

**IN THE UNITED STATES COAST GUARD  
COURT OF CRIMINAL APPEALS**

UNITED STATES,

Appellee

v.

Sam O. WEISER  
Electrician's Mate (E-4)  
U.S. Coast Guard,

Appellant

APPELLANT'S REPLY BRIEF

Dkt. 1469  
Case No. CGCMG 0375  
Before McClelland, Brubaker, and  
Havraneck

Tried at Norfolk, VA by General Court-  
Martial convened by the Commander,  
Coast Guard Atlantic Area, on 7-11  
January 2019.

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
COAST GUARD COURT OF CRIMINAL APPEALS**

COMES NOW Appellant, Electrician's Mate (EM3) Sam O. WEISER, to reply to the Government's Answer.

**I. The secondary material citations in EM3 Weiser's appellate brief are not extra-record citations and are not used to make factual assertions.**

The government cites three cases to argue this Court should not consider EM3 Weiser's arguments that cite to secondary material sources.<sup>1</sup> These cases - *United States v. Beatty*,<sup>2</sup> *United States v. Roderick*,<sup>3</sup> and *United States v. Holt*<sup>4</sup> - address the issue of what military appellate courts may consider when reviewing factual sufficiency and sentence appropriateness. "When

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<sup>1</sup> Appellee Br. at 12-13.

<sup>2</sup> 64 M.J. 456, 458 (C.A.A.F. 2007) (holding the lower court needed to make a determination as to whether they improperly considered testimony from a motions hearing or sentencing hearing in determining factual sufficiency).

<sup>3</sup> 62 M.J. 425, 431 (C.A.A.F. 2006) (holding the court incorrectly considered evidence for a purpose the trial judge did not allow when making a legal sufficiency determination)

<sup>4</sup> 58 M.J. 227, 232 (C.A.A.F. 2003) (holding the court incorrectly ignored the trial judge's instruction on certain evidence when completing factual sufficiency review and the result was the court had improperly considered extra-record evidence while determining guilt or innocence).

making determinations of guilt, innocence, and sentence appropriateness” appellate courts are precluded from considering “extra-record” citations.<sup>5</sup> In contrast, EM3 Weiser cites to secondary materials in the first assignment of error for ineffective assistance of counsel.<sup>6</sup> Whether EM3 Weiser’s defense counsel were ineffective is a question of law, not a question of fact, and EM3 Weiser is not asking the Court to rely on those assertions to overturn the case on factual sufficiency. These cases do not support the government’s argument that the secondary materials should be ignored.

There is no reason this Court cannot consider secondary materials in deciding issues of legal error. Secondary materials are not binding on the Court, but may be used persuasively.<sup>7</sup> The secondary materials support the argument EM3 Weiser’s trial defense counsel would have sought certain evidence if they had performed a reasonable investigation, relying on information in secondary materials that are gleaned from case law itself. It is difficult to prove a negative. But because trial defense counsel erred from what they failed to do, reference to secondary materials is required as they demonstrate the complicated nature of the evidence and why an expert toxicologist or forensic psychologist was necessary.<sup>8</sup>

To the extent there is a dispute over the necessity of expert testimony or consultation at EM3 Weiser’s trial, at the very least this Court can (and should) order a *Dubay* hearing to further develop the facts and resolve that dispute.

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<sup>5</sup> *Holt*, 58 M.J. at 232; *see also Beatty*, 64 M.J. at 458, *Roderick*, 62 M.J. at 431.

<sup>6</sup> Appellant Br. at 16-17.

<sup>7</sup> *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999) (citing *United States v. Kelly*, 39 M.J. 235, 238 (C.A.A.F. 1994)).

<sup>8</sup> Appellant Br. at 16-17.

**II. Trial Defense Counsels' performance was deficient because they failed to complete a thorough investigation that reasonably developed a mistake of fact defense or prepared them for cross-examination.**

- A. The government's assertion that there was a reasonable trial strategy lacks merit because EM3 Weiser's trial defense counsel adopted an unreasonable trial strategy without thorough investigation and proper preparation.

The government argues that trial defense counsel made a reasonable strategic decision not to seek expert toxicologist assistance because they "believed the uncertainty could add to the reasonable doubt the members may have had about Appellant's guilt."<sup>9</sup> But trial defense counsel made this strategic decision without conducting a thorough and reasonable investigation. If trial defense counsel had consulted an expert, they would have realized how such evidence could be useful in attacking LTJG [REDACTED] credibility and supporting EM3 Weiser's mistake of fact defense.

