UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

LAMONT E. HOYES
CULINARY SPECIALIST FIRST CLASS (E-6), U.S. NAVY

NMCCA 201300303
Review Pursuant to Article 62(b), Uniform Code of Military Justice, 10 U.S.C. 862(b)

Sentence Adjudged: 25 January 2013.
Military Judge: CDR Colleen Glaser-Allen, JAGC, USN.
Convening Authority: Commander, Naval Air Force Atlantic, Norfolk, VA.
For Appellant: LT Jared Hernandez, JAGC, USN.
For Appellee: LCDR Keith Lofland, JAGC, USN.

31 December 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2

WARD, Senior Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellee, contrary to his pleas, of conspiracy to commit aggravated sexual assault, violation of a lawful general order, making false official statements, aggravated sexual assault, and wrongful sexual contact in violation of Articles 81, 92, 107, and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, and 920 (2006). The members sentenced the appellee to forty-two months confinement and a dishonorable discharge. After trial but before authentication of the record, the defense filed a motion

with the military judge seeking a new trial pursuant to RULE FOR COURTS-MARTIAL 1210, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), alleging newly discovered evidence and fraud on the court-martial. Following a series of post-trial sessions, the military judge granted the defense motion and ordered a new trial. The United States now appeals that ruling pursuant to Article 62, UCMJ.

Background[1]

The appellee was assigned to USS DWIGHT D. EISENHOWER (CVN 69). On 26 July 2011, the ship made a port call to Mayport, Florida. A number of Sailors from the ship's supply department, to include the appellee, Culinary Specialist First Class TG (TG), Culinary Specialist Seaman SF (SF), Culinary Specialist Seaman VC (VC), and Culinary Specialist Seaman PV (PV), went into town on liberty that evening. During the evening, SF and VC drank to excess in celebration of VC's 21st birthday. At some point during the evening, the appellee and VC flirted and discussed having sexual intercourse later that evening.

After drinking together in one of the local bars, SF, VC, PV, TG and the appellee all shared a cab back to a local hotel. Once they arrived, with the exception of SF, the group went to VC's hotel room. SF went across the hall to another room. A short time later, two other Sailors from the room across the hall assisted SF into VC's room and laid her down on the floor, fully clothed and visibly drunk. She remained there on the floor while VC and the others continued drinking and socializing. After a few minutes, VC left the room and went outside the hotel to give money to a friend for cab fare.

When she came back to her room, VC saw the appellee and SF on one of the two beds engaged in sexual intercourse. Soon after observing this, VC engaged in sexual intercourse and fellatio with PV on the other bed. The appellee and PV then switched places. The appellee went over to the bed where VC lay and engaged in sexual intercourse with her. Likewise, PV went to the bed where SF lay and proceeded to do the same with her. After these encounters concluded, VC asked SF if she was "okay

[1] This background section incorporates facts presented at the appellee's trial and the military judge's findings on the defense motion for new trial. Where a witness's account following the appellee's trial differs from previous accounts, those details are described more fully below.

with what just happened" and SF replied "Yes, I just want to go to sleep."[2]

SF soon fell asleep on one of the beds and VC went to another room across the hall where she remarked to several others that she saw the appellee and SF having sex. After a little while, VC went back to her hotel room where she was met by the appellee at the door. When VC stepped back inside her room, she saw SF on top of TG in what appeared to be the act of sexual intercourse. PV was asleep in the other bed. The appellee then attempted to "shhhh" VC and pulled her into the bathroom. There the two kissed and VC proceeded to perform fellatio on the appellee. After several minutes, VC stepped out of the bathroom into the room. SF was asleep on the bed and TG was pulling on a pair of pants. TG, PV and the appellee left the room and VC then went to sleep.

1. VC's pretrial statements and her testimony at the appellee's Article 32 hearing

During the ensuing investigation, VC provided two sworn statements to Naval Criminal Investigative Service (NCIS) agents detailing the events of that night.[3] In both statements, she described how she observed SF engaged in intercourse with the appellee and later with TG; however, she did not reveal the presence of PV and did not reveal her sexual activity with PV and with the appellee. At the appellee's Article 32 hearing, VC essentially testified to the same facts as contained in her statements to NCIS.

