 807 residual hearsay rule removed requirements for introducing residual hearsay.

Congress modified Federal Rule of Evidence (F.R.E) 807, effective December 1, 2019.[57] Per M.R.E. 1102, those amendments amended the parallel provisions in M.R.E. 807, effective June 1, 2021. In *United States v. Kelley*, this Court articulated the test for admitting residual hearsay under the old M.R.E. 807.[58] Under the *Kelley* test, residual hearsay was admissible if the hearsay met four requirements: (1) materiality, (2) necessity, (3) reliability, and (4) a showing that admitting the evidence serves "the general purposes of the[ ] rules [of evidence] and the interests of justice."[59] The amended rule eliminates factors one and four —materiality and the requirement that the hearsay serves the purposes of

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[54] *United States v. Scheffer*, 523 U.S. 303, 308 (1998).
[55] *Id*.
[56] *Id*. at 309.
[57] J.A. at 0586-0602 (4 Federal Rules of Evidence Manual § 807.02 (2024)).
[58] *United States v. Kelley*, 45 M.J. 275 (C.A.A.F. 1996) (in 1996 residual hearsay was covered by M.R.E 803(24)).
[59] *Id*. at 280.

the rules of evidence and justice.[60] The undersigned counsel are unaware of this Court reviewing M.R.E. 807 since these changes were implemented.

In addition to removing requirements for introducing residual hearsay, the amended rule now allows hearsay "*not admissible under*" M.R.E. 803 and 804's categorical exceptions if it is sufficiently trustworthy under the circumstances.[61] By contrast, the old rule's language allowed hearsay "*not specifically covered by* a hearsay exception" in M.R.E. 803 and 804.[62] The advisory committee proposed this change in language to adopt the "near-miss" rule the majority of civilian courts applied to the old Federal Rule of Evidence (F.R.E.) 807.[63] The "near-miss" rule permits hearsay statements that nearly miss admission into evidence under F.R.E. 803 or 804, if trustworthy, to be admitted into evidence through the residual exception.[64]

C. The Supreme Court has articulated reasonable restrictions applicable to third-party culpability evidence.

Appellant does not challenge M.R.E. 807 as facially arbitrary or disproportionate to the laudable goal of excluding unreliable evidence. Rather, the

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[60] *Compare* J.A. at 0603 (the old Mil. R. Evid. 807) *with* J.A. at 0604 (the new Mil. R. Evid. 807).
[61] J.A. at 0607 (emphasis added).
[62] J.A. at 0603 (emphasis added).
[63] *See* J.A. at 0591-92 (4 Federal Rules of Evidence Manual § 807.02 (2024)); *see also* 0608-36.
[64] J.A. at 0593.

military judge and the lower court failed to properly apply M.R.E. 807 in accordance with the Supreme Court's opinions in *Holmes v. South Carolina*, 547 U.S. 319 (2006) *Chambers v. Mississippi*, 410 U.S. 284 (1973).

1. *Holmes v. South Carolina*.

In *Holmes*, the Supreme Court overturned a conviction based on a South Carolina rule of evidence that treated a defendant's proffered third-party-culprit evidence does not raise a reasonable inference as to the accused's innocence when there was strong forensic evidence of the defendant's guilt.[65] In that case, Holmes was convicted of murder, first-degree criminal sexual assault, first-degree burglary, and robbery. He was sentenced to death. At trial, Holmes argued that he was framed and attempted to introduce testimony from several witnesses that placed a third-party culprit at the scene of the crime right before the assault.[66] He also tried to introduce testimony from four other witnesses who testified that the third party had either admitted to committing the crimes or acknowledged that Holmes was innocent.[67] The government's evidence against Holmes included inculpatory forensic evidence supported by DNA evidence. The trial court excluded the third-

[65] *Holmes*, 547 U.S. at 323-24.
[66] *Id*. at 322-23.
[67] *Id*. at 323.

party-culprit evidence. The South Carolina Supreme Court upheld the exclusion because there was strong forensic evidence of Holmes' guilt.[68]

