IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br>Appellee | ) | ANSWER ON BEHALF OF<br>APPELLEE |
| v. | ) | Crim.App. Dkt. No. 202200228 |
| Edmond A. MAEBANE,<br>Hospital Corpsman<br>Second Class (E-5)<br>U.S. Navy<br>Appellant | ) | USCA Dkt. No. 24-0196/NA |

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


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MANUAL FOR COURTS-MARTIAL

## ISSUE PRESENTED

**DOES AN ACCUSED HAVE A SIXTH AMENDMENT RIGHT TO PRESENT EVIDENCE OF A RECORDED THIRD PARTY'S CONFESSION TO THE CRIME FOR WHICH THE ACCUSED IS ON TRIAL?**

## Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of a dishonorable discharge and confinement for more than two years. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

## Statement of the Case

A panel of members with enlisted representation 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, 10 U.S.C. §§ 914, 919 (2016). The Members sentenced Appellant to six years of confinement, a dishonorable discharge, total forfeitures, and reduction in rank to E-1. The Convening Authority took no action.[1] The Military Judge entered the

[1] The Convening Authority purporting to "approve[]" the sentence, (Post-Trial Action at 2, July 15, 2022), was ultra vires, *see* R.C.M. 1109(c) (possible actions by convening authorities); R.C.M. 1109(g) (same); Art. 60a, UCMJ, 10 U.S.C. § 860a (same). Thus, the Convening Authority took no lawful action on the sentence under Article 60a, and the lower court acquired jurisdiction following the Entry of Judgment. *See* Art. 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3); *United States v. Brubaker-Escobar*, 81 M.J. 471, 474–75 (C.A.A.F. 2021).

judgment into the Record, and the sentence, except for the punitive discharge, was executed.

## Statement of Facts

A. The United States charged Appellant with reckless endangerment and involuntary manslaughter.

On April 15, 2021, the United States charged Appellant with murder, involuntary manslaughter, reckless endangerment and obstruction of justice in violation of Articles 114, 118, 119, and 131b, UCMJ, 10 U.S.C. § 914, 918, 919, 131b. (J.A. 243.)

On November 4, 2021, the United States charged Appellant with reckless endangerment in violation of Article 114. (J.A. 245.)

On December 3, 2021, the Convening Authority referred Charge II, involuntary manslaughter, and the Additional Charge, reckless endangerment, to a general court-martial. (J.A. 243–45.)

B. Appellant moved under Mil. R. Evid. 807 to admit a video confession from Petty Officer Williams and Petty Officer Williams's apology note to the Victim's family. The Military Judge excluded both, finding them untrustworthy.

Appellant moved to admit Petty Officer Williams's video confession and apology under Mil. R. Evid. 807. (J.A. 463–77.) The United States opposed and presented additional evidence. (J.A. 546–56.)

1. Law enforcement interviewed Petty Officer Williams several times.

Appellant introduced three video interviews of Petty Officer Williams in his Motion to admit Petty Officer Williams's confession and handwritten note. (J.A. 476.)

a. In the first interview, Petty Officer Williams said he did not see the Victim being shot.

In Petty Officer Williams's first interview, he said "he did not see the shooting of [the Victim] but opined it was a suicide." (J.A. 515.) Petty Officer Williams was not given his Article 31(b) rights.

b. In the second interview, Petty Officer Williams confessed after initially denying culpability. He wrote an apology to the Victim's family.

Four hours after the first interview, law enforcement interviewed Petty Officer Williams again. (J.A. 524, 573.) He was advised of his Article 31(b) rights and given a cleansing warning. (J.A. 524, 573.)

i. In the second interview, Agent Thompson accused Petty Officer Williams of shooting the Victim and he denied it.

Agent Thompson began, "Some of your story doesn't really make sense" or isn't "adding up completely." (J.A. 479, audio at 7:20, 8:05.) She said Petty Officer Williams was "scared and I think you're scared to kinda come out with the truth," mentioning his first interview. (J.A. 479, audio at 8:50, 9:00.) She told him

she thought he shot the Victim and that the Victim's family deserved to know what happened. (J.A. 479, audio at 9:10.)

Petty Officer Williams asserted: "If I shot him, I don't remember . . . . I never put the magazine inside the gun." (J.A. 479, audio at 9:58.) "I sat, took a drink, looked at the TV and that's when the gunshot happened." (J.A. 479, audio at 10:43.)

Agent Thompson said she thought it was an accident, that he would have a long career and bright future, and he could get over an accident. (J.A. 479, audio at 11:57.) Agent Thompson said she thought he was scared. (J.A. 479, audio at 12:32.)

Petty Officer Williams replied, "I am scared." (J.A. 479, audio at 12:37.) Petty Officer Williams said: "If I knew I did it, I would say it." (J.A. 479, audio at 12:40.)

Agent Thompson said that the bullet came from where Petty Officer Williams was seated. (J.A. 479, audio at 13:15.)

Petty Officer Williams said: "I don't remember . . . . I don't think I shot him." (J.A. 479, audio at 18:00.) "But if like the evidence . . . you can't argue evidence if the evidence and stuff come back and say I did it was an accident." (J.A. 479, audio at 18.25.)

Agent Thompson said the Victim had a mother and father, and that someone should call to tell them they will not see their son, and tell them if it was an accident or a fight. (J.A. 479, audio at 19:34.)

Petty Officer Williams said: "I don't know what happened . . . . I literally do not know what happened . . . . Maybe I just blocked it out . . . . I don't know what happened." (J.A. 479, audio at 19:35.) "If I knew it was me that did it, I would say it was me that did it." (J.A. 479, audio at 22:10.)

ii. In the second interview, Petty Officer Williams said that if the evidence said he did, then he would accept that he shot the Victim. But he believed that he had not.

Agent Thompson said the Victim's eyeball was sticking out because he was shot from behind, where Petty Officer Williams was seated. (J.A. 479, audio at 24:05.)

Petty Officer Williams said: "I knew I [expletive] up playing with the gun in the first place. It was a stupid [expletive] thing to do . . . . If that's all the evidence that's pointing to that, then I guess when I pulled the trigger and it went off, I guess my mind just shut it off, shut it out. Because I never intended for that to happen. It was just a stupid [expletive] accident." (J.A. 479, audio at 25:45.)

Agent Thompson left the room. (J.A. 479, audio at 27:50–38:29.)

Immediately, Petty Officer Williams whispered to himself, "It wasn't me." (J.A. 479, audio at 27:54.)