LTJG [REDACTED] memory was a crucial issue in the case. Both a forensic toxicologist and psychologist were necessary. A forensic toxicologist could have explained, to either trial defense counsel or the members, LTJG [REDACTED] blood alcohol content (BAC) and how that played a role in her memory.<sup>10</sup> A forensic psychologist was necessary to explain how LTJG [REDACTED] may have been acting normal at intermittent periods, despite her lack of memory, which would have corroborated EM3 Weiser's reasonable belief that she was consenting.<sup>11</sup> Trial defense counsel did not seek consultation to weigh the benefits of such evidence despite the importance of LTJG [REDACTED] memory. Instead they went to trial not knowing exactly how alcohol played an impact in

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<sup>9</sup> Appellee Br. at 14.

<sup>10</sup> See *United States v. Tillman*, No. 20160449, 2019 WL 453505 at \*2-3 (A. Ct. Crim. App. Jan 31, 2019).

<sup>11</sup> See *United States v. Clark*, No. 201400232, 2015 WL 4239924 at \*3-4 (N-M. Ct. Crim. App. July 14, 2014) (providing testimony from a forensic psychologist which demonstrates that a forensic psychologist could testify to whether a person is suffering from memory fragmentation but still able to function, move, and communicate).

the case or what evidence could be used to make a mistake of fact defense.<sup>12</sup> It is unreasonable that trial defense counsel did not at least investigate a mistake of fact defense.

The government cites *United States v. Roberts*, but that case is distinguishable.<sup>13</sup> In *Roberts*, the victim testified she was passed-out during the assault and the assailant stopped when she woke-up.<sup>14</sup> Therefore, photographs in *Roberts* corroborated the victim's testimony that she was not awake during the assault.<sup>15</sup> In this case, the photographs depict LTJG [REDACTED] as asleep before and after the sexual act, but all parties agree that during the penetration she was awake, aware, and able to consent.<sup>16</sup>

The *Roberts* defense counsel was faced with a "rock and a hard place choice."<sup>17</sup> Using a forensic psychologist would have constrained the defense counsels' theory. The defense had to either concede that Xanax affected the victim, thereby corroborating that photos showed she was asleep during the sex act, or argue that she was not impaired during sexual activity.<sup>18</sup>

But EM3 Weiser's trial defense counsel did not face such a choice. Using a forensic psychologist or toxicologist consultation or testimony would not have conceded an issue or bolstered LTJG [REDACTED] testimony. Here, trial defense counsel needed to consult with experts because there was a way to attack the photos (unlike in *Roberts* where there was no way to reasonably attack the photos).<sup>19</sup> Evidence that lack of memory does not equate to lack of

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<sup>12</sup> R at 805.

<sup>13</sup> No. 20150023, 2019 WL 6792460 at \*4 (A. Ct. Crim. App. 2019).

<sup>14</sup> *Roberts*, 2019 WL 6792460, at \*2.

<sup>15</sup> *Roberts*, 2019 WL 6792460, at \*3.

<sup>16</sup> R. at 783-84.

<sup>17</sup> *Roberts*, 2019 WL 6792460, at \*5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

consent, or that people impacted by alcohol can act normally at intermittent periods, would have given trial defense counsel an avenue to present a mistake of fact defense. This theory needed to be investigated before trial, and before adopting a single strategy that LTJG █████ was simply lying about consent.<sup>20</sup>

To be clear, trial defense counsel's strategy *might* not have been deficient after a reasonable investigation and consultation with experts. But even if trial defense counsel ultimately decided to stay with the theory that LTJG █████ was lying about consent, trial defense counsel still needed to educate themselves about how alcohol likely impacted LTJG █████ memory before attacking her credibility at trial.<sup>21</sup> Without expert advice, trial defense counsel's cross-examination on the credibility of her memory loss was less effective. For example, during cross examination trial defense counsel got LTJG █████ to admit she only had about six alcoholic drinks over four hours.<sup>22</sup> But without expert testimony to show her lack of memory was not likely without drinking far more heavily, his closing argument fell flat. His point that LTJG █████ might have been awake and participating in foreplay with EM3 Weiser when the photos were taken was simply an assertion without evidence to support it.<sup>23</sup> Without consulting experts, trial defense counsel were unprepared like the counsel in *United States v. Datavs*.<sup>24</sup> The Air Force Court of Appeals' decision is persuasive: like the counsel there, EM3 Weiser's counsel went to trial blind and unprepared to attack the critical witness's testimony.<sup>25</sup>

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<sup>20</sup> *United States v. Scott*, 24 M.J. 186, 192 (C.A.A.F. 1987) (reasoning trial defense counsel have a duty to conduct a reasonable investigation).

<sup>21</sup> *Id.*

<sup>22</sup> Gov. Mot. To Attach, Ex. 1.

<sup>23</sup> R at 801.

<sup>24</sup> 70 M.J. 595, 600 (A.F. Ct. Crim. App. 2011).

<sup>25</sup> *Id.*; *United States v. Datavs*, 71 M.J. 420, 425 (C.A.A.F. 2012).