Reversing in a unanimous opinion, the Supreme Court provided examples of arbitrary and, thus, unconstitutional evidentiary rules. The Court then favorably described two treatise's balancing tests to determine the admissibility of third-party culpability evidence:

> Evidence tending to show the commission by another person of the crime charged may be introduced by [the] accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently *matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded*.[69]
>
> [T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged . . . . [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, *where the evidence is speculative or remote*, or does not tend to prove or disprove a material fact in issue at the defendant's trial.[70]

The Supreme Court then noted that such rules are widely accepted.[71]

The Supreme Court held South Carolina's evidentiary rule was arbitrary because it looked only at the relative strength of the prosecution's evidence, rather

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[68] *Id*. at 322.
[69] *Id*. at 327 (quoting 41 C. J. S., Homicide § 216, pp 56-58 (1991)) (emphasis added).
[70] *Id*. at 327 (quoting 40A Am. Jur. 2d, Homicide § 286, pp 136-138 (1999)) (emphasis added).
[71] *Id*. 547 U.S. at 327.

than the probative value of the third-party-culprit evidence in relation to all the other facts.[72] Thus, *Holmes* distinguishes permissibly excluding third-party culpability evidence from impermissibly excluding such evidence. The evidence is permissibly excluded when it is "speculative or remote, or does not tend to prove or disprove a material fact in issue in the defendant's trial." The evidence is impermissibly excluded when it is excluded in a manner that is arbitrary or disproportionate to the ends that the hearsay rule seeks to promote.[73]

In *Holmes*, the Supreme Court identified where an otherwise permissible rule might be applied to make it arbitrary or disproportionate to its ends. Specifically, the Court explained evidence that is

> offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.[74]

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[72] *Id*. at 330-31.
[73] *Id*. at 324, 327.
[74] *Id*. at 328 (citing *State v. Gregory*, 198 S. C. 98, 104-05, 16 S. E. 2d, 532 at 534-35 (1941) (quoting 16 C. J., Criminal Law § 1085, p 560 (1918) and 20 Am. Jur., Evidence § 265, p 254 (1939)).

But when that rule is changed by courts so that a trial judge's critical inquiry concerns the strength of the prosecution's evidence rather than the probative value of the defense's third-party culpability evidence, then the ruling excluding that evidence is arbitrary or disproportionate to the ends that the hearsay rule seeks to promote.[75] "[W]here the credibility of the prosecution's [evidence] is not conceded," concluding to the contrary would impermissibly remove members from "the sort of factual findings that have traditionally been reserved for the trier of fact."[76]

2. *Chambers v. Mississippi*.

In *Chambers*, petitioner Chambers was convicted of murdering a policeman and sentenced to life imprisonment.[77] At trial, Chambers was precluded on state evidentiary grounds from introducing evidence that another man confessed to the crime four times.[78] The Supreme Court noted that the rejected testimony bore assurances of trustworthiness and was critical to Chambers's defense.[79]

The Supreme Court identified circumstances there that gave the hearsay Chambers sought to introduce assurances of reliability. Those circumstances included (1) the confessions are made spontaneously and to a close acquaintance,

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[75] *Id*. at 329-30.
[76] *Id*. at 330.
[77] *Chambers v. Mississippi*, 410 U.S. 284 (1973)
[78] *Id*. at 289.
[79] *Id*. at 302.

(2) the hearsay is corroborated by "*some* other evidence," (3) the hearsay is against penal interest, and (4) if there is "any question about the truthfulness of the extrajudicial statements" the declarant will be "in the courtroom [and] under oath" subject to the trial counsel's cross-examination with his demeanor and responses being weighed by the members.[80]

Given the facts before it, the Supreme Court held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, *the hearsay rule may not be applied mechanistically to defeat the ends of justice*."[81]

D. The military judge mechanistically and erroneously applied M.R.E. 807 to restrict HM2 Maebane's right to present HM3 M.D.'s confessions as third-party culpability evidence.