After Agent Thompson returned and pressed Petty Officer Williams more, he conceded, "If all the evidence is pointing at me, I know I was the one [expletive] around with the gun around that time, but I still don't know how it got loaded. But I guess, I guess, I did it. There's really no arguing it. It was a stupid [expletive] thing. It was a mistake. I didn't mean to do it. I [expletive] killed somebody." (J.A. 479, audio at 38:40.)

iii. In the second interview, Agent Thompson pressed Petty Officer Williams for more details.

Agent Thompson asked, "Did you point the gun at [the Victim] joking around?" (J.A. 479, audio at 39:22.)

Petty Officer Williams replied, "Joking around." (J.A. 479, audio at 39:25.)

Agent Thompson said, "Did you pull the trigger?" (J.A. 479, audio at 39:27.)

Petty Officer Williams said, "I believe so." (J.A. 479, audio at 39:28.)

Agent Thompson said, "Listen, his mom and dad deserve to know the complete truth, there's no beliefs any more. You know man, alright." (J.A. 479, audio at 39:32.)

Petty Officer Williams said, "I did dry fire the gun at [the Victim]." (J.A. 479, audio at 39:41.)

Agent Thompson said, "You did. And then when you did it this time, did you shoot [the Victim]? It's okay, [Petty Officer Williams]," and put her hand on his shoulder to comfort him. (J.A. 479, audio at 39:43.)

Petty Officer Williams said, "Yes." (J.A. 479, audio at 39:56.)

Agent Thompson said, "I need you to say it." (J.A. 479, audio at 39:57.)

Petty Officer Williams said, "Yes, I shot him." (J.A. 479, audio at 39:59.)

Agent Thompson said: "Can you say it a little louder?" (J.A. 479, audio at 40:01.)

Petty Officer Williams said, "Yes, I shot him." (J.A. 479, audio at 40:03.) "I guess after I took a drink—beer, I picked up the gun either from the floor or couch next to me and then I shot him." (J.A. 479, audio at 44:20.) "I guess that makes sense if I did have the gun in my hand." (J.A. 479, audio at 44:45.) "When I put down my beer, I picked up the gun, pointed it at him, expecting it to dry fire again, boom, hands went up because it scared the [expletive] out of me and that's when I saw him slump. That's when I was like [expletive]." (J.A. 479, audio at 46:10.)

Agent Thompson asked Petty Officer Williams if he wanted to write a letter to the Victim's parents. (J.A. 479, audio at 47:30.)

Petty Officer Williams wrote, "I took [the Victim] from you and this world out of pure stupidity." (Appellate Ex. XVII at 4.)

When Agent Thompson asked what he said to the police at the scene, he said, "I thought he shot himself. Honestly. I honestly, honestly thought he shot himself, so that is what I told the cop." (J.A. 479, audio at 53:15.)

When Agent Thompson pressed him for details about the gun's location that night, Petty Officer Williams was unable to provide any. (J.A. 479, at 1:08:10–1:17:40.)

c. In his third interview, Petty Officer Williams recanted his confession.

Twelve days later, Petty Officer Williams recanted his confession. (J.A. 500.) He said he falsely confessed because he had "never gotten in trouble in his entire life," he had "an hour of sleep," "he was scared," he "wanted the questions to stop," and when Agent Thompson brought up the Victim's family it "made him feel terrible." (J.A. 500.)

Petty Officer Williams said Appellant showed him a Springfield 9mm pistol. (J.A. 501, 504.) He admitted to dry firing it at the Victim's head. (J.A. 501, 503.) They played board games and wrestled. (J.A. 501.) "Right before the shooting, [Petty Officer Williams] stood up leaned over and moved his piece on the board game, sat back down and then heard the shot." (J.A. 502.) He saw the Victim "slumped over to his right side and had blood coming out from the back of his head." (J.A. 502.)

Petty Officer Williams "told first responders [the Victim] had committed suicide" because "that was the first thing that came to his mind, because he was not paying attention." (J.A. 502.)

2. Petty Officer Dini said he saw Appellant holding the pistol.

Petty Officer Dini told law enforcement he saw Appellant holding a firearm "directly after the shooting." (J.A. 514.)

3. The Military Judge excluded the video of Petty Officer Williams's confession and apology, finding them untrustworthy.

The Military Judge denied Appellant's Motion to admit Petty Officer Williams's confession and apology, finding the statements untrustworthy and therefore inadmissible as substantive evidence admissible for the truth of the matter asserted under Mil. R. Evid. 807. (J.A. 276–87, 572–78.) They were not trustworthy because: (1) the forensic evidence "directly contradict[ed] the confession;" (2) Agent Thompson used "suggestive questioning akin to coaching;" (3) the circumstances were "indicative of unreliability;" (4) Petty Officer Williams's Article 31(b) rights were violated; and (5) the confession and note were insufficient to corroborate each other. (J.A. 576–77.)

While the Military Judge ruled the statements were inadmissible under M.R.E. 807, he also ruled Appellant could still the confession to impeach Petty Officer Williams. (J.A. 577.)

C. The United States presented evidence during trial on the merits that Appellant was handling firearms after drinking, and that while wrestling with the Victim, Appellant shot him in the head.

1. Petty Officer Wilson testified he saw Appellant shoot the Victim.

Petty Officer Wilson testified that he, the Victim, and Petty Officers Humes, Dini, and Williams were at Appellant's home. (J.A. 288.) He testified everyone was drinking alcohol. (J.A. 290, 293.) Appellant showed his firearms and passed them around. (J.A. 291–92.) The Springfield pistol was placed under the coffee table in the living room. (J.A. 292.)

At one point, Appellant took the Springfield, loaded the magazine, "charged a round into a chamber, took the magazine out, put the spare round into the magazine, and put the magazine back in the pistol. He then tucked it in his waistband." (J.A. 296.)

Then Appellant and the Victim wrestled. (J.A. 296–97.) Appellant "pulled the pistol out of his waistband and brought it up to [the Victim's] head. And [the Victim] had grabbed it by the front of the muzzle and, sort of, pulled it in, like, a couple inches to his forehead. That was when I heard someone yell, 'Stop' or 'No.'" (J.A. 297.) Appellant racked the slide and pulled the trigger. (J.A. 298.)

In Petty Officer Wilson's first law enforcement interview, he said he did not see what happened because he did not want to get Appellant in trouble. (J.A. 302.)

In his second and third interviews, he said he saw Appellant shoot the Victim. (R. J.A. 301, 303.)

He said he had memory problems and that he was having memory problems in August 2019. (J.A. 304.)