2. VC's testimony at the appellee's trial

At the appellee's trial,[4] VC was the Government's sole percipient witness to the sexual acts charged as SF had no

[2] VC's statement to the Naval Criminal Investigative Service of 14 Sep 11, appended to the record as Appellate Exhibit XXXV at 2. At trial, VC testified that she asked SF "do you know what's going on?" and "are you okay?" to which SF replied "yes." Record at 492.

[3] VC provided sworn statements to NCIS on 14 September 2011 and 10 May 2012. AE XXXV and XXXVI. The defense offered the latter statement on the motion for a new trial. *See* Defense Supplemental Motion for Post-Trial Session of 13 May 2013, AE LXI, Enclosure 4. As VC adopted both statements at the Article 32 hearing, the military judge considered both statements in her ruling. AE LXXIV at 3.

[4] The appellee and TG were tried separately. The appellee's trial was held 22-25 January 2013 and TG's trial was held on 15-18 April 2013.

memory of the percipient events. Consistent with her earlier statements to NCIS and her testimony at the Article 32 hearing, she testified that she walked in on the appellee and SF engaged in sexual intercourse.[5] Cross-examination by civilian defense counsel primarily focused on VC's observations of SF's level of intoxication.[6] Civilian defense counsel did not ask any questions regarding VC's sexual conduct with the appellee or PV's sexual activity with SF and VC.

3. VC's and PV's post-trial statements to NCIS

Although witnesses interviewed during the NCIS investigation and at least one witness at trial[7] indicated the possible presence of a third male in the room, neither the NCIS agents nor the trial counsel could determine his identity prior to the appellee's trial. Following trial, however, the appellee through counsel offered to identify this third male in exchange for sentence relief. Post-trial negotiations ultimately fell through and the appellee never identified to the Government that PV was the third male present in the room.

Following the failed negotiations, NCIS agents searched the appellee's cell and recovered materials identifying PV as the third male. Agents then interviewed PV on 7 April 2013, one week prior to TG's court-martial. PV admitted to being present in the room and, along with the appellee, to engaging in sexual intercourse with SF and VC.

After interviewing PV, NCIS agents then re-interviewed VC on 8 April 2013. This time VC provided a fuller account of the evening.[8] She re-iterated that when she returned to her hotel room after paying her friend's cab fare, she observed the appellee having sexual intercourse with SF. However, when she saw the appellee engaged in sexual intercourse with SF, she was "upset. . .because I thought me and [the appellee] were going to have sex. . . [s]o out of rage and jealousy over [the appellee] [PV] and I started to have sex."[9] She also admitted to

[5] Record at 490-94, 519-21.

[6] *Id*. at 504-532; 545-47.

[7] *Id*. at 562.

[8] AE LXII at 19-22. In this statement, VC corroborated PV's description of the sexual activities between the parties.

[9] *Id*. at 20.

performing fellatio upon the appellee while the two were in the bathroom together, and TG and SF were on the bed.[10]

4. VC's testimony at TG's trial

At TG's trial, VC testified to the full set of facts as described in her 8 April 2013 statement.[11] Although charged with similar offenses as the appellee, TG was convicted of only fraternization.[12]

6. TM's statement to NCIS

On 13 May 2013, another member of the ship's supply department, Culinary Specialist Third Class TM (TM), provided a sworn statement to NCIS agents.[13] She also worked with the appellee, TG, VC, PV, and SF onboard EISENHOWER. Though she was not an eyewitness to the events of 26 July 2011, she described several conversations she had with VC and others, to include the appellee, in the days following the port call. According to her, the day after the port call VC openly boasted about her sexual activities with the appellee. But when TM asked the appellee a day or two later, he denied having slept with VC and expressed frustration as "[p]eople [had been] . . . coming up to [him] asking [him] this, and [he has] been telling them, NO."[14] Several weeks after the port call, TM described how VC became upset when she learned that the appellee was denying having had sex with her, saying "[y]ou know HOYES is denying that he slept with me, but it's okay. . . . I think it's cool, I got something for him. It's gonna be a big mess." *Id*.[15]

In the weeks leading up to the appellee's trial, TM corresponded frequently with VC via Facebook and once by telephone regarding the appellee's case. According to TM, VC expressed anxiety and frustration over the upcoming trial, stating "they wasn't [sic] drunk, it wasn't rape, and we knew

[10] *Id*.

