**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**
**WASHINGTON NAVY YARD**
**WASHINGTON, D.C.**

**BEFORE**

**J.W. ROLPH** **D.A. WAGNER** **E.B. STONE**

**UNITED STATES**

**v.**

**Jose R. CABRERA-FRATTINI**
**Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200201665 Decided 2 August 2006

Sentence adjudged 25 January 2002. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot, Parris Island, SC.

LT J.L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
Capt BRIAN KELLER, USMC, Appellate Government Counsel



WAGNER, Senior Judge:

The appellant was convicted, contrary to his pleas, by officer and enlisted members sitting as a general court-martial, of carnal knowledge and committing an indecent act with a minor, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The members sentenced the appellant to a dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1, and confinement for three years. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's seven assignments of error, the Government's answer, and the additional matters attached by the Government. We agree with the appellant's second assignment of error that the military judge erred in finding a key Government witness unavailable based on the facts presented by the Government and subsequently admitting the videotaped deposition of that witness in violation of the Confrontation Clause of the Sixth Amendment. Because of our

resolution of this assignment of error in the appellant's favor, we need not address the remaining six assignments of error.

**Background of the Case**

The charges against the appellant arose from his alleged sexual involvement with a minor, TO. TO did not testify at the Article 32, UCMJ, hearing. Following referral of charges, the defense requested that the convening authority order an oral deposition of TO in order to preserve her testimony at trial and because the defense had been unsuccessful in its attempts to interview her. The convening authority denied the request. In the initial stages of the trial, the defense raised a motion for a new Article 32, UCMJ, investigation and complained to the military judge that the defense team had been denied access to TO in preparing for trial, citing the denial of their request to orally depose her. The military judge found the Article 32, UCMJ, investigation to be in substantial compliance with RULE FOR COURTS-MARTIAL 405, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), but ordered an oral deposition of TO so that the defense would have the opportunity to cross examine the key Government witness prior to trial. The military judge also ordered the Article 32, UCMJ, investigation reopened for the limited purpose of considering the transcript of that deposition.

On 13 November 2001, a videotaped deposition of TO was conducted. During her description of the allegations during the deposition, TO testified that she was drinking and had problems remembering the events, but did recall telling the appellant her age, twelve years old, and recalled thereafter engaging in sexual intercourse with him, at times in the presence of others. TO was cross-examined by the trial defense counsel.

The appellant's trial was scheduled to begin on 10 December 2001. TO and her mother had been issued subpoenas and travel arrangements had been made. On 7 December, the Government was notified that TO had been hospitalized on 4 December and would not be available for trial before the end of the month. The Government thereafter raised a motion *in limine* to allow the introduction of the videotaped deposition of TO into evidence in lieu of producing her to testify at trial. The defense opposed the motion, citing the appellant's Sixth Amendment right to confrontation. The Government argued that TO was unavailable to testify due to mental illness or infirmity under MILITARY RULE OF EVIDENCE 804(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), and that the deposition should be admitted as former testimony under MIL. R. EVID. 804(b)(1) or, alternatively, under the residual hearsay exception, MIL. R. EVID. 807.

The evidence supporting the Government's position regarding unavailability consisted of the testimony of Dr. B, a civilian psychiatrist who described herself as the "tending physician" for TO during her hospitalization, and the hospital records from that period of hospitalization. Record at 174. At an Article 39(a),

UCMJ, session held on 22 January 2002, Dr. B testified that she had first met TO on 5 December 2001, the day after TO had been admitted to the hospital. Dr. B testified that TO was admitted based on the recommendation of TO's outpatient therapist, who sensed a deterioration in her mental condition during sessions. Dr. B diagnosed TO as having bipolar-2 disorder (rapid cycling), as well as post-traumatic stress disorder. Dr. B testified that both mental disorders were Axis I issues, classified as mental illnesses that can be effectively treated. Dr. B started TO on medication to treat her disorders.

Dr. B testified that persons with bipolar disorder have difficulty managing their moods and that "life stressors" make that even more difficult.[1] Record at 177. According to Dr. B's testimony, TO told her that she had she cut her hand trying to commit suicide in August 2001, but did not tell anyone. Dr B testified that her staff had taken a clinical history from TO's family that revealed a suicide gesture where TO put a plastic bag over her head, increased difficulty sleeping and concentrating, dropping school grades, fighting on the school bus, irritable behavior and racing moods and thoughts. Dr. B also testified that the antidepressants previously prescribed for TO were not the correct treatment for her disorder and may have exacerbated her symptoms.

When asked whether the issue of TO testifying was discussed, Dr. B replied that it had been, and stated that: "[TO] focused on that as though that was part of why she couldn't go on living. It would be better to be dead. I don't want to go back to court. I'm so tired of all of this." Record at 179. Dr. B testified that it appeared as though TO felt that she did not want to be bothered with the trial and depositions and that, if she had "to go back there, I don't have a life." *Id*. Dr. B finished her direct testimony by stating that, in her opinion, it would be detrimental to TO for her to testify in court.

During cross-examination, Dr. B admitted that she had never seen TO before 5 December 2001 and that her review of TO's history had come from the hospital's assessment staff. Dr. B also stated that she had not reviewed TO's prior medical records or talked to her prior physicians. She further testified that TO was coherent, of average intelligence, and not suffering hallucinations. Additionally, Dr. B indicated that she had spent 30 minutes with TO on 5 December 2001 and about 15 minutes reviewing assessment records. Dr B. testified that she would have seen TO "for about 15-30 minutes" each weekday thereafter (6, 7, and 10 December were weekdays) and that a "substitute doctor" would have seen TO on the weekends. Record at 183. Dr. B also testified that she held staff meeting three times a week to share

[1] Dr. B testified that it was the bipolar disorder alone that impacted on TO's ability to appear in court without harm to herself and that the post-traumatic stress disorder played no role in that determination.

information with social workers, nurses, and therapists regarding the patients.

Dr. B testified that the hospital assessment staff had recorded in the hospital records TO's description of her involvement with the appellant as having been "gang-raped" by "four to six Marine officers." Record at 186. Dr. B also testified that the records indicated that TO had told her staff that she had, on more than one occasion, consumed alcohol and engaged in consensual sexual encounters with a number of Marines. Dr. B also stated that she had never spoken with TO's mother, although her assessment staff had. Dr. B testified that TO was subject to other life stressors resulting from her family life, stating that TO had "a lot of them." Record at 190. Dr. B also recounted that TO was released from the hospital after five days, because she was no longer suicidal and her treatment could continue on an outpatient basis. Dr. B recommended that she begin treatment with a particular therapist and had not seen TO, or followed up on her in any way, since her discharge from the hospital.

Dr. B testified that, in her opinion, it would be possible, but doubtful, that TO's condition had improved dramatically since her discharge and that her treatment would be long-term in nature. Record at 192. She testified that, statistically, patients with such a disorder would not stabilize for 6 to 12 months. Dr. B specifically stated that nothing in her diagnosis would cause TO to be unable to testify in court. However, during the course of cross-examination, Dr. B stated: "I know she could come into court and do very poorly and that's why I am here on her behalf so that she does not come to court." Record at 202. Dr. B testified that she believed TO would be "about 18 to 25 years old before she will be in any way able to master this." Record at 198.

Dr. B testified that TO was suffering a "chronic psychiatric illness." Record at 203. She testified: “You can do a lot of things to make your bi-polar disorder worse. In my opinion one of them would be for her to have a more stressful life with court. It is very stressful coming to court. I find it stressful.”