Applying *Holmes*, the third-party culpability evidence here should have been admitted under M.R.E. 807 because it is not remote, it is not speculative, and it is reasonably connected to the alleged crime where (1) the declarant was in the room when the crime happened,[82] (2) earlier in the evening before the victim was killed, he pointed the pistol that killed the victim at the victim and pulled the trigger,[83] (3) his dinner plate was next to where forensic evidence suggests the fatal shot originated,[84] (4) gunshot residue found on his clothing indicated he was in contact

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[80] *Id.* at 300-01 (emphasis added).
[81] *Chambers*, 410 U.S. at 302 (emphasis added).
[82] J.A. at 0338.
[83] J.A. at 0330-35.
[84] J.A. at; 0433; 0438-39; 0502; 0637-54.

with a discharged firearm, was in close proximity to a discharging firearm, or otherwise in an environment of gunshot residue the night of the shooting,[85] and (5) the declarant's confession is video recorded and his letter is signed by him, and therefore there can be no dispute as to his out-of-court statements' content.

Moreover, and as in *Chambers*, the rejected evidence bore assurances of trustworthiness and was critical to HM2 Maebane's defense:

1. HM3 Williams's confessions were against his penal interest. He admitted to NCIS that he killed HM3 M.D. and even wrote a letter to the victim's parents apologizing for taking him from this world.[86] That confession exposed him to the risk of criminal prosecution for involuntary manslaughter—making it reliable as a near miss to M.R.E. 804(b)(3)'s statement against interest hearsay exception.
2. HM3 Williams's statement was made shortly after the shooting, albeit not to a close acquaintance.
3. There is evidence corroborating the hearsay as identified above.[87]
4. Finally, as in *Chambers*, if there is any remaining question about the truthfulness of HM3 Williams's confessions, he was in the courtroom under

[85] J.A. 0395.
[86] J.A. at 0479; J.A. at 0481.
[87] J.A. 0338; J.A. at 0331-0335; 0433; 0438-39; 0395; 0502; 0646-57.

oath during HM2 Maebane's trial, subject to the trial counsel's cross-examination with the members weighing his demeanor and responses.[88] Therefore, like *Chambers*, the excluded hearsay here bore sufficient guarantees of trustworthiness and was critical to HM2 Maebane's defense. And it is not remote, or speculative, and is reasonably connected to the alleged crime—factors the Supreme Court relied on in *Holmes* in finding the rule prohibiting admittance of this evidence was arbitrary and violated appellant's right to have a meaningful opportunity to present a complete defense. The military judge abused his discretion by failing to apply *Chambers* and *Holmes* to the facts.

E. The military judge failed to apply the correct law.

Instead of applying *Chambers*, the military judge engaged in the analysis the Supreme Court admonished against in *Holmes*. The Supreme Court held trial judges cannot apply the rules of evidence to prevent an accused from introducing proof of third-party guilt because the government's evidence, if believed, strongly supports a guilty verdict.[89]

Here, the military judge found as a fact that the government's forensic evidence against HM2 Maebane made it "highly unlikely if not impossible that HM3 Williams shot [HM3 M.D.]" and then listed this forensic evidence as his first

[88] J.A. at 0337.
[89] *Holmes*, 547 U.S. at 331.

reason for finding HM3 Williams's confessions untrustworthy.[90] Therefore, the military judge's critical inquiry concerned the strength of the prosecution's case despite the Supreme Court's holdings in *Chambers* and *Holmes*. Evaluating the strength of the government's evidence is a role reserved for the factfinder.[91] This misapplication of the law is an abuse of discretion.