He was granted testimonial immunity as part of his summary court-martial plea agreement. (J.A. 298.)

2. Petty Officer Humes testified he saw Appellant shoot the Victim.

Petty Officer Humes testified everyone was drinking alcohol. (J.A. 311–12.) Later, Appellant and the Victim were "horse playing around on the couch," during which "Appellant pulled the slide on his pistol." (J.A. 312.) He saw a round eject, leading him to conclude Appellant "just put another round into the chamber." (J.A. 313.) Petty Officer Williams tried to tell Appellant to stop, but Appellant "pulled the trigger and shot [the Victim]." (J.A. 313.)

In his first law enforcement interview, he did not say what he saw because he was afraid of getting Appellant in trouble. (J.A. 314.) In his second interview, he said he saw Appellant shoot the Victim. (J.A. 317.)

He was granted testimonial immunity as part of his summary court-martial plea agreement. (J.A. 315.)

3. Petty Officer Dini testified he did not see who shot the Victim, but immediately after the shot, he saw Appellant holding a firearm.

Petty Officer Dini testified everyone was drinking alcohol. (J.A. 321, 323, 327.) Earlier, he saw Petty Officer Williams playing with the 9mm firearm. (J.A. 330.) Petty Officer Williams was pointing the firearm at others, and dry firing at himself and the Victim. (J.A. 330–32.) He thought this happened "more . . . than [ten] minutes before," the shooting, but could not give a "good estimate of the time." (J.A. 332.)

He heard a pop, saw smoke, and saw Appellant with a gray and brown .45-caliber pistol in his right hand, and the Victim slumped over. (J.A. 323–24, 326.) Appellant was holding the gun down by his right side. (J.A. 334.) He did not remember seeing the pistol grip. (J.A. 334.)

He told law enforcement the firearm in Appellant's hand was not a black 9mm, but a "brown" or "brownish" 1911 pistol. (J.A. 335.) He gave similar testimony in a different court-martial. (J.A. 336.)

He was granted testimonial immunity as part of his summary court-martial plea agreement. (J.A. 325.)

4. Petty Officer Williams testified he did not see what happened. He testified that when he was interviewed a second time by the agent, he confessed to shooting the Victim.

Petty Officer Williams testified he was in the room when the Victim died, but did not see what happened. (J.A. 327.) He said he falsely confessed to shooting the Victim and that he wrote an apology to the Victim's family. (J.A. 338–40, 341–42, 346, 351–55.)

5. Chief Petty Officer Hall testified that Appellant received weapon safety training, and that Petty Officer Williams told him he had falsely confessed.

Chief Petty Officer Hall testified Appellant received training on the four weapon safety rules: "treat every weapon as if it was loaded. Keep your finger straight and off the trigger until you're ready to fire. Keep the weapon on safe until you're ready to fire. And never point at anything you do not intend to shoot." (J.A. 358.)

Chief Petty Officer Hall testified that after his interview with law enforcement, Petty Officer Williams told him he thought "he confessed to a homicide he didn't commit." (J.A. 356.) Petty Officer Williams called his father, and Chief Hall heard Petty Officer Williams tell his father that he thought "he confessed to a homicide he didn't commit." (J.A. 356.)

6. Lieutenant Bierman testified that Appellant told him the Victim shot himself.

Lieutenant Bierman was the first law enforcement officer on the scene. (J.A. 359.) Lieutenant Bierman asked, "Who was [expletive] with the pistol?" (J.A. 360.) Appellant said, '"Nobody. He did it to himself."' (J.A. 360.)

7. Mr. Garber testified that Appellant told him the Victim shot himself.

Mr. Garber secured the scene that night. (J.A. 363.) He spoke with Appellant and asked what happened. (J.A. 363–64.) Appellant said they were on the couch. (J.A. 364.) They had been drinking alcohol and playing video games. (J.A. 364.) Appellant said the Victim "reached down into the sofa, pulled out a pistol and put it to his head and shot himself." (J.A. 364.)

8. Lieutenant Colonel Warren testified the entry point on the Victim was atypical for suicide.

Lieutenant Colonel Warren performed the autopsy on the Victim. (J.A. 365.) She testified the temple was the entry point for most self-inflicted gunshots she had seen. (J.A. 366.) The location of the entry point at the front of the Victim's head was "atypical for self-inflicted gunshot wound[s]." (J.A. 367.)

9. Ms. Shaffer testified that an unfired round of ammunition had been chambered and ejected from the Springfield firearm.

Ms. Shaffer conducted testing and determined that an unfired round "was chambered, so cycle—moved from the magazine or potentially just put into the

chamber. And then, the slide was retracted and extracted and ejected" the round. (J.A. 372.) This could have been from "somebody racking a slide and ejecting that round." (J.A. 372.)

10. Agent Keller testified about the bullet's trajectory and recommendations he made for evidence to be tested.

Agent Keller testified he was unable to establish the trajectory before the bullet entered the Victim's head. (J.A. 374.)

He did not recall if he recommended the plates and utensils found on the coffee table be tested for DNA. (J.A. 375.) When asked again if he recommended testing them, Agent Keller said, "I would have to look at the spreadsheet again. I don't recall." (J.A. 376.) When asked if that information could have been useful, he said, "Yes, but, you know, plates and cups can be set down wherever over the course of an evening." (J.A. 376.)

D. Appellant presented the case in Defense.

1. Lieutenant Colonel Broderick testified about memory formation issues and what impacts it.

Lieutenant Colonel Broderick testified as an expert in forensic psychiatry. She testified that many things impact the accuracy of memory, such as alcohol, trauma, and stress, as well as receiving information from someone else. (J.A. 654–73.) She further testified that flashbacks from post-traumatic stress disorder may

affect memory. (J.A. 673.) She also noted that the Victim, based off his medical records, appeared to possess risk factors consistent with suicide. (J.A. 674–75.)

2. Mr. Coleman testified about the forensic evidence in the case.

Mr. Coleman testified that testing the Victim's hands for gunshot residue could be probative, but that not doing so was an accepted practice. (J.A. 676–77.)

Mr. Coleman would have expected to see blood spatter patterns on Petty Officer Williams's clothing, if he was in the position he testified he was in at the time of the shooting. (J.A. 377.)

E. The Military Judge instructed the Members on how they could use inconsistent and consistent prior statements.

The Military Judge instructed the Members they "may consider the inconsistency in deciding whether to believe that witness's in-court testimony. You may not consider the earlier statements as evidence of the truth of the matters contained in the prior statements." (J.A. 380–81.)