*Id*. When asked about utilizing measures such as remote live testimony to reduce the stress on TO, Dr. B replied that she would still not recommend it. Dr B admitted that such a procedure would reduce the stress, but added, "Does it reduce the stress to the point that I think it is a value to my patient, no." *Id*. Dr. B emphasized that talking about the events, in her opinion, would be therapeutic for TO when she is 18 to 25 years of age.

Dr. B stated that, in her opinion, TO was suffering from an ongoing mental illness, that the treatment would be protracted, and that the harm from her testifying in court would be more than *de minimis*. She stated that "it would be a major, over-

stimulating event that could be predictably associated with either a repeat suicide attempt or a repeat psychiatric hospitalization." Record at 208. Dr. B testified that TO receiving her subpoena to appear as a witness in court was a contributing factor in her hospitalization. In a 4 December 2001 entry into TO's record of treatment, Dr. B wrote, "Patient was only going to have to give depositions, however, now it appears she will have to attend the court proceedings." AE XLI at 10.

The military judge found "that it would be detrimental to [TO]'s mental and physical health now and in the foreseeable future to testify..." and that "[a]ny court appearance would retraumatize [TO] and would worsen her mental and physical health to include her possible suicide." Record at 230-31. Having found her unavailable, the military judge went on to admit the videotaped deposition, both as former testimony and under the residual hearsay exception, finding that the right to confrontation was satisfied by the appellant's presence and trial defense counsel's participation in the deposition.

**Admission of the Videotaped Deposition of the Witness**

**1. Standard of Review.**

We review a military judge's decision to admit evidence over defense objection for an abuse of discretion. *United States v. Mason*, 59 M.J. 416, 420 (C.A.A.F. 2004)(citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). We will not overturn the military judge's ruling unless it was "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)). We are required to consider the evidence in the light most favorable to the prevailing party. *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996). While we are bound by the military judge's findings of fact unless they are shown to be clearly erroneous, we review the military judge's conclusions of law *de novo*. *Mason,* 59 M.J. at 422 (citing *United States v. Cravens*, 56 M.J. 370, 375 (C.A.A.F. 2002) and *United States v. Allen*, 53 M.J. 402, 408 (C.A.A.F. 2000)); *Ayala*, 43 M.J. at 298 (citing *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993) and *United States v. Mejia*, 953 F.2d 461, 464-65 (9th Cir. 1991)).

Our superior court has applied the foregoing standard of review to a military judge's determination of unavailability of a declarant. *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986)(citing *United States v. Faison*, 679 F.2d 292 (3d Cir. 1982)). The United States Courts of Appeal define this standard as giving "the presumption of correctness" to "basic, primary or historical facts," but reviewing de novo the issue of whether the standards established by the Constitution and the courts to determine unavailability have been met. *McCandless v. Vaughn*, 172 F.3d 255, 265 (3d Cir. 1999)(citing *Martinez v. Sullivan,* 881 F.2d 921, 926 (10th Cir. 1989); *Burns v. Clusen*, 798 F.2d 931,

941-42 (7th Cir. 1986); and *Dres v. Campoy*, 784 F.2d 996, 998 (9th Cir. 1986)).

**2. Military Rules of Evidence.**

The Military Rules of Evidence regarding hearsay statements, like their Federal counterpart, flow from the Sixth Amendment and generally prohibit the use of hearsay evidence. MIL. R. EVID. 802. The rules allow for the introduction of hearsay evidence under the conditions and exceptions enumerated in MIL. R. EVID. 803 and 804. Specifically, the rules permit the admission into evidence of former testimony in lieu of the personal appearance of the witness if the witness is unavailable and the former testimony was given in:

> a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

MIL. R. EVID. 804(b)(1). MIL. R. EVID. 804(a)(4) defines "unavailability as a witness" to include a person who is unable to testify because of then-existing physical or mental illness or infirmity.

**3. Right to Confrontation.**

There is no dispute that the deposition was properly ordered and conducted, and the appellant had ample and full opportunity to cross-exam TO, with a view toward the deposition's possible later use at trial. The sole issue in contention is whether the evidence adduced during the Government's motion to admit the videotaped deposition was sufficient to show that TO was unavailable and, thus, sufficient to protect the appellant's right to confrontation.

There is ample precedent for finding a witness, even a critical one, unavailable where the act of testifying in court is determined to be detrimental to the witness' physical or mental well-being. For example, the infirmity of an elderly witness that prevents the witness from traveling is an "exceptional circumstance" that can support the admission of deposition testimony at trial. *United States v. Keithan*, 751 F.2d 9 (1st Cir. 1984). Also, a witness unable to travel because of tuberculosis has been found to be unavailable, even though the witness may recover at some point in the future. *Howard v. Sigler,* 454 F.2d 115 (8th Cir. 1972).

The Supreme Court, however, characterizes the right to confrontation as a "bedrock procedural guarantee." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). Historically in Anglo-Saxon law, the right to confront witnesses has been seen as a "face-to-

face" in-court confrontation, combined with a meaningful opportunity to cross-examine the witness. *Id*. As the *Crawford* court observed, the common law that served as a starting point for the drafters of the Constitution conditioned admissibility of an absent witness's testimonial statement on unavailability and a prior opportunity to cross-examine. The Court went on to conclude that the Sixth Amendment, therefore, incorporated those limitations. *Id*. at 54. This is borne out by "numerous early state-court decisions" that made such an incorporation "abundantly clear." *Id*. The court therefore concluded that the confrontation clause demands "what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

In a case that preceded *Crawford*, the Court of Appeals for the Armed Forces stated:

> The confrontation clause of the sixth amendment requires the Government to demonstrate that the declarant is unavailable when it seeks to admit a deposition against an accused at a criminal trial in the place of live testimony.

*Cokeley*, 22 M.J. at 228 (citing *United States v. Inadi*, 475 U.S. 387 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *United States v. Crockett*, 21 M.J. 423 (C.M.A.1986)). The court described this test as being "whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness." *Id.*

The courts, generally, have expressed a strong preference, grounded in the Sixth Amendment, for live testimony at trial in a criminal case. "[T]rial by deposition violates both the literal language and the purpose of the Confrontation Clause...." *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993). In striking down a Kentucky procedure allowing depositions in lieu of live testimony they termed "easier and more efficient in terms of judicial and prosecutorial administration," the United States Court of Appeals for the Sixth Circuit stated that, while the procedure "may offer the same reliability that we require in civil cases," a "deposition is a weak substitute for live testimony, a substitute that the Sixth Amendment does not countenance on a routine basis." *Id*. That court went on to state that "[t]he Constitution does not allow us to so water down the explicit requirement of live testimony in criminal cases." *Id*.

The military courts have adopted similarly strong language in addressing confrontation issues: "[I]n order for out-of-court statements to be admissible under the Confrontation Clause, it is preferable for face-to-face confrontation to occur at trial." *United States v. Hines*, 23 M.J. 125, 131 (C.M.A. 1986). In a case where our superior court upheld the admission of an excited utterance by a child victim, they again reinforced the stringent

standards that guarantee the right of confrontation: "Let there be no doubt, however, that this Court favors confrontation, and this case should be read very narrowly." *United States v. Arnold*, 25 M.J. 129, 133 (C.M.A. 1987). *See also*, *United States v. Dill*, 24 M.J. 386, 387 (C.M.A. 1987)("We have emphasized that an accused ordinarily has a right under the Sixth Amendment to the Constitution 'to be confronted with the witnesses against him.'" *Hines* at 23 M.J. at 127).