[11] *Id.* at Enclosure 7.

[12] *Id*. at Enclosure 9.

[13] AE LXXII at 8-11.

[14] *Id*. at 9.

[15] *Id*. TM described this conversation as occurring several weeks after the port call at Mayport, FL and when she asked VC what she meant, VC said "Nothing." *Id*.

what we were doing."[16] VC also expressed her desire to stop the trial from going forward. TM urged VC to either talk to the appellee directly or to his civilian defense counsel, and TM relayed messages back and forth between VC and the appellee.

Following TG's trial, the appellee's detailed defense counsel filed a motion for a new trial pursuant to R.C.M. 1102 alleging newly discovered evidence and fraud on the court-martial.[17] On 1 July 2013, the military judge heard argument on the motion; on 11 July 2013 she granted the defense motion citing both newly discovered evidence and fraud upon the court-martial.[18]

Standard of Review

When reviewing matters under Article 62(b), UCMJ, we act only with respect to matters of law. *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011) (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). We may not find additional facts and cannot substitute our own interpretation of the facts. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). Thus, we are bound by the military judge's findings unless such findings are clearly erroneous. Findings are "clearly erroneous" when they are not "fairly supported by the record." *Gore*, 60 M.J. at 185 (citations omitted).

In this case, we review the military judge's ruling granting the defense petition for a new trial for an abuse of discretion. *United States v. Johnson*, 61 M.J. 195, 199 (C.A.A.F. 2005). An abuse of discretion occurs when findings of fact are not supported by the record, the decision is based on an erroneous view of the law, or the military judge's "application of the correct legal principles to the facts of a particular case is clearly unreasonable." *United States v. Williams,* 37 M.J. 352, 356 (C.M.A. 1993) (citations omitted).

Newly Discovered Evidence

[16] *Id.* at 10.

[17] AE LX.

[18] AE LXXIV.

In her ruling, the military judge characterizes VC, PV and TM's statements to NCIS agents after the appellee's trial, and the testimony of VC at TG's trial, as new evidence under R.C.M. 1210(f).[19] To qualify as "new evidence" under R.C.M. 1210(f), the evidence must meet the following criteria:

> (A) The evidence was discovered after the trial;
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> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
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> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

As to the second criterion, an individual "should not be allowed to profit from his or her lack of due diligence in investigating the case or to play games with the court and 'hide' evidence, awaiting the verdict before springing the evidence upon opponents." *United States v. Fisiorek*, 43 M.J. 244, 247 (C.A.A.F. 1995) (citation omitted). Due diligence applies to the efforts of defense counsel, and in this regard we consider whether the newly claimed discovery is truly "*bona fide*." *Id*. at 248.

In regard to the third criterion, we consider the materiality of the new evidence offered in relation to the trial. *Johnson,* 61 M.J. at 200. We examine "the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of other evidence in the case pertaining to this issue." *Id.* at 199 (citations and internal quotation marks omitted). To properly gauge materiality of this evidence, we look beyond the mere existence of the statements to the information contained therein and its role in the trial. *United States v. Pineda*, No. 201000150, 2011 CCA LEXIS 120 at *12-14 (N.M.Ct.Crim.App. 2011) (analyzing the content of post-trial statements made by a witness inconsistent with his earlier trial testimony).

1. Evidence of Sexual Acts in the Room

[19] AE LXXIV at 8-10.

Regardless of whether the appellee knew who was in the hotel room and what sexual conduct occurred,[20] the military judge reasoned that the more relevant inquiry was whether "new evidence and due diligence in finding it is limited to what actually occurred in the hotel room on 26 July 2011 or includes the new NCIS statements [from VC and PV] and [VC's testimony at TG's trial] . . . . and the latter could not have been discovered by the Defense prior to trial despite its due diligence."[21] In essence, the military judge deemed that these post-trial statements and testimony, while not necessarily containing new information, were nonetheless "newly available" to the defense only after the appellee's trial and therefore constituted "new evidence."