He instructed that some of Petty Officers Wilson and Humes' inconsistent statements could be used for the truth of the matter asserted. (J.A. 381–82.)

He instructed that prior consistent statements made by Petty Officers Wilson, Humes, Williams, and Dini could be considered to "refute the charge of recent fabrication, improper influence, and improper motive" and "for the truth of those statements." (J.A. 382.)

F. Appellant argued in closing that Petty Officer Williams shot the Victim.

During closing, Appellant argued Petty Officer Williams shot the Victim, relying on his confession and its circumstances. (J.A. 678–82.) "The prior inconsistent statement[] was recorded. If it is what they say it is, why don't they play it for you?" (J.A. 682.) "They have the evidence sitting with NCIS and they won't show it to you." (J.A. 682.)

The United States did not object to Appellant's argument.

G. The Members found Appellant guilty and sentenced him.

The Members found Appellant guilty of involuntary manslaughter and reckless endangerment. (J.A. 384.) The Members sentenced Appellant to reduction to E-1, total forfeitures, six years of confinement, and a dishonorable discharge. (J.A. 385.)

## Summary of Argument

The Military Judge correctly found Petty Officer Williams's statements to law enforcement were inadmissible under the Mil. R. Evid. 807 residual hearsay exception as they were unreliable, thus not supported by sufficient guarantees of trustworthiness.

First, Petty Officer Williams's recanted confession was contradicted by forensic and ballistic evidence from the crime scene. Second, law enforcement's suggestive questioning undermined the reliability of his statements. Third, Petty

Officer Williams's mental state, including a lack of sleep, made his statement unreliable. Fourth, Petty Officer Williams recanted his statements. Finally, eyewitness testimony contradicted Petty Officer Williams's "half-hearted admission." Even if this Court disagrees, Appellant suffered no prejudice as he presented similar evidence, including the testimony of Petty Officer Williams.

## Argument

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION EXCLUDING THE CONFESSION AND APOLOGY: APPELLANT FAILED TO SHOW THEY WERE SUPPORTED BY SUFFICIENT GUARANTEES OF TRUSTWORTHINESS. FURTHER, APPELLANT FAILS TO SHOW PREJUDICE.

A. The standard of review is abuse of discretion.

Appellate courts review rulings on the admissibility of evidence for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000).

"A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) he fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted).

Abuse of discretion is a strict standard, requiring "more than a mere difference of opinion." *McElhaney*, 54 M.J. at 130. "The challenged action must

be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id*. (internal quotation marks and citation omitted).

Courts are highly deferential when a military judge articulates his analysis on the record. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

B. The right to a complete defense can be limited by evidentiary rules that are not "arbitrary or disproportionate to the purposes they are designed to serve."

1. An accused has a Sixth Amendment due process right to present a complete defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." U.S. Const. amend. VI; *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotations omitted).

2. Evidentiary rules violate an appellant's constitutional rights only if they are "arbitrary or disproportionate to the purposes they are designed to serve."

"[F]ederal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes*, 547 U.S. at 324. "The Supreme Court has repeatedly held that an accused has no right under the Constitution to present his defense without regard for a jurisdiction's legitimate procedural and evidentiary rules." *United States v. Ndanyi*, 45 M.J. 315, 321

(C.A.A.F. 1996) (citing *Michigan v. Lucas*, 500 U.S. 145 (1991); *Taylor v. Illinois*, 484 U.S. 400 (1988); *Montana v. Egelhoff*, 518 U.S. 37 (1996)).

Courts must weigh procedural and evidentiary rules against an accused's constitutional right to present a complete defense. *Holmes*, 547 U.S. at 324. "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Id*. (quoting *United States v. Scheffer,* 523 U.S. 303, 308 (1998) (*Scheffer*'s internal quotation marks omitted)); *see United States v. Gaddis,* 70 M.J. 248, 254 (C.A.A.F. 2011) (applying arbitrary and disproportionate test to Mil. R. Evid. 412 and finding rule not unconstitutional).

Rules are "arbitrary" when they "exclude[] important defense evidence but [do] not serve any legitimate interests." *Holmes,* 547 U.S. at 325 (rule excluded evidence of third party's guilt where there was "strong forensic evidence" against defendant); *see also Washington v. Texas*, 388 U.S. 14 (1967) (law barred participants of crimes from testifying in each other's trials unless participant acquitted first); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (state's "voucher" rule prevented accused from treating witness as adverse who previously confessed, but denied doing so while testifying); *Crane v. Kentucky*, 476 U.S. 683 (1986) (after confession admitted by prosecution, accused prevented from introducing evidence showing confession was unreliable); *Rock v. Arkansas*, 483 U.S. 44

(1987) (rule prohibited accused from introducing hypnotically refreshed testimony).

The Supreme Court "has never held that a federal rule of evidence violated a defendant's right to present a complete defense." *United States v. Mitrovic*, 890 F.3d 1217, 1222 (11th Cir. 2018).

3. Mil. R. Evid. 802 provides that hearsay is generally inadmissible.

Hearsay is an out-of-court statement "offer[ed] in evidence to prove the truth of the matter asserted in the statement." Mil. R. Evid. 801(c). Hearsay is generally inadmissible. Mil. R. Evid. 802.

a. Mil. R. Evid. 804 allows hearsay evidence if the declarant is unavailable, the statement is against interest, and the statement is trustworthy.

Certain hearsay is admissible if: (1) the declarant is unavailable; (2) the statement is against the declarant's interest such that it could expose him to criminal liability; and (3) the statement is "supported by corroborating circumstances that clearly indicate its trustworthiness . . . and is offered to exculpate the accused." Mil. R. Evid. 804(b)(3).

b. Mil. R. Evid. 807 provides the residual exception to the hearsay rule.

Congress amended Fed. R. Evid. 807, effective December 1, 2019. (J.A. 589–602.) Mil. R. Evid. 807 was accordingly amended. *See* Mil. R. Evid. 1102[2]. Mil. R. Evid. 807(a) allows for the admission of hearsay if:

> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of the circumstances under which it is made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Mil. R. Evid. 807.

A military judge is afforded "considerable discretion" in determining whether to admit residual hearsay. *United States v. Donaldson,* 58 M.J. 477, 489 (C.A.A.F. 2003); *United States v. Kelley*, 45 M.J. 275, 280–81 (C.A.A.F. 1996).