The military courts have been equally clear in placing a heavy burden on the prosecution in making witnesses available for live testimony at trial: "[W]e have been quite insistent that the Government exhaust every means to secure the preferred live testimony before utilizing an out-of-court declaration." *Hines*, 23 M.J. at 133. Our superior court has termed this burden as "the prosecution's 'obligation . . . to exert all reasonable measures to acquire the presence of . . . [its] witnesses and tender them for cross-examination.'" *Dill*, 24 M.J. at 388 (quoting *Hines*, 23 M.J. at 133). This obligation is firmly rooted in military jurisprudence: "[W]e have been quite insistent that all reasonable means of obtaining crucial witnesses' presence be undertaken before we will consider approving substitutes." *United States v. Barror*, 23 M.J. 370, 373 (C.M.A. 1987).

The Courts of Appeal have also uniformly held that the burden of proof of the unavailability of the witness on the party offering the deposition is a heavy one. The proponent must "make stringent efforts to show that a declarant is unavailable." *Burns*, 798 F.2d at 936-37 (citing *Barber v. Page*, 390 U.S. 719 (1968)). These efforts must be made in a good faith attempt to produce the witness. *Id*. The lengths to which the proponent must go to produce a witness is a question of reasonableness. *California v. Green*, 399 U.S. 149, 189 (1970). If there is a possibility, however, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. *Roberts*, 448 U.S. at 74.

The reasonableness of the prosecution's efforts "must be evaluated with a sensitivity to the surrounding circumstances and the defendant's interest in confronting the absent witness." *McCandless*, 172 F.3d at 266. More diligent efforts are required where the declarant is a critical witness, especially one whose interests are in unison with the prosecution. *Id*. *See United States v. Foster*, 300 U.S. App. D.C. 78, 986 F.2d 541, 543 (D.C. Cir. 1993)("The more important the witness to the government's case, the more important the defendant's right, derived from the Confrontation Clause of the Sixth Amendment"); *United States v. Lynch*, 499 F.2d 1011, 1022 (D.C. Cir. 1974) (holding Confrontation Clause considerations "are especially cogent when the testimony of a witness is critical to the prosecution's case against the defendant."); *United States v. A&S Council Oil Co.*, 947 F.2d 1128, 1133 (4th Cir. 1991) ("Where [a case] involves the government's most crucial witness, the [Confrontation Clause]

concerns are especially heightened."); *United States v. Quinn*, 901 F.2d 522, 529 (6th Cir. 1990).

Ultimately, it is the military judge who must sift through the facts, apply the law, and make the determination. In doing so, he or she is faced with a daunting task. The military judge must carefully weigh all facts and circumstances of the case, keeping in mind the preference for live testimony. Factors to be considered include the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay. *Cokeley*, 22 M.J. at 229. Also, in making such a determination, the military judge must ensure that the information supporting the unavailability is neither "sparse" nor "stale." *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987).

But it is important to remember that the consideration of these factors is not a balancing test, for the proponent bears the burden of demonstrating unavailability in the face of the strong preference for live testimony. *Cokeley,* 22 M.J. at 228 (citing *Inadi*, *Roberts,* and *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986)).

In *Cokeley*, our superior court addressed a similar fact pattern involving the admission into evidence of a deposition of a key Government witness in place of the live testimony of the witness at trial. In finding an abuse of discretion in the determination of unavailability at trial, the court stated that the military judge "did not articulate that he weighed the relevant considerations." *Cokeley*, 22 M.J. at 229. The court also noted that the testimony of the witness was more than "merely cumulative or of a minor nature but was absolutely necessary to prove that a crime had been committed and to describe the assailant." *Id*.

Additionally, the need to consider the witness' infirmity <u>at the time of trial</u> has been found to be a critical factor in unavailability determinations. *Id*. at 230; *Burns*, 798 F.2d at 936-937; *Jones v. Nabisco, Inc.*, 95 F.R.D. 25, 26 (E.D. Tenn. 1982). This is buttressed by the language of MIL. R. EVID. 804(a)(4) that the witness is unable to be present "because of death or *then existing* physical or mental illness or infirmity...." (emphasis added). In *Burns*, for example, the trial court found a witness was unavailable based on a physician's testimony at a hearing held two months after the last contact with the witness. The appellate court found that the trial court erred in basing its ruling on stale information, and by requiring the defendant to show that the witness was available. The *Burns* court stressed that the government was required to make "stringent efforts to show that [the witness] was unavailable." *Id*. at 942.

Applying the foregoing to the facts of this case, we conclude that the military judge erred in finding TO unavailable based solely on the evidence presented by the Government. The deposition was the critical piece of evidence directly identifying the appellant as the person with whom TO was engaged in sexual intercourse on the evening in question. In short, the verdict rested almost completely on TO's deposed testimony. As such, her unavailability required greater scrutiny.

We do not quibble with the qualifications of Dr. B, or her diagnosis that TO was suffering from a serious mental illness in December 2001 that would likely demand years of medication and therapy to control. We note, however, that Dr. B admitted that it was possible, but doubtful, that TO had improved dramatically enough over the 44 days since she had last seen her to be able to testify at trial. Record at 192. While Dr. B's strong opinion was that such a rapid recovery would not have occurred, it would have been a relatively simple process for the Government to have updated Dr. B's prognosis with a statement from the treating therapist or to have had Dr. B contact TO to update her prognosis personally. Despite Dr. B's opinion, based on considerable medical acumen and reliable statistics, we are not persuaded on the basis of the record before us that, on the date of trial, TO was unavailable to testify.

Also, the tone and tenor of Dr. B's testimony reveals her zealous advocacy on behalf of TO, an admirable quality to be expected from a treating physician. To eliminate the possibility of any natural bias, however, resulting from the doctor-patient relationship, an independent medical opinion from a court-appointed doctor would have been of great benefit to the military judge in this case. *See Warren v. United States*, 436 A.2d 821, 829 (D.C. 1981).

The Government presented no statement from TO regarding her fear of testifying, nor was there any statement from TO's mother, who was, apparently, available as a witness on the motion if the Government had called her.[2] Such testimony would have gone a long way toward answering any question as to whether the court was dealing with an otherwise cooperative witness who could not testify because of her mental condition or an uncooperative witness shielding herself from the uncomfortable duty of testifying by wrapping herself in her admittedly serious mental infirmity. While these are difficult questions to ask of a child witness, they are, in our minds, absolutely necessary for the Government to show that it has put forth its best efforts to secure the appellant's right to confrontation.

[2] The dissent states in part that TO's mother's input "was already clearly on the record." We are only able to find one reference by the trial counsel to TO's mother asking that they not telephone the house any more because TO is afraid it is about travel arrangements to the trial. Record at 147.

Additionally, the Government did not pursue another avenue potentially available to satisfy the appellant's right to confrontation. Although the issue of remote live testimony was broached by civilian trial defense counsel during argument on the motion and cross-examination of Dr. B, the military judge did not reference R.C.M. 914A, MIL. R. EVID. 611(d), or *Maryland v. Craig*, 497 U.S. 836 (1990). Nor did he make any specific findings regarding the availability of alternate forms of live testimony in lieu of accepting the videotaped deposition into evidence. In *Craig*, the Supreme Court addressed the use of remote closed-circuit television to allow a child victim in a sexual abuse case to testify contemporaneously during the trial, be subject to cross-examination, be observed by the accused and the trier of fact, but to not have to experience the trauma of appearing in the courtroom itself, full of court personnel, spectators, and the person who allegedly abused her.