Here, the facts at issue in these post-trial statements are: 1) that PV was present in the room during the alleged sexual assault; 2) that both PV and the appellee engaged in sexual acts with VC and SF; and 3) that VC omitted these details from her pretrial statements. A proper examination under R.C.M. 1210 must consider not just the form but also the content of the "new" evidence. For "[t]he key to deciding whether evidence is 'newly discovered' or simply 'newly available' is to ascertain when the defendant found out about the information at issue." *See United States v. Turns* 198 F.3d 584, 587 (6th Cir. 2000) (holding that witness's exculpatory post-trial affidavit was not "newly discovered evidence" under Rule 33 of the Federal Rules of Criminal Procedure where contents of the affidavit were known but the defendant and his counsel chose not to call the witness out of concern she may not testify truthfully).[22] While these statements may have been made after trial, these facts were all known to the appellee prior to his trial.

Evidence known by an accused at the time of trial cannot be characterized as new evidence. *See, e.g.*, *United States v.*

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[20] While the military judge does not specifically address whether the appellee was aware of PV's presence in the room or PV's sexual conduct with SF and VC, her findings do note that the Government only learned of PV's identity after seizing written notes from the appellee during a search of his brig cell following trial. The military judge also found that these notes seized from the appellee eventually led to the post-trial sworn statements from VC, PV and TM. AE LXXIV at 3.

[21] AE LXXIV at 9.

[22] We look to federal treatment of petitions for new trial as "Congress intended that military practice with respect to petitions for new trial mirror practice in federal civilian courts." *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998).

Owen, 500 F.3d 83, 89 (2nd Cir. 2007) (reversing district court order granting new trial where substance of co-defendant's testimony covered direct dealings with the defendant and therefore was known to the defendant prior to trial). Moreover, evidence of an event where an accused was an active participant is not newly discovered even if he withholds that information from his defense counsel. *United States v. Luna*, 94 F.3d 1156, 1161 (8th Cir. 1996). Additionally, if defense counsel, as part of trial strategy, opts not to use that evidence, then a new trial petition is nothing more than a "new tactic, not new evidence." *United States v. Day.* 33 C.M.R. 398, 401 (C.M.A. 1963).[23]

In her ruling, the military judge likened this case to *United States v. Williams*,[24] a sexual assault case in which the defense requested a new trial based on newly discovered evidence that impeached the credibility of the victim. In *Williams*, evidence after trial revealed a sexual relationship between the purported victim, Specialist (SPC) W, and another soldier, SPC M. However, the military judge's reliance on *Williams* is misplaced.

In *Williams*, both SPC W and SPC M affirmatively concealed their relationship from the court-martial as well as the trial and defense counsel, a key distinction from the instant case.[25] Unlike the rumored relationship in *Williams*, here the appellee knew who was present in the hotel room and what actually transpired. The only question was whether to attempt to incorporate these facts into a trial strategy, a question that raises the issue of due diligence.

On that question, the military judge concluded that any effort by the defense to "ferret out" this information before

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[23] At the post-trial hearing on 1 July 2013, detailed defense counsel effectively conceded that the defense team was aware of these facts prior to the appellee's trial, but insisted it was "clear that [VC] wasn't going to give an honest answer. . . . [and] what is the point of asking those questions if she's not going to give an honest answer to them?" Record at 1232.

[24] 37 M.J. 352 (C.M.A. 1993).

[25] During the post-trial hearing in *Williams*, SPC M testified that he lied to defense counsel before trial when asked whether he and SPC W had a sexual relationship, and SPC W testified that she did not tell defense counsel because she was never asked. *Id*. at 357. Additionally, when defense counsel questioned SPC W at the Article 32, UCMJ pretrial hearing about her relationship with SPC M, she testified that "she did not know why SPC M came to see her . . . and that he was just her associate." *Id*. at 355.

trial would have been fruitless. But this reasoning tacitly endorses the defense's decision to avoid these areas at the Article 32 hearing, the first opportunity to openly confront VC under oath and impeach her credibility. Moreover, it implicitly excuses any lack of effort to locate corroborating sources for this impeachment evidence.