[2] The amended Fed. R. Evid. 807 applied to all proceedings commencing after Dec. 1, 2019 and to pending proceedings, as practicable. *See* 28 U.S.C. § 2074; Proposed Amendments to the Federal Rules of Evidence, Rule 807 (Apr. 25, 2019). Thus, Mil. R. Evid. 807 was amended and applied to all proceedings commencing after June 1, 2021, and to pending proceedings, as practicable. *See* Mil. R. Evid. 1102. Charges were preferred on April 15, 2021. (J.A. 243.) The Motion to admit the video interview and note was litigated on March 29, 2022. (J.A. 572.) Thus, it was proper for the Military Judge to apply the amended Mil. R. Evid. 807 in his Ruling.

i. Pre-amendment Rule 807.

Under the previous Rule 807, courts first looked to whether there were "equivalent circumstantial guarantees of trustworthiness" to statements offered under Rule 803 or 804 before admitting the statement under Rule 807. *See* Mil. R. Evid. 807 (2019). However, the amended Rule 807 eliminated that requirement because "[t]he 'equivalence' standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions[.]" (J.A. 593 (4 Federal Rules of Evidence Manual § 807.02 (2024)).

Moreover, under the previous Rule 807, hearsay statements may have been excluded as "near-misses" when the statement was "specifically covered by a hearsay exception" in Rule 803 or 804, but not admissible under either of those exceptions. (J.A. 591–92 (citing *Glowczenski v. Taser Inter., Inc.*, 928 F. Supp. 2d 564 (E.D.N.Y. 2013) (finding Rule 807 "inapplicable" to a treatise because it was "specifically covered by" Rule 803(18) even though it was inadmissible under that provision.")).)

Finally, under the previous Rule 807, some courts held that they were prohibited from considering corroborating evidence in determining whether a hearsay statement was trustworthy. (J.A. 596 (citing *Batoh v. McNeil-PPC, Inc.*, 167 F. Supp. 3d 296 (D. Conn 2016)).)

ii. Post-amendment Rule 807.

"[U]nder the 2019 amendment, the court can proceed directly to whether the hearsay statement is trustworthy." (J.A. 593.) In evaluating whether a statement has "sufficient guarantees of trustworthiness," appellate courts have continued to apply the factors for guarantees of trustworthiness that existed prior to the amendment. *E.g. United States v. Burgess*, 99 F.4th 1175, 1184 (10th Cir. 2024) ("We have previously identified these factors as relevant when considering the trustworthiness of hearsay statements") (citing *United States v. Tome*, 61 F.3d 1446, 1453 (10th Cir. 1993)).

Rule 807 also eliminated "near-misses" by substituting "not specifically covered by" with "not admissible under." *Compare* Mil. R. Evid. 807 (2019) *with* Mil. R. Evid. 807 (2024). Now, courts could admit hearsay statements, if trustworthy, even if the type of hearsay statement offered was listed in Rule 803 or 804. (J.A. 592.)

Finally, "the 2019 amendments to Rule 807 'specifically require[] the court to consider corroborating evidence in the trustworthiness enquiry[.]'" *United States v. Burgess*, 99 F.4th 1175, 1183 n.5 (10th Cir. 2024); (J.A. 596.) "Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence." (J.A. 596.) Further, "it is obviously the case that if there is independent evidence that is contrary to the

statement, the statement will be very unlikely to satisfy the trustworthiness requirement." (J.A. 596 (citing *Askew v. Lindsay*, 45 F.4th 573 (2nd Cir. 2022) (finding testimony offered under Rule 807 insufficiently trustworthy, in part because it conflicted with eyewitness report made by 911 caller.)).)

4. Mil. R. Evid. 403 excludes otherwise admissible evidence.

"The Military Judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. "Courts may properly exclude evidence of third-party culpability when, under the facts and circumstances of the individual case, its exclusion would not deprive the defendant of a fair trial." *United States v. Wade*, 512 F.App'x 11, 13–14 (2nd Cir. 2013).

C. The Military Judge did not violate Appellant's constitutional right to a complete defense or clearly err in excluding Petty Officer Williams's false confession because it lacked sufficient guarantees of trustworthiness.

1. The Military Judge did not abuse his discretion in finding the confession lacked trustworthiness under Mil. R. Evid. 807.

In *Rhoades v. Henry*, 638 F.3d 1027 (9th Cir. 2011), a third-party confession to murder occurred shortly after the declarant was arrested and while he was drunk. *Id*. at 1034. A while later, the declarant confessed again and provided details that were consistent with what law enforcement knew. *Id*. Once the declarant sobered

up, he recanted. *Id*. The court upheld excluding the third-party confession as unreliable: the declarant was intoxicated, he recanted, he had an alibi, and there was no evidence tying him to the murder. *Id.* at 1036.

In *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), a declarant admitted to robbing the victim with three other men, one of whom killed the victim. *Id*. The declarant then named a different person as the killer, and then claimed he killed the victim before recanting any involvement in the robbery or murder. *Id.* at 81–82. The appellant's proffer of fingerprints and other evidence showing the declarant knew the victim did not make the confession trustworthy because the evidence could be innocently explained. *Id*. The court upheld exclusion of the confession as untrustworthy. *Id*. Notably, the *Moore* court found that "contradictions alone can render an otherwise admissible statement untrustworthy." *Id*. at 83,

Like *Moore*, Petty Officer Williams confessed under pressure and while sleep deprived. (J.A. 500.) His confession was contradicted by his first interview and recanted in his third. (J.A. 499–504, 515.) He also told first responders that the Victim committed suicide. (J.A. 502.) Like *Moore*, only one statement by the declarant admitted to killing the Victim—the others consistently showed he did not know who fired the shot. (J.A. 499–504, 515.)

Like *Rhodes*, the circumstances of Petty Officer Williams's confession were unreliable given his mental state due to grief, fear, and lack of sleep. (J.A. 500.) His confession was made more untrustworthy by Agent Thompson's leading and suggestive questioning, including mischaracterizing the evidence as pointing to his guilt. (J.A. 479.)

Like *Rhodes*, other evidence made the confession less trustworthy: Petty Officers Wilson and Humes told agents they saw Appellant shoot the Victim. (J.A. 297–98, 313.) Further, Petty Officer Williams never deviated from his statement and drawings that he was on the left side of the couch, when looking at the television, and Petty Officers Wilson, Humes, and Dini put him there too. (J.A. 386–88.)

Thus, the Military Judge did not clearly err in finding the confession lacked trustworthiness under Mil. R. Evid. 807.

a. Contrary to Appellant's assertion, the Military Judge properly considered credibility in making Findings of Fact as part of his ruling.

"Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record." R.C.M. 905(d).

Where evidence conflicts, a military judge makes necessary determinations of weight and credibility in ascertaining these findings of fact. *See, e.g.*, *Rhoades*, 638 F.3d at 1036; *Moore*, 651 F.3d at 81–82; (*see also* J.A. 596 ("Of course, the

court must consider not only the existence of corroborative evidence but also the strength and quality of that evidence.")).

Appellant's argument that the Military Judge should not have evaluated the strength of the evidence in making his Mil. R. Evid. 807 ruling fails. (*See* Appellant Br. at 28–29.)

b. Appellant's argument that Mil. R. Evid. 807 applies differently to the United States than to an accused is contrary to case law and the party-neutral language in Mil. R. Evid. 807.

"[T]he accused, as is required of the State, must comply with established rules of procedure and evidence[.]" *Chambers*, 410 U.S. at 302; *see also Kelley*, 45 M.J. at 281, n.* ("Our holding favors neither the prosecution nor defense. It favors the proponent of evidence[.]"). Moreover, Mil. R. Evid. 807 uses party-neutral language based on the "proponent" of the statement. *See* Mil. R. Evid. 807 (requiring the "proponent" give reasonable notice to the "adverse party" of any statement sought to admit).

Here, Appellant sought to introduce a hearsay statement under Mil. R. Evid. 807. (J.A. 463–477.) The Military Judge applied precedent from this Court to evaluate whether the statement was trustworthy under Mil. R. Evid. 807. (J.A. 576–77) (citing *Donaldson*, 58 M.J. at 488). Appellant does not cite any case law to support the proposition that the Military Judge's reliance on *Donaldson* was

error because it did not involve an accused seeking to admit a hearsay statement. (*See* Appellant Br. at 29.)

Thus, under case law and Mil. R. 807's party-neutral language, Appellant's implication that Mil. R. Evid 807 applies differently to the United States versus an accused is incorrect. (*See* Appellant Br. at 29.)

c. Appellant's arguments fail: the Findings of Fact are not clearly erroneous.

When a military judge's ruling involves mixed questions of fact and law, facts are reviewed for clear error and conclusions of law are reviewed de novo. *Kelley*, 45 M.J. at 279–80. "A finding of fact is clearly erroneous when there is no evidence to support the finding, or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Horne*, 82 M.J. 283 (C.A.A.F. 2022) (internal quotations and citations omitted).

i. The Military Judge characterizing Petty Officer Williams's recorded confession as "possible" and a "half-hearted admission" is not clearly erroneous because Petty Officer Williams's initially and repeatedly denied culpability.

In the second interview, Petty Officer Williams repeatedly stated that he did not remember, nor did he believe, that he shot the Victim. *See supra* Section I.B.1.b.i. His confession suggested that he felt compelled to believe the evidence Agent Thompson inaccurately said implicated him, not that he remembered

shooting the Victim. (J.A. 479, audio at 25:46–44:20.) Further, his apology was brief, did not expressly say he killed the Victim, and did not provide any details. (J.A. 481.) Petty Officer Williams finally gave a confession while sleep-deprived and after repeatedly denying culpability. (J.A. 479, 500.)

Thus, Appellant's argument is incorrect and the Military Judge characterizing the confession as "possible" and a "half-hearted admission" was not clearly erroneous. (*See* Appellant Br. at 30–31.)

ii. Appellant's argument that Petty Officer Williams declining to admit to obstruction of justice made his confession sufficiently trustworthy is unsupported by case law and raised for the first time on appeal.

In reviewing a military judge's ruling for abuse of discretion, the appellate courts review the record material before the military judge. *United States v. Lloyd*, 69 M.J. 95, 100 (C.A.A.F. 2010) (declining to find abuse of discretion for "failing to adopt a theory that was not presented in the motion at trial level"). A legal theory not presented at trial "may not be raised for the first time on appeal absent exigent circumstances. *Id*. at 101 (internal citations omitted).

Appellant's argument that the Military Judge clearly erred by not considering that Petty Officer Williams denied moving the Springfield pistol is raised now for the first time on appeal. Further, Appellant provides no legal authority for the notion that refusing to admit to one crime makes a confession to

another crime more reliable. (*See* Appellant Br. at 32–33.) The United States is aware of no such authority.

Thus, Appellant may not raise this argument for the first time on appeal and the Military Judge did not clearly err in failing to consider that fact.

iii. The Military Judge's finding that Petty Officer Williams's mental state and the suggestive questions weighed in favor of finding the confession was untrustworthy is not clearly erroneous.

The Military Judge found Petty Officer Williams "appeared to be lucid and intelligent" but ultimately concluded he was "unstable from grief, fear, and lack of sleep." Appellant was sleep-deprived and gave a second interview just seven hours after his first unwarned interview. (J.A. 479, 500.) Throughout the interview, Appellant maintained that he did not remember the night but was persuaded by Agent Thompson that the evidence showed he shot the Victim. (J.A. 479.) He gave Agent Thompson the answer she was looking for because he was "scared" and "wanted the questions to stop." (J.A. 500.)

Therefore, there was evidence to support the Military Judge's conclusion that Petty Officer Williams's statement was unreliable, in part because he was "unstable from grief, fear, and lack of sleep." Appellant's assertion that the Military Judge clearly erred is incorrect.

iv. The Military Judge considered all evidence presented to him.

First, even assuming the Military Judge failed to consider potentially corroborating evidence, the lower court correctly concluded any error was harmless. *See infra* Part E.

Second, Appellant cites to J.A. 404 to argue the Military Judge did not consider the limitations of forensic evidence. (See Appellant Br. at 34–35.) This evidence was not presented to the Military Judge as part of the Motion. (*See* J.A. 463–77.) Thus, Appellant fails to show the Military Judge clearly erred in not considering the forensic evidence's limitations. (*See* Appellant Br. at 34–35); *see also supra* Section I.C.1.c.ii.

d. The Military Judge properly used principles established by *Donaldson* in determining the confession was unreliable and nothing limits its application to children.

To determine the trustworthiness of a statement, trial courts may consider, among other factors, "(1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated." *Donaldson*, 58 M.J. at 488 (citations omitted); *see also United States v. Callaway*, No. 38345, 2014 CCA LEXIS 742 (A.F. Ct. Crim. App. Oct. 1, 2014).

The Military Judge applied the principles established in *Donaldson* and used in *Callaway*—not the facts—when determining the reliability of the confession.