In considering the right of confrontation, the Court in *Craig* stated that it had never held that the Confrontation Clause "guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Craig,* 497 U.S. at 844. The Court went on to emphasize that this right guarantees that each witness provides testimony under oath, thus impressing upon them the "seriousness of the matter" and preventing false statements because of the potential for a perjury conviction; forcing each witness to submit to cross-examination, "the 'greatest legal engine ever invented for the discovery of truth'"; and permitting the trier of fact to "observe the demeanor of the witness" and thus assess credibility. *Id.* at 845-46 (quoting *California v. Green*, 399 U.S. 149, 158 (1970).

In recognizing that there is a compelling interest in protecting minor victims of sexual abuse from further trauma and embarrassment, the Court concluded that the "interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id*. at 853. This mode of presentation of evidence is specifically recognized in military practice in R.C.M. 914A and MIL. R. EVID. 611(d). Military judges are authorized to allow child victims of sexual abuse to utilize remote live testimony where the child is unable to testify because, among other reasons, the child witness "suffers from a mental or other infirmity." MIL. R. EVID. 611(d). The military judge should have demanded that the Government fully explore this reasonable and available option for live testimony before admitting the deposition into evidence.

We view the determination of unavailability of a witness at trial as a prerequisite to introducing alternative forms of evidence such as depositions as requiring more than the moving party demonstrating the existence of an obstacle, even a compelling one, to the production of the live witness at trial. The moving party's burden must include adequate efforts to

overcome that obstacle, such as a showing that invitational travel orders have been issued to a witness outside the effective range of service of process. Similarly, in the case before us, much was left unknown or undone by the moving party in establishing that the obstacles preventing TO from testifying at trial could not have been overcome.

We do not, as the dissent would contend, require the Government to "do everything humanly possible" to produce a live witness at trial. We simply demand what the law compels -- that all reasonable means of obtaining a key witnesses' presence be considered before allowing the use of a substitute for live, in-court testimony. *Barror*, 23 M.J. at 373. In this case, the Government did not "exhaust every means to secure the preferred live testimony before utilizing an out-of-court declaration." *Hines*, 23 M.J. at 133.

The dissent refers to the evidence presented by the Government on the issue of unavailability as "unrebutted" and not refuted. There is no burden on the appellant to present evidence of any kind on this issue. The burden is wholly on the Government as the proponent of the deposition. *Cokeley*, 22 M.J. at 229. The dissent's reliance on *United States v. Cordero*, 22 M.J. 216, 221 (C.M.A. 1986) to support the proposition that the defense has a burden to rebut the Government's evidence is misplaced. In *Cordero,* the Government had demonstrated the witness's unavailability by showing that the witness had disregarded the subpoena issued to her and had fled the country without providing any information as to her whereabouts. *Id.* In that case, the Government had unequivocally demonstrated unavailability of the witness at the time of trial and there were no readily apparent alternative methods of producing her for trial. The court in *Cordero* was simply stating the obvious, that, once unavailability is firmly established, the only way to overcome that determination is for the appellant to demonstrate that the witness could be produced. In the present case, the Government failed to provide a sufficient showing of unavailability and there was much more that the Government could have done in an effort to produce TO.

Our decision in this case is fact-specific. The record before the court does not contain sufficient evidence of Government efforts to obtain the witness at the time of trial to overcome the heavy burden demanded by the appellant's right to confrontation. Accordingly, we conclude that the record before us is not sufficient to meet the Government's burden to show that TO was unavailable to testify at the time of trial, we further conclude that the military judge abused his discretion in admitting the videotaped deposition based on the facts before him.

**4. Prejudice**

In addition to the videotaped deposition of TO, the Government evidence against the appellant included two witnesses

who testified that the appellant was aware of TO's age at the time of the alleged offenses. The Government also presented the testimony of Private M that he had walked in and saw TO on top of, and appearing to be having sexual intercourse with, a "black person" and that the appellant was the only "colored person" at his residence at the time. Record at 292-93. The Government played the videotaped deposition of TO to the members and the appellant, through counsel, requested that the cross-examination portion of the deposition not be played.

Where an error of constitutional dimension is involved, this court may only affirm if the error is found to be "harmless beyond a reasonable doubt." *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004)(quoting *Chapman v. California,* 386 U.S. 18, 24 (1967)). The court in *Simmons* also defined the harmless error inquiry under the *Chapman* analysis as whether it is "'beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained.'" *Id.* (quoting *Neder v. United States,* 527 U.S. 1, 15 (1999)).

In *Arizona v. Fulminante,* 499 U.S. 279, 296 (1991), the Court made it clear that the Government has the burden of establishing that an error did not contribute to the conviction. In that case, the Court found that, without the confessions, it was "unlikely that Fulminante would have been prosecuted at all, because the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict." *Id*. at 297. The Court also found that the confessions influenced the sentencing phase of the trial. *Id*. at 301.

Our superior court has described its focus in applying the *Chapman* harmless error analysis as "whether the error had or reasonably may have had an effect upon the members' findings." *United States v. Bins,* 43 M.J. 79, 86 (C.A.A.F. 1995). We cannot affirm findings in a case involving constitutional error "unless we determine beyond a reasonable doubt that the error did not contribute to the findings of guilty." *United States v. Hall,* 58 M.J. 90, 94 (C.A.A.F. 2003).

The videotaped deposition was the central and most critical piece of evidence introduced against the appellant at trial. We have no doubt that the appellant's findings of guilty were predicated in large part on the deposition. Without this evidence, we are not convinced that the appellant would have been convicted of either offense. The dissent's discussion of the sufficiency of the evidence bears no relevance on this point.

**Conclusion**

Accordingly, the findings and sentence are set aside. The record of trial is returned to the Judge Advocate General of the Navy. A rehearing may be ordered.

Judge STONE concurs.

ROLPH, Chief Judge (Dissenting):

Having carefully considered the briefs of appellate counsel, and the arguments, analysis, and case citations set forth in the majority opinion, I must very respectfully dissent. Upon thorough review of the appellant's record of trial, I do not believe that the military judge presiding over this contested general court-martial abused his discretion when he admitted into evidence the deposition testimony of TO -- the twelve-year-old victim -- over the objection of the defense.

Standard of Review

A military judge's ruling on the admission of evidence, and on the determination of witness unavailability for purposes of both the confrontation clause of the Sixth Amendment to the Constitution and MILITARY RULE OF EVIDENCE 804(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), should not be overturned on appeal absent a clear abuse of discretion. *United States v. Johnson,* 46 M.J. 8, 10 (C.A.A.F. 1997)(quoting *United States v. Redmond,* 21 M.J. 319, 326 (C.M.A. 1986)); *United States v. Cokeley,* 22 M.J. 225, 229 (C.M.A. 1986). Under this exacting standard of review, the military judge's decision must not be reversed unless it was "`arbitrary, fanciful, clearly unreasonable," or "clearly erroneous.'" *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers,* 25 M.J. 61, 62 (C.M.A. 1987). Only when the military judge's findings of fact are clearly erroneous or his conclusions of law are patently incorrect will his considerable discretion have been abused. *United States v. Humphreys*, 57 M.J. 83, 90 (C.A.A.F. 2002); *United States v. Kelley,* 45 M.J. 275, 279-80 (C.A.A.F 1996). If reasonable judicial minds could logically differ as to the propriety of the judicial determination made, then no abuse of discretion has occurred. *United States v. Glenn,* 473 F.2d 191, 196 (D.C. Cir. 1972). *Accord United States v. Travers,* 25 M.J. 61, 62-63 (C.M.A. 1987). We review *de novo* the mixed question of law and fact presented in determining the ultimate issue of unavailability for purposes of the Confrontation Clause. *McCandless v. Vaughn*, 172 F.3d 255, 265 (3d Cir. 1999); *Martinez v. Sullivan*, 881 F.2d 921, 926 (10th Cir. 1989); *Burns v. Clusen*, 798 F.2d 931, 941-42 (7th Cir. 1986).