According to TM, VC expressed her sexual interest in the appellee openly throughout the workplace prior to the port call, and she openly bragged of her sexual exploits with the appellee the following day.[26] The ensuing rumor mill in the aftermath of the port call also apparently extended to VC's sexual involvement with PV.[27] Furthermore, when TM confronted the appellee over these rumors a few days after the port call, he expressed frustration and complained about the number of people asking him if the rumors were true.[28]

Here, the military judge made no findings of any attempt by the defense to exercise due diligence, concluding instead that the appellee was essentially "stuck" with VC's limited version due to her prior consistent statements to NCIS agents and her testimony at the Article 32 hearing. In light of the notoriety that VC's conduct that night apparently enjoyed, due diligence required more than simply dismissing any attempt to investigate and corroborate these facts omitted from VC's pretrial statements; otherwise due diligence is rendered meaningless.

For example, the appellee could have cross-examined VC, both at the Article 32 hearing and at trial, and confronted her about these facts omitted from her earlier version, i.e. PV's presence in the room and VC's sexual activities with both PV and the appellee. Next, the appellee could have sought PV to testify as a witness regarding these events. Although PV initially denied any involvement to NCIS agents, he admitted these omitted details when confronted by NCIS agents after the appellee's trial.[29] Additionally, as indicated earlier, several Sailors approached the appellee following the port call and asked him if he had sex with VC. These questions were the result of VC openly bragging about her sexual exploits with the

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[26] In her statement to NCIS agents, TM related that prior to the port call, "[VC] let it be known around our division that she wanted to have sex with HOYES." AE LXXII at 8.

[27] *Id*.

[28] *Id*. at 9.

[29] AE LXII at 11-18.

appellee after the port visit. Lastly, given his direct knowledge the appellee could have testified himself about these facts in order to impeach VC's limited version of events. Yet the military judge made no findings regarding any effort by the appellee or his defense team to locate any of these potential corroborating witnesses or sources of impeachment evidence.

Consequently, the military judge erred by finding this evidence, previously known to the appellee, "newly discovered" and unavailable despite due diligence. By failing to consider the appellee's awareness of this evidence, and by failing to evaluate due diligence with respect to other potential sources of impeachment evidence, the military judge's conclusion is an unreasonable "application of the correct legal principles to the facts [of this] case . . . ." *Williams,* 37 M.J. at 356.

2. Statements by VC Indicating Bias or Motive to Fabricate

We next turn to the evidence cited by the military judge indicating VC's potential bias against the appellee, and the military judge's related conclusion that due diligence would not have yielded this evidence prior to trial.[30]

The military judge found that VC testified both at the Article 32 hearing and at trial that she was "best friends" with SF at the time of the incident.[31] The same witness statements described in the military judge's findings also reveal that VC made no attempts at work to hide her sexual attraction for the appellee, her leading petty officer and direct supervisor. That VC was initially jealous when she saw the object of her attraction engaging in sexual intercourse with her best friend is not beyond the foreseeable pale of VC's already damaged credibility, particularly considering the entire context of her behavior that evening. But this was an area that the appellee and his defense counsel chose not to explore either at the Article 32 hearing or at trial.

[30] In her findings, the military judge notes that in VC's 8 April 2013 statement, VC explained that she was jealous upon seeing the appellee having sex with SF, "so out of rage and jealousy over [the appellee], [PV] and I started to have sex." AE LXXII at 4. Additionally, the military judge notes in her findings that TM related in her statement to NCIS agents how VC was upset upon learning that the appellee was denying having had sex with VC, saying "I got something for him. It's gonna be a big mess." *Id*. at 5.

[31] *Id*. at 4.