B. The affidavit from trial defense counsel does not address the issue of a forensic psychologist.

While the government provided an affidavit from trial defense counsel regarding his decision not to seek a forensic toxicologist, it fails to address why trial defense counsel never sought a forensic psychologist.<sup>26</sup> The affidavit asserts trial defense counsel's strategy was to argue LTJG ■■■ was lying to avoid punishment, she did consent, and that expert testimony would have undermined favorable evidence from the taxi driver that impeached her testimony.<sup>27</sup> The affidavit suggests trial defense counsel did not even consider investigating evidence for a mistake of fact defense, or how the taxi driver's testimony would have been useful even if LTJG ■■■ was intoxicated enough to have memory loss.<sup>28</sup>

A forensic psychologist's testimony may have been compelling corroboration of the taxi driver's statement that LTJG ■■■ appeared sober. It could have strengthened EM3 Weiser's argument that his mistake of fact was reasonable because LTJG ■■■ appeared sober enough it did not impact her consent even if she actually was not. Such a decision was not contradictory to trial defense counsel's claim, post-trial, that he was trying to paint LTJG ■■■ as lying about her lack of memory.<sup>29</sup> Moreover, a consultation with a forensic psychologist would have revealed how alcohol's impact on memory played a role in LTJG ■■■ belief about her consent that evening. Even if trial defense counsel understood memory loss and blackouts from other cases, consultation with an expert in *this* case was still needed. While trial defense counsel may have

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<sup>26</sup> Gov. Mot. To Attach, Ex. 1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

ultimately decided not to call the expert to testify, failing to investigate this option before choosing a trial strategy was unreasonable and deficient.

C. Trial defense counsel's deficient performance prejudiced EM3 Weiser.

Trial defense counsel's deficient performance was prejudicial because of how the government used the photos at trial. One of the best ways to combat the evidence was to use expert forensic psychologist testimony to show LTJG █████ could still behave normally at intermittent periods while affected by alcohol.<sup>30</sup> The trial defense counsel could also have used a toxicologist to show her BAC was likely low enough to corroborate EM3 Weiser's statements that he believed she was not that drunk, she was awake, and she was consenting during the penetration.<sup>31</sup> Such evidence would support the defense's theory that during the eight-minute period when there are no photographs of LTJG █████ face, but the penetration occurred, she was reasonably appearing to consent.<sup>32</sup>

The government's entire prejudice argument, in fact, focuses on these photographs as "overwhelming" evidence of guilt.<sup>33</sup> That is precisely the point: given the critical nature of the photos where LTJG █████ appears to be sleeping, trial defense counsel had to be prepared with testimony or cross-examination that exposed LTJG █████ lack of memory as feigned. An expert witness, or even consultation, was critical.

Trial defense counsel's affidavit does not properly address the photographs, how the penetration could have been consensual, or how there could have been a reasonable mistake of

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<sup>30</sup> *United States v. Clark*, No. 201400232, 2015 WL 4239924 at \* 3-4 (A. Ct. Crim. App. Jan. 31, 2019) (quoting forensic psychologist testimony).

<sup>31</sup> R. at 515-16 (explaining that during penetration she was awake and consenting).

<sup>32</sup> Pros. Ex. 14-21

<sup>33</sup> Appellee Br. at 18-19.





intoxicated that evening and he was not sure when he took the photos.<sup>45</sup> Additionally, LTJG [REDACTED] own testimony corroborates him. She agreed she was awake and aware during the penetration and sexual activity.<sup>46</sup> She was able to tell EM3 Weiser when she wanted to stop.<sup>47</sup> This corroborates EM3 Weiser's testimony that she was awake during sexual activity and that he stopped when she asked him to stop.<sup>48</sup>

The specification is legally and factually insufficient because the government has not disproven the reasonable mistake of fact defense, as LTJG [REDACTED] confirmed. The photos from before and after the penetration may be relevant, but LTJG [REDACTED] testimony matches what EM3 Weiser said happened. He reasonably believed he was consenting and stopped when she told him to stop. Whether under factual or legal sufficiency, the conviction should be set aside.

[REDACTED]

LT, USCG  
Appellate Defense Counsel  
1254 Charles Morris Street SE  
Bldg. 58, Suite 100  
Washington Navy Yard, DC 20374

[REDACTED]

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<sup>45</sup> R. at 500, 522, 525, 536.

<sup>46</sup> R. at 277-78.

<sup>47</sup> *Id.*

<sup>48</sup> R. at 515-16.

**Certificate of Filing and Service**

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via email on March 17, 2020.



LT, USCG  
Appellate Defense Counsel  
1254 Charles Morris Street SE  
Bldg. 58, Suite 100  
Washington Navy Yard, DC 20374