Confrontation and the Admission of Deposition Testimony

In the landmark case of *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court set forth exacting standards aimed at guaranteeing an accused's Sixth Amendment right ". . . to be confronted with the witnesses against him . . . ." U.S. CONST. AMEND. VI. Before "testimonial" witness statements may be admitted into evidence against an accused, the Confrontation Clause requires that the witness who made the statement be unavailable, and that the accused have been afforded a prior opportunity to cross-examine the witness. *Crawford,* 541 U.S. at

53-54; *see also Idaho v. Wright,* 497 U.S. 805 (1990); *Ohio v. Roberts,* 448 U.S. 56 (1980).

Under MIL. R. EVID. 804(a), "unavailability of a witness" is also required prior to admission of former testimony -- including testimony by deposition -- and includes situations in which the declarant "is unable to . . . testify at the hearing because of death or *then existing physical or mental illness or infirmity.*" (emphasis added). *See* Art. 49, Uniform Code of Military Justice, 10 U.S.C. § 849. When former testimony is offered as an exception to the hearsay rule, the proponent bears the burden of clearly establishing the unavailability of the absent witness. *United States v. Hubbard*, 28 M.J. 27, 31 (C.M.A. 1989). Former deposition testimony of a witness may be admitted against an accused at trial in the same or another proceeding under MIL. R. EVID. 804(b)(1), if it was taken in compliance with law, and "if the party against whom the testimony is . . . offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

It is undisputed that the videotaped deposition testimony of TO was taken "in compliance with law," *see* R.C.M. 702, was "testimonial" in nature, and bore "adequate indicia of reliability," *see Roberts,* 448 U.S. at 66. It is also undisputed that the deposition of TO afforded the appellant a personal examination of TO in his physical presence, was taken under oath, subjected TO to cross-examination, and, because it was videotaped, afforded the members the opportunity to observe TO's demeanor. *California v. Green,* 399 U.S. 149, 158 (1970). Procedurally, it is important to note that TO's deposition was taken after the Article 32, UCMJ, investigation was completed, post-referral of charges, and after a specific defense request for face-to-face confrontation of TO. Upon order of the military judge, the Article 32, UCMJ, Investigating Officer and the Convening Authority subsequently considered the deposition testimony in relation to their original recommendation and decision, respectively, to refer the charges against the appellant to a general court-martial.[3] The following chronology of events is germane to the issues raised by this assignment of error:

[3] In ordering the taking of TO's deposition, the military judge directed that the Government provide a copy of the deposition to the Article 32, UCMJ, Investigating Officer for his "consideration and comment." He also ordered that an addendum to the Article 34, UCMJ, advice letter be prepared by the staff judge advocate to advise the convening authority of the deposition and allowing for that authority to determine "the impact of the deposition on his decision to refer the charges . . . to a general court-martial." *See* Appellate Exhibit LXIV at 2. Finally, the military judge required the convening authority to execute a referral memorandum indicating what impact, if any, TO's deposition and the subsequent Article 34, UCMJ, advice letter addendum had upon his decision to refer the appellant's case to a general court-martial. Appellate Exhibit XXIII; Record at 65-66.

## Chronology

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| 03 Jul 2001 | Charges against appellant referred to GCM. |
| 12 Jul 2001 | Appellant arraigned. |
| 30 Oct 2001 | Defense raises motion to compel new Article 32, UCMJ, investigation to confront TO. |
| 31 Oct 2001 | Military judge denies motion for new Article 32, UCMJ, investigation but orders deposition of TO. |
| 13 Nov 2001 | Deposition of TO conducted. |
| 04 Dec 2001 | TO hospitalized for mental deterioration. |
| 07 Dec 2001 | Government notified of TO's hospitalization. |
| 10 Dec 2001 | TO discharged from hospital. [Originally scheduled date for commencement of trial]. |
| 11 Dec 2001 | Defense litigates Motion *in Limine* to exclude deposition testimony of TO. |
| 07 Jan 2001 | Military judge orders testimony of treating psychologist (Dr. Bock) and production of her *curriculum vitae* to resolve Motion *in Limine.* |
| 22 Jan 2006 | Dr. Bock testifies on Motion *in Limine.* Appellate Exhibits XXXI, XXXII, XL, XLI admitted on the Motion. |
| 23 Jan 2006 | Military Judge denies Motion *in Limine* and admits into evidence TO's deposition testimony. |
| 23-25 Jan 2006 | Trial on the merits. |

## Discussion

a. Opportunity and Similar Motive to Develop the Testimony.

On 30 October 2001, the appellant, through his counsel, raised a motion at an Article 39(a), UCMJ, session to compel a new Article 32, UCMJ, investigation based on the fact that the defense team had not had the opportunity to interview TO, and that she was not present at the original Article 32, UCMJ, pretrial investigation. Claiming that "the defense ha[d] been refused the ability to cross-examine the victim in this case on the record as required by case law," Record at 23, the appellant's counsel went on to elaborate extensively on why a new Article 32 investigation should be ordered. Among the reasons offered were the following:

1) The convening authority, in deciding whether or not to refer the charges to trial, should have the benefit of the testimony and cross-examination of the alleged victim, TO. Record at 23.
2) The testimony of TO, once obtained, should be considered by the Article 32, UCMJ, Investigating Officer to determine whether his recommendation to refer charges to a general court-martial would remain the same. Record at 24.

3) An interview of TO alone would be inadequate, as it would not allow for adequate impeachment if inconsistencies were developed. Record at 25.

Arguing further on the motion, defense counsel asserted to the military judge that, cross-examination of TO "is what we are really looking for here, to get her on the record and ask her those hard questions and get them on the record as required by case law." Record at 25. The military judge denied the defense request for a new Article 32 investigation, but ordered a deposition of TO based upon these stated motivations of the defense team.

The deposition of TO was subsequently conducted in the presence of the appellant and his counsel, and presided over by a properly appointed Deposition Officer. TO's deposition testimony was taken under oath and recorded completely on videotape (and fully transcribed verbatim in writing) allowing the finder of fact to fully evaluate her appearance and demeanor during trial on the merits. *See* Prosecution Exhibit 3 and Appellate Exhibit XXXII. During the deposition, the Appellant's defense team had an unrestricted face-to-face opportunity to cross-examine TO regarding the allegations against the appellant arising from their sexual relationship, and took advantage of it. *See United States v. Connor*, 27 M.J. 378, 389 (C.M.A. 1989). Unlike a preliminary hearing where defense counsel may reasonably claim lack of motive to cross-examine a prosecution witness (or examine at all), this post-referral deposition was conducted in full contemplation of this already referred general court-martial. The defense team was clearly aware of all the relevant issues and possessed the same motive and opportunity for cross-examination they would have had if TO had testified in person at trial. *See United States v. Crockett,* 21 M.J. 423, 426 (C.M.A. 1986). The original arguments made to the military judge in support of their motion for a new Article 32 investigation make it clear the defense team knew exactly what the issues were, what was at stake in this case, and what they were after through face-to-face cross-examination of TO under oath. According to the defense team's stated position on the record, this deposition would impact the very foundation of all original decisions leading to referral of the charges against their client to a general court-martial. Based upon these facts, and a thorough review of the deposition testimony, no straight-faced argument can now be asserted that the appellant and his counsel lacked a similar motive and opportunity to develop the testimony of TO through cross-examination.[4] *Id*.