Turning to VC's purported statements described by TM indicating potential bias or motive, the military judge concluded this evidence was "newly discovered." Yet in her findings, the military judge describes how TM relayed to the appellee each comment that she received from VC prior to his trial. TM even texted him the Facebook messages she received from VC to include VC's message that "it wasn't rape, and we knew what we were doing." Despite TM sharing all this information with the appellee before his trial, the military judge still concluded that VC's statements to TM indicating bias and motive "could not have been discovered by the Defense prior to trial despite due diligence."[32]

Even with due deference owed to the military judge, we conclude that the military judge erred. The appellee's claim that this evidence is "newly discovered" lacks *bona fides* as it removes any burden upon the appellee and his counsel to investigate and develop this potential source of evidence before trial. The military judge's ruling effectively relieves the defense from exercising any due diligence and, accordingly, we conclude that the military judge erred. *Williams*, 37 M.J. at 356.

3. Materiality of the Evidence

Assuming that this evidence was "new" and could not have been discovered through the exercise of due diligence, we must finally determine whether "in light of all other pertinent evidence, [the newly discovered evidence] would probably produce a substantially more favorable result for the [appellee]." R.C.M. 1210(f)(2)(C). We weigh materiality of the new evidence in relation to the entire trial. *Johnson*, 61 M.J. at 200.[33]

Quite clearly, at trial the appellee and his counsel chose not to pursue a strategy of attacking VC's credibility.

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[32] AE LXXII at 9-10. The military judge declined to consider the Facebook messages VC sent to TM as "newly discovered" since TM shared them with the appellee before trial.

[33] The military judge relied heavily on the verdict in TG's trial in concluding that this newly discovered evidence would probably produce a substantially more favorable result at the appellee's trial. With its motion, the defense submitted only VC's testimony at TG's trial as well as the results of his trial. Despite this limited record, the military judge found that "the Government called the same witnesses, argued the same theory, and also presented 413 evidence" at TG's trial, findings that are unsupported by the record in this case. AE LXXIV at 3. As she acknowledged during the motion session, a different military judge presided over the TG trial. Record at 1300-01.

Instead, civilian defense counsel opted to focus VC's testimony on those aspects that supported the defense theory of the case: that SF may have been drunk, but not substantially incapacitated.[34] Notably, any strategy that attacked VC's credibility by exposing the entire extent of her sexual activities would have inevitably exposed PV. This was a prospect that the appellee was apparently unwilling to do even though PV could potentially corroborate the defense theory that SF was not substantially incapacitated.[35] Notably, after trial the appellee quickly abandoned this tactic when through counsel he attempted to leverage PV's identity in exchange for sentence relief.

Unlike the purported victim in *Williams*, VC's credibility, or more importantly lack thereof, was not a pivotal issue in this case. Her putative biases or motives were not placed in issue by either side. In short, the defense needed her to be believed to carry its theory of the case, a fact further illustrated when the civilian defense counsel called VC to testify unfavorably as to SF's character for truthfulness.

In evaluating the materiality of this new evidence, however, the military judge failed to address the actual role VC's credibility played at trial. Instead, she rested her conclusion on a different outcome at TG's trial where VC's credibility was placed in issue by the defense. Absent is any consideration how this evidence would have affected the appellee's trial when the appellee relied on, rather than attacked, VC's credibility. *Johnson*, 61 M.J. at 199. Therefore, we hold that the military judge abused her discretion by concluding this evidence would probably produce a substantially more favorable result for the appellee.

Fraud on the Court Martial

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[34] Record at 335-339. During closing argument, civilian defense counsel argued that VC's testimony regarding SF's affirmative response to her question "are you okay" was "the absolute lynch (sic) pin of everything about this case. . . . [b]ecause if [SF] was truthful in that response and if she did know what had just happened with [the appellee] immediately after, then she was able to appraise the nature of the sexual conduct at issue." *Id*. at 812-13.

[35] According to his NCIS statement, PV observed that SF "was able to walk and talk" and "was coherent." AE LXII at 15; AE LXXIV at 4-5. However, he also corroborated VC's account of the sexual acts between the appellee and SF. *Id*.