(J.A. 576–77.) He never relied on their facts in making his findings. Nothing in *Donaldson* limits the principles to cases where the declarant is a child. Thus, Appellant is incorrect that the Military Judge improperly applied *United States v. Donaldson*, 58 M.J. 477 (C.A.A.F. 2003) and *Callaway*, No. 48345 2014 CCA LEXIS at *21–22. (*See* Appellant Br. at 29–30, 31–32.)

2. Like, *Scheffer*, exclusion of this untrustworthy hearsay did not violate Appellant's right to present a complete defense.

In *United States v. Scheffer*, 523 U.S. 303 (1998), the Court held Mil. R. Evid. 707's per se exclusion of polygraph evidence did not violate an appellant's Sixth Amendment right to present a complete defense. This is because it is a "rational and proportional means of advancing" the interest of ensuring "only reliable evidence is introduced at trial." *Id*. at 309, 312, 317. It was not arbitrary or disproportionate because there was no way to know in an individual case whether the results were reliable. *Id*. at 312.

Like *Scheffer*, Mil. R. Evid. 807 did not violate Appellant's constitutional rights. Mil. R. Evid. 807's purpose is to allow statements "supported by sufficient guarantees of trustworthiness—after considering the totality of the circumstances." Mil. R. Evid. 807. Further, the Members heard all of the "relevant details" of Petty Officer Williams's confession and apology. (J.A. 338–55.); *Scheffer*, 523 U.S. at 316–17. Appellant was only prevented from using the confession and note for the truth of the matter asserted.

Therefore, application of Mil. R. Evid. 807 did not violate Appellant's right to a complete defense.

3. *Holmes* and *Chambers* are inapplicable because both cases address facially invalid state court rules of evidence. Neither case considers application of the residual hearsay exception.

a. The *Holmes* court found a state court's evidentiary rules that excluded evidence of third-party guilt based solely on inculpatory forensic evidence denied the accused a fair trial.

In *Holmes*, the trial court prevented the appellant from introducing evidence of a third-party's confession. 547 U.S. at 323. The trial court found the confession only raised suspicion, but not a presumption of innocence. *Id*. at 323–24. The State Supreme Court agreed, applying a rule that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded." Id. at 329 (internal quotations and citations omitted). Neither court appears to have considered the reliability of the confession.

The Supreme Court held this was unconstitutional because it was arbitrary and did not serve a legitimate end. *Id*. at 331. This is because "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side[.]" *Id*. The lower court also did not consider the reliability or quality of the government's evidence as argued by the appellant. *Id*.

b. The *Chambers* court found a state court's evidentiary rules that did not allow the accused to impeach his own witness or admit statements against penal interest denied him a fair trial.

In *Chambers*, the appellant was charged with murder. 410 U.S. 284 (1973). Before trial, a third-party made a sworn confession to the appellant's defense counsel. *Id*. at 287. The third-party also spontaneously confessed to the murder to multiple friends shortly after the incident. *Id*. at 300. The confessions were independently corroborated by eyewitness testimony to the shooting. *Id*. At a preliminary hearing, the third-party recanted his confession. *Id*. at 288. After calling him as a witness at trial, the appellant sought to treat the third-party as an adverse witness to cross-examine him. *Id*. at 292. The motion was denied under Mississippi's "voucher" rule, which prohibited a party from impeaching its own witness. *Id*. at 291–92.

The appellant then sought to introduce statements made by the third-party to his friends, confessing to the murder. *Id*. at 298. The statements were excluded as hearsay. *Id*. Mississippi's hearsay rule recognized only statements against pecuniary interest as an exception, not penal interest. *Id*. at 299.

The *Chambers* court found that the Mississippi court's refusal to permit cross examination and consider statements against penal interest denied the appellant a fair trial. *Id*. at 302. The *Chambers* court concluded, "[i]n reaching this judgment, we establish no new principles of constitutional law . . . we hold

quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." *Id*. at 302–03.

Thus, the *Chambers* court's holding was that Mississippi's "voucher rule" and hearsay exclusion were arbitrary rules that deprived the accused a fair trial. See *Holmes*, 547 U.S. at 325 (citing *Chambers* as an example of "arbitrary rules.").

c. Mil. R. Evid. 807 is a reasonable restriction on untrustworthy evidence, thus *Holmes* and *Chambers* are inapplicable.

Appellant concedes that Mil. R. Evid. 807 is not facially arbitrary or disproportionate. (*See* Appellant Br. at 21.) Thus, Appellant incorrectly asserts that the Military Judge should have relied on *Holmes* and *Chambers* because those cases turn on the validity of state court rules and do not address the application of Mil. R. Evid. 807. (See Appellant Br. at 21.)

4. Even if this Court analyzes *Holmes* and *Chambers* as-applied, the Military Judge did not err because *Holmes* and *Chambers* are factually distinguishable from this case.

a. Unlike *Holmes*, the Military Judge did not solely consider inculpatory forensic evidence, and instead reviewed the totality of circumstances that made Petty Officer Williams's statements not sufficiently trustworthy.

Unlike *Holmes*, the Military Judge did not solely rely on forensic evidence that inculpated the accused. He looked at the totality of the circumstances that made it untrustworthy: the agent used suggestive questions and violated his Article 31(b) rights; Petty Officer Williams was unstable during the statement due to grief,

fear, and lack of sleep; Petty Officer Williams recanted; and the note was the only thing to corroborate the confession. (J.A. 576–77.)

Thus, even as-applied, Appellant's argument that the Military Judge erred in not applying *Holmes* is incorrect. (*See* Appellant Br. 28–29.)

b. Unlike *Chambers*, there were no spontaneous confessions or corroborating eyewitness testimony, and the Military Judge permitted cross-examination of Petty Officer Williams.

Unlike *Chambers*, Appellant was able to cross-examine Petty Officer Williams. (J.A. 338–55.) Petty Officer Williams did not spontaneously confess to any close acquaintances and stated initially he did not see the shooting. (J.A. 515.) Further, unlike *Chambers*, there is no eyewitness testimony corroborating Petty Officer Williams as the culprit; the eyewitnesses identified Appellant as the shooter. (J.A. 298, 317; *see also* J.A. 596 ("[I]t is obviously the case that if there is independent evidence that is contrary to the statement, the statement will be very unlikely to satisfy the trustworthiness requirement.").)

*Chamber*s is unlike this case. (*See* Appellant Br. 28–29.)

D. The Military Judge did not abuse his discretion in finding the video inadmissible under Mil. R. Evid. 403.

"[W]ell established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326; Mil. R. Evid. 403.