F. The military judge unreasonably applied the *Donaldson* indicia of reliability to the facts of this case.

Instead of relying upon the above law to evaluate HM3 Williams's confession's reliability, the military judge turned to this Court's opinion in *United States v. Donaldson*.[92] He cited *Donaldson's* four "indicia of reliability" to help determine whether HM3 Williams's confessions had the equivalent circumstantial guarantees of trustworthiness as other hearsay exceptions.[93] In *Donaldson*, this Court established "indicia of reliability" to help determine whether hearsay is sufficiently trustworthy to be admitted *against* an accused.[94]

Donaldson is inapt for two reasons. First, it concerns evidence being admitted against an accused rather than an accused exercising his Sixth Amendment right to present a complete defense. Second, it concerns a three-year-

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[90] J.A. at 0574; 0576.
[91] *Holmes*, 547 U.S. at 330.
[92] 58 M.J. 477 (C.A.A.F. 2003).
[93] J.A. at 0576.
[94] *Donaldson*, 58 M.J. at 488.

old's hearsay rather than an adult who has had life experience and whose confessions to a crime were made after being fully informed of his rights.

Even assuming it was necessary to rely on *Donaldson*'s factors, the military judge abused his discretion by unreasonably applying them to the facts. He erroneously determined that NCIS's suggestive questioning, HM3 Williams's mental state when he confessed, his subsequent recanting, and other circumstantial evidence made HM3 Williams's confessions untrustworthy.[95]

1. The military judge's use of the law is foundationally unsound—his analysis begins with mischaracterizing how clear HM3 Williams was in his conviction that he shot HM3 M.D.

The military judge mischaracterized HM3 Williams's recorded confession as a "possible" confession and a "half-hearted admission."[96] HM3 Williams's recorded confession is anything but an uncertain confession. He states, "…I did it. There's really no arguing it. It was a stupid fucking thing. It was a mistake. I didn't mean to do it. I fucking killed somebody."[97] Furthermore, HM3 Williams provided these additional details of how he shot HM3 M.D.: "when I put down my beer, I picked up the gun, pointed it at [HM3 M.D.], expecting it to dry fire again, boom,

[95] J.A. at 0572-0578.
[96] J.A. at 574.
[97] J.A. at 0479 (at approximately 38:40).

hands went up because it scared the fuck out of me and that's when I saw [HM3 M.D.] slump."[98]

The military judge also mischaracterized HM3 Williams's written confession to HM3 M.D.'s family as a "vague note of apology."[99] HM3 Williams was explicit in what he wrote to the M.D. family. "Your son was a good man and *I took him you from you and this world* out of pure stupidity."[100] The note is clear. HM3 Williams confessed to taking HM3 M.D. from his family and this world. The military judge's failure to correctly frame the statements he evaluated precipitated the unreasonable application of his M.R.E. 807 inquiry.

2. <u>The military judge unreasonably failed to make factual distinctions between his cited case law and the facts of this case.</u>

The military judge cited *Callaway* to justify his finding that HM3 Williams's confession was untrustworthy on the basis that suggestive questioning prompted it.[101] In *Callaway*, the Air Force Court of Criminal Appeals, considered another three-year-old child's out-of-court statements to his father accusing his step-father of sexual assault and assault consummated by battery.[102] The lack of suggestive

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[98] *Id.* (at approximately 46:10).
[99] J.A. at 0574.
[100] J.A. at 0481 (emphasis added).
[101] J.A. at 0576 (citing *United States v. Callaway*, No. ACM 38345, 2014 CCA LEXIS 742 (A.F. Ct. Crim. App. Oct. 1, 2014)).
[102] *Callaway*, 2014 CCA LEXIS at *1-3.

questioning and spontaneity of the child's accusations suggested credibility there.[103]

Unlike *Callaway*, HM3 Williams is a fully matured adult with education and military experience.[104] The military judge further found HM3 Williams was "lucid and intelligent" during his NCIS interrogation.[105] HM3 Williams understood NCIS's questions and had the wherewithal to ask for clarification on one occasion when he did not understand their cleansing warning.[106] In fact, the record is void of evidence supporting HM3 Williams's susceptibility to suggestive questioning is akin to a child's susceptibility.