In her ruling, the military judge deemed VC's actions of omitting significant details from her earlier accounts as "confessed perjury by omission," and therefore concluded that VC committed fraud on the court-martial.[36]

Neither Article 73, UCMJ, nor R.C.M. 1210 defines "fraud on the court-martial." The Discussion to R.C.M. 1210 cites "confessed or proven perjury" as examples. However, whether misleading or false testimony short of perjury can constitute fraud on the court-martial is not addressed. Given R.C.M. 1210's general consistency with Federal Rule of Procedure 33,[37] federal case law on this parallel provision provides additional guidance.

In our R.C.M. 1210 construct, military courts first must determine whether incomplete, inaccurate, or other purportedly mendacious testimony is, in fact, false. *See, e.g., United States v. Rios*, 48 M.J. 261, 268-69 (C.A.A.F. 1998); *United States v. Giambra*, 33 M.J. 331, 335 (C.M.A. 1991). Similarly, a determination of material falsity is the first step for federal courts faced with motions for new trial based on alleged false testimony.[38]

Under the federal test, however, "simple inaccuracies or inconsistencies" are not considered materially false and do not necessitate a new trial. *United States v. Monteleone,* 257 F.3d 210, 219 (2nd Cir. 2001). Even "presentation of a witness who recants or contradicts his prior testimony" will not meet the requisite falsity. *United States v. Bortnovsky*, 879 F. 2d 30,

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[36] AE LXXIV at 7. Despite the military judge's characterization, we find no evidence in the record that VC ever admitted to giving false testimony at the appellee's trial. The military judge's analysis of "fraud on the court-martial" appears based solely on the Government's concession at the post-trial session that VC "omitted significant facts regarding her sexual activity, possible bias or motive, and [PV's] presence from her prior accounts of the events of 26 July 2011." *Id*. Absent, however, are any factual findings or analysis of particular false testimony by VC with respect to a material matter. *See United States v. Bell*, 42 M.J. 832, 835-36 (N.M.Ct.Crim.App. 1995) (holding that perjury requires proof that a witness gave false testimony on a material fact).

[37] *See Manual for Courts-Martial, United States* (2012 ed.), App. 21, A21-98.

[38] Under this test, a new trial should be granted when "(a) the court is reasonably well satisfied that the testimony given by a material witness is false; (b) the jury might have reached a different conclusion; (c) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." *United States v. Mazzanti*, 925 F.2d 1026, 1029 (7th Cir. 1991).

33 (2nd Cir. 1989) (quoting *United States v. Holladay*, 566 F. 2d 1018, 1019 (5th Cir. 1978) (*per curiam*)). A witness' incomplete direct testimony combined with "incomplete . . . or ineffective cross examinations" also fails to meet the threshold for a new trial under FED. R. CRIM. P. 33. *See United States v. Reed*, 986 F.2d 191, 194 (7th Cir. 1993) (holding that "the oath to tell the whole truth does not . . . require witnesses to volunteer information beyond that perceived to be sought by the questioner"). With the military jurisprudence and federal practice as our guide, we turn now to the military judge's conclusion that VC committed "perjury by omission" and therefore committed fraud on the court-martial.

1. Perjury by Omission

We cannot subscribe to the military judge's novel theory of "perjury by omission". The C.A.A.F. long ago held that "statements under oath which are literally, technically, or legally true cannot serve as a basis for conviction of false swearing." *United States v. Purgess*, 33 C.M.R. 97, 100 (C.M.A. 1963). This holding is consistent with the Supreme Court's ruling in *Bronston*, wherein the Supreme Court decided that a jury could not consider a perjury charge where the allegedly false statement was "literally true but not responsive to the question asked and arguably misleading by negative implication." *Bronston v. United States*, 409 U.S. 352, 353 (1973). The Supreme Court went on to state that "*[p]recise questioning is imperative as a predicate for the offense of perjury*" and that "any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." *Id*. at 362 (emphasis added).