[4] Defense counsel, in seeking at trial to exclude the deposition of TO he requested, disingenuously claimed that the deposition of TO was simply an opportunity to "interview" her, and that "it was not the defense's goal to cross-examine her as if we were at trial." Record at 94. This, of course was completely contrary to the argument he made in originally requesting the new Article 32 investigation to the effect that a mere "interview" of TO would be an inadequate remedy as it would not properly preserve possible "impeachment evidence." Record at 25.

b. Unavailability of TO

On 04 December 2001, just six days before this trial was originally scheduled to commence, TO was admitted to the Spirit of St. Louis Hospital in St. Charles, Missouri, for inpatient psychiatric evaluation and treatment. AE XXXI. In a letter dated 07 December 2001, TO's attending psychologist notified the prosecution team that:

> "[TO] was admitted . . . because of severe danger to herself. She has initiated psychiatric treatment for her presumed mood disorder. She is being treated with medications. She is having significant psychiatric problems as well as medication adjustment reactions. She cannot attend court on any date before the end of December. She remains hospitalized at this time. The date of her discharge is not yet known."

AE XXXII. Upon her admission, it was noted that TO (now 13 years old and in the eighth grade) was experiencing her first psychiatric hospitalization, and that she had previously been treated as an outpatient for depression and suicidal ideation. Record at 174; AE XLI at 9. Her hospitalization was ordered after her outpatient therapist and the hospital assessment staff noted a serious deterioration in her mental status and became alarmed by her suicidal attempts and gestures. *Id*. During her admitting psychiatric evaluation, the following was recorded:

> ". . . . Recently, patient had to give a deposition '*then it all got really worse.*' (sic) Patient has had numerous self-harm events such as putting a plastic bag over her head and cutting her hand with a knife '*I never told anyone.*' (sic) Patient has been in outpatient counseling. Her counselor recently was concerned about patient's worsening of status and recommended psychiatric assessment. At assessment, the patient could not contract for safety and felt preoccupied by her thoughts of killing herself. There was also, in the past week, an incident on the school bus, where patient was called various sexual slur names and a coke (sic) bottle was thrown at her. Patient had cut her wrist in the past week."

AE XLI at 9 (quotes and italics in original). Other symptoms clearly documented at the time included diminished sleep, decreased attention and concentration due to internal distraction, intermittent racing thoughts, wide mood swings (including crying spells and irritable temper), and panic

attacks. *Id*. After six days of inpatient treatment, TO's discharge summary (dated 10 December 2001) reflected that she continued to be "solemn and disinterested with defeated, sad demeanor" and also felt "beleaguered by hopelessness and wished to die." *Id*. at 4. Dr. Bock, who had been attending TO throughout her hospitalization, documented her formal diagnosis that TO was suffering from, among other things, "Bipolar II Disorder, Rapid Cycling, Panic Disorder" and "Post-Traumatic Stress Disorder," both AXIS I disorders under the AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994)(hereinafter DSM-IV). *Id*.

This evidence was considered by the military judge in support of the Government's position that TO was unavailable as a witness. Not wholly satisfied with the information contained within TO's medical records, and concerned about the accused' right to confrontation of this critical Government witness, the military judge ordered the production of Linda P. Bock, M.D., a board-certified child psychologist and TO's attending physician while hospitalized from 04 to 10 December 2005, as a witness on the motion. Record at 157, 169-70, and 173-74; AE XL. On 22 January 2002, another Article 39(a), UCMJ, session was conducted by the military judge to adduce additional testimony and evidence relating to TO's medical and psychiatric condition. At this hearing, the judge received the sworn testimony of Dr. Bock, and additionally received into evidence her *curriculum vitae* and eighty-eight pages of medical and psychiatric treatment records relating to TO's hospitalization. AE XL and XLI. Dr. Bock's credentials and expertise as a board-certified child psychiatrist and analyst practicing since 1980 were well-established and undisputed.[5] Record at 173-74.

Dr. Bock reiterated on the stand the diagnosis she previously documented in TO's medical records. She went on to carefully explain that "Bipolar II Disorder, Rapid Cycling, Panic Disorder"[6] and "Post-Traumatic Stress Disorder" (PTSD)[7] are both

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[5] Dr. Bock's impressive *curriculum vitae* reflects an internship in pediatrics (1974-1975); a residency in pediatrics (1975-1976); a residency in psychiatry (1976-1978); and a fellowship in child and adolescent psychiatry (1978-1980). She was engaged in a full or part-time private adolescent psychiatry practice from 1980 to the time of trial. She served in numerous consulting and teaching positions relating to her profession, published extensively in her field, and was a member and/or director of multiple professional organizations related to the treatment of psychiatric disorders.

[6] Bipolar II Disorder is characterized by the occurrence of one or more "Major Depressive Episodes" accompanied by at least one "Hypomanic Episode." DSM-IV at 359. "Completed suicide (usually during Major Depressive Episodes) is a significant risk, occurring in 10%-15% of persons with Bipolar II Disorder." *Id*. at 360. This disorder is often, as in this case, associated with "Panic Disorder," which involves a discrete period of intense fear or discomfort that "has a sudden onset and builds to a peak rapidly (usually in 10 minutes or less) and is often accompanied by an imminent sense of danger or impending doom and an urge to escape." *Id*. at 359 and 394-95. When the "Rapid-Cycling"

serious AXIS I mental disorders, and that TO clearly met the criteria for each as set forth in the DSM-IV. Record at 175-80. Dr. Bock testified that TO's mental condition deteriorated significantly after her 13 November 2001 deposition, and that she required anti-psychotic and anti-depressant medications to deal with her disorders. *Id.* at 176-78. TO had a suicidal "episode" in August 2001 for which she was prescribed anti-depressants, followed by a second "suicide gesture" after her deposition testimony was given. *Id*. at 178. While hospitalized, Dr. Bock described TO as:

> ". . . agitated, irritable. She was very unstable in mood. At times she would be [a] little bit tearful and weepy; and other times she would be bossy and pushy. She couldn't sit still. She was constantly fidgeting, very uncomfortable . . . [']let's go, get me out of here['']. She was clearly very uncomfortable."

*Id.* at 181. TO also experienced a panic episode during which she believed that there were men outside her window at the hospital trying to get into her room to rape her. *Id*. at 180. Dr. Bock, after considering all of TO's demonstrated psychological abnormalities before and during hospitalization, concluded that it would be detrimental for her to testify as a witness at appellant's trial. Record at 180.

In the majority opinion above, Dr. Bock's conclusions concerning the detrimental impact upon TO of testifying at trial were challenged as "inadequate" for having been based upon dated or "stale" information. Because Dr. Bock had not personally examined TO between 10 December 2001 (the date of TO's discharge from the hospital) and 22 January 2002 (the date she testified on the Motion) – a period of approximately 43 days – the majority concludes that the military judge abused his discretion in ruling that she was unavailable. Clinging to a single response given by Dr. Bock on cross-examination to the effect that TO's condition could "possibly" have improved since 10 December 2001, the majority ignores the reality of the whole of this board-certified psychiatrist's testimony. Also, the question posed on cross-examination simply asked whether it was "[p]ossible that [TO's] in a better state than when you discharged her?" Record at 192. It did <u>not</u> ask whether it was "possible" that testifying at trial

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specifier has been included in a Bipolar Disorder diagnosis, it indicates the occurrence of four or more mood episodes during the previous 12 months. *Id.* at 390.