In *Wade*, the appellant was charged with possession with intent to distribute. *Wade*, 512 F.App'x at 13. The appellant's argument was that the drugs belonged to a third-party and sought to introduce the third-party's prior criminal conviction for drug possession. *Id*. The district court excluded the introduction of the roommate's criminal record. *Id*. at 13–14. On appeal, the *Wade* court found the district court reasonably excluded the testimony of third-party guilt because the testimony "presented a risk of juror confusion and extended litigation of a collateral matter." *Id*. at 14. Further, the *Wade* court found there was no prejudice in the exclusion of third-party guilty because "he was able to present equally useful evidence supporting his theory[.]" *Id*. Specifically, the Wade court found that the appellant's ability to question a witness allowed the appellant "to present his theory of third-party culpability through other means." *Id*. at 14 n.1.

Here, the Military Judge did not abuse his discretion in finding that the statements from Petty Officer Williams confessing to shooting the Victim would "mislead the members and waste time in violation of [Mil. R. Evid.] 403." (J.A. 577.) Like *Wade*, introducing Petty Officer Williams's interview would present a risk of juror confusion and extended litigation. Introducing his second statement would require all of Petty Officer Williams's interrogations to be played.

Petty Officer Williams did not make a confession during the first interview, (J.A. 515), made a confession in the second interview after again denying

culpability, (J.A. 479), and recanted the confession in the third interview, (J.A. 500). Admission of the second interview would also waste time by requiring the United States to introduce expert witnesses on false confessions to address Petty Officer Williams's second interview. Introducing expert testimony by the United States would then include expert witnesses by Trial Defense Counsel for rebuttal. This would waste scarce judicial resources. (*See* J.A. 580.)

Also, like *Wade*, Appellant was able to present equally useful evidence by cross-examining Petty Officer Williams on his admissions during the second interview. (J.A. 351–55, 637–53.) Thus, the Military Judge reasonably restricted the admission of Petty Officer Williams's second interview and note, and Appellant was not prejudiced by this exclusion.

E. Any error did not result in prejudice under the "substantial influence" or "harmless beyond a reasonable doubt" standards.

1. Error must not "substantial[ly] influence" the findings for non-constitutional errors. Constitutional errors must be "harmless beyond a reasonable doubt."

Exclusion of hearsay and other evidence does not deprive an appellant of his constitutional right to a complete defense where he is able to present other similar evidence. *United States v. Roberson*, 65 M.J. 43, 47 (C.A.A.F. 2007).

For non-constitutional errors, Government has the burden to show the error did not have a "substantial influence on the findings." *United States v. Washington*, 80 M.J. 106, 110 (C.A.A.F. 2020) (quotations omitted). This is done

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 question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). "Materiality" and "quality of the evidence" require consideration of "the particular factual circumstances of each case." *Washington*, 80 M.J. at 111.

When excluded evidence results in a constitutional violation, the Government must show '"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' *United States v. Hoffmann*, 75 M.J. 120, 128 (C.A.A.F. 2016) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17–18 (2003)).

Excluding constitutionally required evidence is not harmless if it prevents an appellant's sole means of defense. *See, e.g.*, *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005) (evidence for innocent ingestion defense); *United States v. Stever*, 603 F.3d 747, 757 (9th Cir. 2010) (evidence that gang put drugs on the appellant's property).

2. Appellant was not prejudiced by any error because it did not have a substantial influence on the findings.

a. The United States' case was strong.

Petty Officers Wold and Humes saw Appellant shoot the Victim. (J.A. 288, 301–03, 312–13, 317.) Forensic evidence validated Petty Officer Humes's memory of Appellant loading and shooting the 9mm pistol. (J.A. 312–13, 372–

73.) Further, Petty Officer Dini saw Appellant holding a firearm just after the shot. (J.A. 323–324.)

b. Appellant's case was weak.

Appellant presented little evidence in support of his theories. Appellant's evidence did not explain why Petty Officers Wold and Humes would misidentify Appellant as the shooter, or why Petty Officer Dini saw Appellant holding a firearm. (J.A. 288, 301–03, 312–13, 317, 323.)

Furthermore, Appellant's statements that the Victim shot himself were contradicted by the eyewitness testimony and unsupported by forensic evidence. (J.A. 288, 301–03, 312–13, 317, 323, 367.) Lieutenant Colonel Broderick was unable to establish reasonable doubt as she testified only generally about factors that may affect memory and that the Victim's medical records indicated risk factors for suicide. (J.A. 654–75.)

c. The materiality and quality of the excluded evidence weigh against finding prejudice.

In *Roberson*, the appellant suffered no prejudice under the *Kerr* factors when he presented other similar evidence, including evidence of duress. *Roberson*, 65 M.J. at 45–47.

Like *Roberson*, Appellant was able to admit substantially similar evidence, because Petty Officer Williams testified that he confessed and wrote the apology. (J.A. 338–55); *see Roberson*, 65 M.J. at 45–47. Appellant treated the confession as

if it could be used for its truth by trying to show the conditions of the confession made it reliable. (J.A. 351–55, 637–53.) In closing, Appellant used the confession and the circumstances of the confession to argue Petty Officer Williams was the shooter. (J.A. 678–82.) Appellant also used the video confession not being admitted into evidence to his advantage by arguing: "If it is what they say it is, why don't they play it for you?" and "They have the evidence sitting with NCIS and they won't show it to you." (J.A. 682.)

Therefore, even if the Military Judge erred it did not have a "substantial influence on the findings." *Washington*, 80 M.J. at 110.

3. Any error was harmless beyond a reasonable doubt.

Any error was also harmless beyond a reasonable doubt. Two points deserve further elaboration. First, Petty Officers Wilson and Humes provided eyewitness testimony that Appellant shoot the Victim. (J.A. 298, 317.) Petty Officer Dini saw Appellant holding a firearm immediately after the shot. (J.A. 323–24, 326.) Lastly, Petty Officer Humes' testimony of seeing a round cycled through the firearm—just before the shot—was corroborated by forensic evidence. (J.A. 313); *see supra* Section I.C.

Second, the confession and apology were introduced for impeachment and used to argue Petty Officer Williams was the shooter. (J.A. 338–42, 351–55, 678–82.) Appellant encouraged the Members to draw adverse conclusions because they

were not allowed to see the video of the confession or the apology. (J.A. 681–82.) Appellant was not denied a defense. *Cf. Brewer*, 61 M.J. at 432; *Stever*, 603 F.3d at 757.

Appellant's claim fails.

**Conclusion**

The United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.


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