The military judge's failure to parse the capabilities of a small child from that of a fully grown adult man before applying relevant case law to those facts is an unreasonable application of the law to these facts. This error makes his analysis of HM3 Williams's susceptibility to suggestive questioning an abuse of discretion.

3. The military judge failed to consider that HM3 Williams declined NCIS's invitation to adopt a confession to obstruction of justice.

SA Thompson used the same suggestive questioning on HM3 Williams in a failed attempt to secure his confession to moving the Springfield after the shooting. Yet HM3 Williams capably and repeatedly declined to adopt her assertions that he

[103] *Id*. at 13, 18, 22.
[104] J.A. at 0573-74.
[105] J.A. at 0574.
[106] J.A. at 0573.

or another partygoer obstructed justice by moving the Springfield.[107] Therefore, HM3 Williams's recorded confession reveals he possessed the wherewithal to resist NCIS's suggestive questioning rather than succumb to it. The military judge's failure to consider this important fact while otherwise ruling suggestive questioning indicated a lack of reliability to HM3 Williams's confessed shooting was an abuse of discretion.

4. HM3 Williams's mental state when he confessed weighs in favor of finding the confession trustworthy and the military judge's conclusion to the contrary is clearly unreasonable.

The military judge found that "[d]uring the interrogation [HM3 Williams] appeared lucid and intelligent. He asked questions and appeared to understand what was being asked of him."[108] The military judge further found he was not subjected to any "unlawful inducements, coercion, or unlawful influence" during his NCIS interrogations.[109] Nevertheless, the military judge found HM3 Williams's mental state during his confession unreliable.[110] In doing so, the military judge found that HM3 Williams was "unstable" from the events transpiring in the previous twenty-four hours.[111]

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[107] J.A. at 0479 (at approximately 1:15-1:30).
[108] J.A. at 0574.
[109] J.A. at 0574.
[110] J.A. at 0577.
[111] J.A. at 0576.

The military judge's application of the law to the facts is perplexing. On the one hand, he found HM3 Williams was "lucid and intelligent" during the NCIS interrogations, and on the other hand, he found him to be "unstable."[112] These are unreasonably incongruent conclusions. Moreover, the military judge's conclusion that HM3 Williams was unstable is unsupported by the recording of HM3 Williams's composure during his second interview with NCIS—during which he freely and voluntarily confessed to shooting HM3 M.D.[113] Thus, the military judge's determination that HM3 Williams's mental state is circumstantial evidence that the confession is untrustworthy is an unreasonable application of the principle. Really, the recording reveals HM3 Williams's mental state supports the confession's trustworthiness.

G. The military judge failed to consider important facts.

The lower court's opinion correctly identified that the military judge failed to consider important facts corroborating HM3 Williams's confession, and thus ostensibly abused his discretion.[114] Particularly, the military judge failed to

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[112] J.A. at 0574; J.A. at 0577.
[113] J.A. at 0479.
[114] J.A. at 0013-0015; *United States v. Maebane*, No. 202200223, slip op. at 13-14 (N-M. Ct. Crim. App. May 3, 2024). "(1) HM3 [Williams] was in the room when the shooting occurred; (2) HM3 [Williams] had earlier expressed some animosity regarding the victim; (3) in the hours before the shooting, HM3 [Williams] had pointed and dry-fired the pistol in the victim's direction; (4) HM3 [Williams'] dinner plate, which HM3 [Williams] says he set down just prior to the shooting, was on the coffee table next to where the forensic evidence indicates the shot

consider the fact that HM3 Williams' dinner plate put him in the trajectory cone from where the fatal shot originated. However, the lower court then erroneously concluded that error was harmless.[115]

The military judge also failed to consider the import of the government forensic evidence's disclaimed limitations.[116] The forensic evidence's limitations include its inability to determine the exact trajectory of the bullet, where the bullet originated from, and could not provide any conclusions "regarding the position of *anyone else* present at the time of the shooting."[117] The military judge's failure to consider these important facts was an abuse of discretion because they cast substantial doubt on how much weight, if any, he should have given the forensic evidence.