[7] PTSD involves the development of characteristic symptoms following an extreme traumatic stressor, which may include persistent re-experiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma, and numbing of general responsiveness. The full symptom picture must be available for more than 1 month, and the disturbance must cause clinically significant distress or impairment in social, occupational, or other areas of functioning. *Id.* at 424.

would not be detrimental to TO's diagnosed psychiatric disorder and clearly guarded condition. The whole of Dr. Bock's testimony on this matter is instructive:

[Cross-examination by defense counsel of Dr. Bock]

Q. What was her prognosis when you released [TO from hospitalization]?
A. Guarded.

Q. What does that mean?
A. She has a serious chronic psychiatric disorder. Many individuals who have young or early onset bipolar disorder have the worse (sic) prognosis as opposed to an individual whose bipolar disorder doesn't become symptomatic until they are 25 or 30. Someone who is symptomatic at five, six is much worse off. So she is still very early onset (sic) so her prognosis is guarded.

Q. Possible [sic] that she's in a better state than when you discharged her?
A. Pardon?

Q. Is it possible –
A. Currently?

Q. Yes. Is it possible?
A. All things are possible.

Q. Well, you gave –
A. I would find it doubtful, but it is possible.

Q. Well, you gave her medication and ordered her return to school?
A. Statistically, mood stability for bipolar disorder requires six to twelve months before you can expect to be at what you call baseline. So it is a very long recovery period. I usually counsel the social workers to advise the parents to expect that it's going to be a very rocky road and that she may need rehospitalization.

Record at 192.

The entire testimony of Dr. Bock, along with the evidence presented on this motion, demonstrates very persuasively that TO was currently suffering from a serious psychiatric disorder that required long-term treatment and medication. This board-certified psychiatrist with over twenty years of experience made it clear that TO was newly diagnosed, that treatment and drug therapy[8] had been newly initiated, and that "she is in pretty

[8] TO was prescribed Seroquel, a brain protectant that blocks dopamine and

severe discontrol currently." Record at 205. Dr. Bock told the military judge that TO's illness was ongoing, required protracted treatment, and opined that "if she's called in to testify as a witness in these proceedings that that will cause even greater trauma for her."[9] Record at 207. Dr. Bock's responses to questions from the military judge were unequivocal on this point: [Questions by Military Judge]:

Q. Dr. Bock, is it my understanding that the illness that [TO] is suffering from is an ongoing illness; is that correct?
A. Correct.

Q. And that her treatment is likely to be long term?
A. Protracted, yes, sir.

Q. And it is your opinion that if she's called in to testify in these proceedings that that will cause even greater trauma for her?
A. Yes, sir.

Q. Now, when we speak in terms of trauma and traumatizing for the child, it is my understanding from what you are saying that this is more than a diminimous (sic) emotional stress placed on the child?
A. Yes, I think a more helpful term to use is stimulating. Because if you use trauma, it gets confused with PTSD; and when someone has bipolar disorder, it is very difficult for them to tolerate much stimulation. They have to calibrate how much stimulation they are going to get in their life so it doesn't overwhelm and over stimulate the brain cells. The medicines are meant to kind of destimulate as it were to protect the brain from over stimulation . . . .

Q. But as it relates to [TO], again, if she testifies we are talking about her suffering more than minor emotional distress?
A. Yes. I am – yes, sir – I think it would be a major, over stimulating event that could be predictably associated with either a repeat suicide attempt or a repeat psychiatric hospitalization.

Record at 207-08.

Dr. Bock's testimony was unequivocal and unrebutted. In light of the specific nature and seriousness of TO's psychiatric

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anti-psychotic medication, and Tegretor, which was a mood stabilizer. AE LXIV at 3; Record at 175-76.

[9] It is instructive that Dr. Bock's original admission diagnosis indicating that TO might be able to testify "by the end of December" completely changed after consideration of her full medical history, present symptoms, and ultimate diagnosis.

diagnosis, it was also clearly reasonable that Dr. Bock would not feel the need to "update" her recommendation within a mere month-and-a-half of having rendered it. She testified clearly to this effect on the motion:

> " . . . . I can't think of any other data that would be pertinent to change my view . . . I just don't think it's good for her to have to take that level of stimulation. I just think it's too much for her, and I don't think it is going to change for a long while. You know[,] six to twelve months of medication and a longer period of time in therapy until she masters talking about traumas. She may never master talking about traumas."

Record at 209.

In my opinion, and on these facts, the military judge's findings of fact were not "clearly erroneous" and he did not abuse his discretion in admitting TO's deposition testimony. *See United States v. Donaldson,* 978 F.2d 381 (7th Cir. 1992)(holding district court's ruling that pregnant female was unavailable when she was admitted to hospital with serious illness on eve of trial was proper); *United States v. Amaya,* 533 F.2d 188, 191 (5th Cir. 1976)(concluding witness unavailable due to loss of memory, even where evidence did not establish loss was permanent); *People v. Lombardi,* 332 N.Y.S.2d 749 (N.Y. 1972)(finding witness unavailable where evidence demonstrated her mental and physical health would be seriously jeopardized and could have resulted in further and perhaps successful attempt at suicide.); *Warren v. United States,* 436 A.2d 821 (D.C. 1981)(holding evidence of severe risk of psychological trauma to witness that could potentially flow from testifying at trial sufficient to sustain judge's determination that witness was unavailable). *People v. Gomez,* 103 Cal. Rptr. 80 (1972)(concluding witness was unavailable where there was a "strong possibility" that it would be detrimental to her psychological welfare to appear in court.)

The cases cited by the majority in support of their proposition that the military judge relied on "dated" information, and that he should have done more in making his "unavailability" determination, can clearly be distinguished from this case. *Cokely* clearly recognizes that "there is no bright-line rule which will fit every situation," and that "[u]navailability is clear when the witness is not expected to improve." 22 M.J. at 229 (*citing United States v. Keithan,* 751 F.2d 9 (1st Cir. 1984). *Cokeley* additionally acknowledges, "delay of the trial is not necessary in every case where a witness is ill but may recover someday." *Id*. (citing *Howard v. Sigler,* 454 F.2d 115 (8th Cir. 1972)). In *Cokeley,* the then Court of Military Appeals determined that the military judge abused his discretion in admitting over defense objection the deposition testimony of the

alleged victim of Cokeley's attempted rape. The alleged victim returned a subpoena to appear at trial with a note stating that she was unable to travel due to pregnancy. At the time of trial, counsel learned that the alleged victim had given birth by emergency Caesarean section, that complications had ensued with her and her child, and that her attending physician had opined that it would be "two to three weeks" before her ability to travel could be ascertained, and that further consultation with the attending pediatrician was required to ascertain exactly when she could travel. *Id.* at 226-27. Because the alleged victim's unavailability would have most likely been "merely temporary," it was held to be error to admit her deposition in lieu of her live presence at trial. *Id*. at 228. Additionally, the judge in *Cokeley* erroneously shifted the burden to the accused to demonstrate that the witness was available and necessary. *Id*. at 229. This case is clearly distinguishable in that, unlike pregnancy complications, TO's mental disorders were clearly not "merely temporary" afflictions, but rather long-term psychiatric maladies with no discernible date of resolution, and no indication as to when it would be non-detrimental for TO to testify. Delaying the proceedings was not a realistic remedy where Dr. Bock clearly indicated it would take "six to twelve" months for TO to arrive at a "baseline," and even then her ability to testify could not be guaranteed. Record at 192, 198, and 208-09. Dr. Bock was unequivocal in her estimate that "TO would require extensive therapy for an indefinite time, and that she would probably be unable to discuss the events involving the Appellant for five to twelve years. *Id*.