While VC's accounts both before and during the appellee's trial[39] may have been carefully crafted to avoid disclosing her sexual activities and those of PV, no direct question on these "omitted key facts" as described by the military judge was posed to VC at the appellee's trial.[40] The military judge herself

[39] Despite R.C.M. 1210's focus on testimony at trial, the military judge relied, in part, on VC's pretrial statements in concluding that she committed "perjury by omission" and therefore committed fraud on the court-martial. AE LXXIV at 7.

[40] Several instances cited in the defense post-trial motion point to testimony at the appellee's trial where VC may have testified falsely. However, without the benefit of factual findings, we do not know if these questions and answers form the basis of the military judge's ruling. Only one question arguably addresses those "omitted key facts" cited by the military judge,

noted as much in addressing this point with detailed defense counsel at the post-trial hearing.[41] Absent such questions and related findings, there is no legal basis for the military judge's conclusion that VC's omissions constituted a fraud on the court-martial. Furthermore, considering the heavy burden R.C.M. 1210 places on a moving party,[42] fraud on the court-martial requires specific findings on a witness's actual false testimony at trial, something lacking from the military judge's ruling. For these reasons, we conclude that the military judge abused her discretion by concluding VC committed fraud on the court-martial through "perjury by omission." *See United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (finding an abuse of discretion "where the military judge's ruling was based on a 'misapprehension of the applicable law' and the military judge's findings failed to address the relevant considerations.") (quoting *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986).

2. Awareness of the false testimony

Even assuming, *arguendo*, that misrepresentations or even false testimony short of perjury can constitute fraud on the court-martial, we conclude that the military judge erred by failing to consider the appellee's awareness of that same fraud.

Here, the appellee demands a new trial by complaining of a witness's false testimony that he was aware of yet chose not to pursue as part of a trial strategy.[43] However, the fact remains

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specifically the presence of PV in the hotel room, and that question was posed by civilian defense counsel during cross-examination:

CDC: Now, you are, according to your testimony, in a room with [TG] and [the appellee], is that right?
WIT: Yes.

CDC: And who else was in this room? Anybody, or just the three of you?
WIT: Just the three of us.

Record at 516.

[41] Record at 1232.

[42] "We are most certainly aware that petitions for new trial based upon a witness' change of her testimony are not viewed favorably in the law. . . . [and the moving party] has the heavy burden of establishing his entitlement to relief." *Giambria*, 33 M.J. at 335 (quoting *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928)) (additional citations omitted).

[43] At the Article 32 hearing and to a lesser degree at trial, civilian defense counsel's cross-examination of VC touches on these areas that the appellee

that the appellee was not "taken by surprise when the false testimony was given," and the military judge failed to evaluate how the appellee and his counsel were "unable to meet it or did not know of its falsity until after the trial." *United States v. Mazzanti*, 925 F.2d 1026, 1029 (7th Cir. 1991).

Consequently, absent specific findings of actual perjured testimony and evaluating any degree of awareness by the appellee and his counsel, we conclude that the military judge abused her discretion by ruling that VC's testimony at trial amounted to "perjury by omission" and therefore fraud on the court-martial. *Williams*, 37 M.J. at 356.

Conclusion

To now reward the appellee with a new trial after he chose to forego this evidence at trial would permit the very type of gamesmanship disfavored under R.C.M. 1210. *Fisiorek*, 43 M.J. at 247. R.C.M. 1210 does not envision relief simply because trial tactics fail. *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982). Accordingly, we hold that the military judge abused her discretion in concluding that these subsequent statements from VC, PV, and TM, along with VC's testimony at TG's trial constituted newly discovered evidence, or, in the alternative, fraud on the court-martial.

The appeal by the United States is granted. The ruling of military judge is vacated and the record of trial returned to the Judge Advocate General for further proceedings not inconsistent with this opinion.

Judge MCFARLANE and Judge MCDONALD concur.

For the Court

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now cites as evidence of perjury or perjury by omission. Some of the very examples cited in the defense motion for a new trial come during civilian defense counsel's cross-examination of VC either at the Article 32 hearing or at trial. In light of detailed defense counsel's subsequent concession that the defense team was aware of these facts, it is unclear why these questions were posed to VC when no attempt was made to impeach her following her misleading or untruthful answers.

R.H. TROIDL
Clerk of Court