H. The military judge's alternative ruling that admitting evidence of HM3 Williams's confession would violate M.R.E. 403 was an abuse of discretion and substantially prejudiced HM2 Maebane.

The military judge ruled, in the alternative, that admitting evidence of HM3 Williams's confessions would "mislead the members and waste time" in violation

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originated; and (5) forensic evidence showed that HM3 [Williams] was om contact with, or in close proximity to, a discharging firearm that night and that the expected-but-absent- blood spatter could indicate that HM3 [Williams] was not sitting where he said he was at the time of the shooting." *Id*.

[115] J.A. at 0013-15; *United States v. Maebane*, slip op. at 13-14.

[116] *Compare* J.A. at 0572-78 *with* J.A. at 0401, 0432-33.

[117] J.A. at 0404 (emphasis added).

of M.R.E. 403.[118] The military judge did not make clear findings of fact and conclusions of law related to this M.R.E. 403 ruling. Where the military judge fails to articulate his analysis by making clear findings of fact and conclusions of law, his ruling is given less deference, and the appellate court examines the record to make its own assessment.[119]

Military Rule of Evidence 403 requires a military judge to decide whether the probative value of evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[120] The Rule's concern for "misleading" evidence guards against the creation of unduly distracting "side issues."[121] It is not intended to "weed out" evidence the military judge considers to have questionable credibility.[122] "The time concerns of the Rule speak to questions of scarce judicial resources and not to probative value or prejudice."[123] Finally, M.R.E. 403 "is a rule of inclusion" requiring the

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[118] J.A. at 0577.
[119] *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009).
[120] J.A. at 0579-88 (1 Military Rules of Evidence Manual § 403.02 (2022)).
[121] *United States v. Gonzalez*, 16 M.J. 58, 60 (C.M.A. 1983).
[122] *Id*.
[123]J.A. at 0579-88 (1 Military Rules of Evidence Manual § 403.02 (2022)).

admission of evidence rather than its exclusion if a military judge is unsure of the appropriate balance between the evidence's probative value against its dangers.[124]

Here, the government's case that HM2 Maebane shot HM3 M.D. rests on forensic evidence, and intoxicated, and at times, shifting eyewitness testimony. Those same intoxicated witnesses' recollection of their exact locations when somebody killed HM3 M.D. is the foundation for the forensic evidence's probative value. Also, the government's star witness, HM2 Wold, self-described his memory as "shit."[125] Without a doubt, the "dangers inhering in [all] eyewitness identification . . . have been recognized by the courts and the object of much comment."[126]

Conversely, HM3 Williams's two confessions to killing HM3 M.D. contradicted the government's evidence that HM2 Maebane killed HM3 M.D. It is axiomatic that presenting the defense's only evidence directly attacking the government's evidence can never reasonably be considered a waste of time or misleading for the members.[127] Even still, neither the recorded confession nor the

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[124] *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004).
[125] J.A. at 0300.
[126] *United States v. McLaurin*, 22 M.J. 310, 312 (C.M.A. 1986) (citing *United States v. Wade*, 388 U.S. 218, 229 (1967)).
[127] *See United States v. Garcia*, 40 M.J. 533, 538 (A.F.C.M.A. 1994) (holding expert testimony that was counter to what the Military Judge believed to be true was admissible under MRE 403); *see also United States v. Brown*, 45 M.J. 514, 517 (A. Ct. Crim. App. 1996) (holding expert testimony concerning perception

note to the M.D. family is oppressively long.[128] Indeed, the substantive portion of HM3 Williams's recorded interview is less than one and a half hours long, and the note is less than a page.

Finally, the military judge failed to apply the M.R.E. 403 balancing test correctly. He questioned his ultimate ruling in open court, "it seems like we're keeping [HM3 Williams's recorded confession and letter to HM3 M.D.'s family] from them, the finder of fact here. Is that the right thing to do?"[129] He further wondered out loud, "I'm not sure what would be more misleading or confusing, to [ask HM3 Williams about it on direct and cross-examination] or to play the video for [the members] to be honest."[130] The military judge erroneously resolved his doubt in favor of exclusion rather than inclusion. This abuse of discretion prevented HM2 Maebane from arguing the truth of HM3 Williams's confessions to the very crime the government charged him with. That result affronts the interests of justice.[131]

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error and the process of memory formation was admissible under Mil. R. Evid. 403).

[128] J.A. at 0479, 0481

[129] J.A. at 0269.

[130] J.A. at 0269.

[131] *See Brady v. Maryland*, 373 U.S. 83 (1963) (considering the prosecution's suppression of another person's confession to the crime that Brady was convicted of and concluding the other person's confession was material to determining Brady's guilt and therefore presumably would have been admissible at Brady's trial).

I. The military judge's error was not harmless beyond a reasonable doubt.

When there is an error of constitutional dimension, reversal is required on appeal if the government cannot prove the error was harmless beyond a reasonable doubt.[132] Here, HM2 Maebane was denied the opportunity to introduce and argue that HM3 Williams's confessions are evidence that HM3 Williams did it. This error is not harmless beyond a reasonable doubt.[133]

The government relies on the other witnesses' testimony to argue that the error was harmless. Yet those same witnesses provided inconsistent statements.[134] Moreover, Petty Officers Wold and Humes testified under deals with the government that offered them protection from lengthy confinement,[135] and both were intoxicated during the alleged offenses.[136] Finally, it is undisputed that:

- HM3 Williams was in the room when the shooting happened;[137]
- He held animosity toward HM3 M.D. because HM3 M.D. antagonized him;[138]

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[132] *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).
[133] *See Brady*, 373 U.S at 90.; *see also Holmes*, 547 U.S. at 330; *Chambers*, 410 U.S. at 301.
[134] J.A. at 0299; 0316.
[135] J.A. 0447-60.
[136] J.A. at 0293; 0307-08; 0310-11; 0327; 0329.
[137] J.A. at 0338.
[138] J.A. at 0507; 0571. (HM3 Williams sent a text message while at the party proclaiming, "being slight drunk around [HM3 M. D.] is hell").

- His dinner plate was next to where forensic evidence suggests the fatal shot originated;[139]
- He pointed the pistol that killed HM3 M.D. in his direction and pulled the trigger earlier in the evening;[140]
- Gunshot residue found on his clothing indicated he was "in contact with a discharged firearm, was in close proximity to a discharging firearm, or otherwise an environment of gunshot residue" the night of the shooting;[141] and
- The forensic expert would expect to see blood splatter on HM3 Williams's clothing if he were where he claimed to be sitting when the fatal shot was fired, and no such blood splatter was ever found.[142]

This evidence would have operated in concert with HM3 Williams's confessions to create reasonable doubt that HM2 Maebane killed him.

The missing element in HM2 Maebane's defense was HM3 Williams's confessions. Connecting the confessions with the evidence above would have allowed HM2 Maebane to argue HM3 Williams's animosity was a motive to squeeze the trigger, he had the opportunity to squeeze the trigger, he had

[139] J.A. at 0637; J.A. at 0502.
[140] J.A. at 0330-35.
[141] J.A. at 0371-74; 0395.
[142] J.A. at 0343-45; 0377; 0446.

demonstrated a propensity to squeeze the trigger, *and* evidence that HM3 Williams shot HM3 M.D. Without the confessions in evidence, the trial counsel exploited the gap in HM2 Maebane's incomplete defense by arguing in rebuttal: "[t]here is no evidence to support the fact - - to support the theory that [HM3 Williams] did it. It's fanciful doubt. *It's not supported by anything*. It might be convenient, but *it's not supported by any actual evidence*."[143] Thus, the error was not harmless.

[143] J.A. at 0379 (emphasis added).

Conclusion

The military judge abused his discretion in excluding this evidence, and this constitutional error was not harmless beyond a reasonable doubt. As such, this Court should set aside HM2 Maebane's conviction and sentence.

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