The military judge in this case appreciated that the burden to demonstrate unavailability rested with the Government (*see* Record at 157). He specifically and carefully considered and addressed virtually all of the factors the *Cokeley* decision listed as important in properly making this determination. AE LXIV; Record at 228-32. Unlike the situation in *Cokeley,* the military judge here clearly articulated the many factors he considered and weighed in arriving at his determination that TO was "unavailable." AE LXIV.

I also believe the majority is in error in asserting that the military judge improperly relied on "stale" information in making his decision. Again, the cases cited in the majority opinion are clearly distinguishable from this case. *Burns v. Clusen*, 798 F.2d 931 (7th Cir 1986), cited as dispositive on this issue by the majority, is different in critical respects:

First, *Burns* involved an adult witness. Here, we are dealing with a twelve-year-old child victim who was only thirteen at the time of trial.

Second, *Burns* involved a period of almost two months from when the diagnosing psychiatrist had last had personal contact with the alleged victim (4 Nov 1980) and the motion hearing on unavailability being conducted (18 October 1980). Following that

period, the *Burns trial* was twice postponed for an additional period of approximately five months (i.e., a total of 7 months) before trial on the merits began, with no reassessment of the alleged victim's condition being made. *Id.* at 935-36, 939. That is clearly not the situation here. A mere 43 days elapsed from the last date Dr. Bock had contact with TO (10 December 2001) to trial on the merits commencing (23 January 2002, the day after Dr. Bock testified and the determination of TO's unavailability was announced). Additionally, the psychiatrist in *Burns* had diagnosed a mental disorder ("schitzophreniform disorder") that had a clearly documented duration of less than six months, making it highly probable that the victim would have been capable of testifying at the time that trial actually began in that case. *Id*. at 938. TO's disorder was not short-term in nature, and indeed may afflict her for many years or the rest of her life. Record at 207. Accordingly, Dr. Bock's information, diagnosis, opinions and prognosis were clearly not "stale."

Third, two presiding judges in the *Burns* case rendered inconsistent findings on the issue of "unavailability," making it difficult upon review to determine what actually served as the basis for the finding. The trial court in *Burns* further erred by refusing to reconsider its ruling because the defendant had not introduced expert testimony to show the witness had recovered, improperly shifting the burden to the accused to show "availability." The findings in this case by Judge Keller are clear, unambiguous, timely, and consistent with the evidence presented at trial. No burden shifting ever occurred during this trial. The infirmities throughout the *Burns* trial did not occur at this general court-martial.

Finally, *Burns* involved the admission of preliminary hearing testimony that was not recorded on videotape, thus depriving the fact-finder of the opportunity to assess the victim's demeanor. That is not the case here.

Similarly, the majority's reliance on *United States v. Vanderwier,* 25 M.J. 262 (C.M.A. 1987) is also misplaced. In that case, the "unavailable" witness (ship's executive officer) was deposed over defense objection, the military judge entered no essential findings of fact, and the witness was ruled "unavailable" for trial despite the fact that the trial ended just two-days before the witness' period of unavailability ended. *Id*. at 266-67. The abuse of discretion in *Vanderwier* bears no logical relationship to the diligence and effort exerted by Judge Keller to determine exactly what TO's status was as the trial dates closed in on the parties.

The majority faults the military judge for failing to obtain a "statement from TO regarding her fear of testifying," or "a statement from TO's mother." The logic of this appears faulty in the face of unavailability determinations based upon formal and properly diagnosed psychiatric disorders. TO's fear of testifying was but one symptom among many serving as the basis

for the ultimate diagnosis of "Bipolar II disorder, Rapid Cycling, Panic Disorder" and "PTSD." The unrebutted mental health expert here was Dr. Bock. It was her well-considered psychiatric diagnosis based on years of medical and psychiatric experience that was critical to this particular determination. Obtaining a "statement" from TO would have offered little to Dr. Bock's analysis (*see* Record at 209) or that of the court, and could have caused TO even more and greater trauma and symptoms than she was already suffering. To request TO to provide a statement in this manner simply to test her resistance to testifying "would have unnecessarily burdened the very person whose well-being the court sought to protect." *See Warren,* 436 A.2d at 830. Also, while asking TO's mother to provide a "statement" may have given the court additional information of interest, the mother's input in this case was already clear in the record, and surely would not have altered Dr. Bock's conclusion. *See* Record at 147, 229; AE XLVII.

Finally, the majority suggests that an "independent medical opinion from a court-appointed doctor" was suggested in this case to "eliminate the possibility of any natural bias . . . resulting from the doctor-patient relationship [between TO and Dr. Bock]." Admittedly, Dr. Bock was genuinely concerned for the welfare of her psychiatrically disturbed minor patient, as any properly trained health care professional would be when caring for someone suffering from multiple Axis I mental disorders. Dr. Bock's "advocacy" on behalf of TO was noteworthy more as a reflection of the seriousness of TO's mental condition than for its impact on relieving her from the obligation to testify at trial. The majority's recommendation for independent, court-appointed psychiatric expertise would make sense if there had been "dueling" expert witnesses testifying before the court on this issue, or if Judge Keller doubted the credentials, expertise, or professional opinion of Dr. Bock. That was not the case here. Dr. Bock's testimony was persuasive and absolutely unchallenged by any other mental health professional. *See United States v. Cordero*, 22 M.J. 216, 221 (C.M.A. 1986). The majority's suggestion for the appointment of an independent court-expert in this case would have added tremendous expense and delay to the proceeding when absolutely no evidence rebutted Dr. Bock's diagnosis and opinions. Also, assuming an "independent" court-appointed doctor was designated to examine TO, how then should the trial judge deal with the "natural bias" flowing from <u>that</u> doctor-patient relationship? I believe that, as jurists, we tread on very thin ice when we counter fully qualified and unrebutted expert testimony with nothing more than unsupported argument and speculation.

The requirement of the law is not that the Government must do everything humanly possible to get a witness to testify, only that it make a reasonable, good faith effort to get the witness to court. *United States v. Reed,* 227 F.3d 763, 767 (7th Cir. 2000). "'[T]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness'." *Id*.

(quoting *Roberts,* 448 U.S. at 74). Once TO's unavailability was demonstrated by the Government through the very persuasive testimony of Dr. Bock, the burden then rested upon the defense to refute this showing with more than mere speculation and supposition. *Cordero,* 22 M.J. at 221 (holding that once the Government demonstrated witness had disregarded subpoena and returned to her home in Germany, burden shifted to defense to refute her unavailability). There is nothing in this record to suggest that the Government acted in bad faith or sought to create TO's unavailability at trial. The record is clear in reflecting the Government's good faith effort to obtain TO's presence at trial, including making travel arrangements and issuing her a subpoena to be present.

In light of TO's serious mental afflictions and the possible psychological harm that could have resulted from having her take the stand during trial on the merits, I believe the military judge was clearly within the realm of his considerable discretion in determining that TO was unavailable. The full and complete direct and cross-examination of TO at her earlier deposition -- in the presence of the accused, all counsel, and a qualified deposition officer -- ensured that the appellant's confrontation rights were secured to the maximum extent possible in this case. The fact that the defense team ultimately elected to withhold their cross-examination of TO from the members for tactical reasons cannot be held against either TO or the military judge.

c. Remote Live Testimony.

The majority additionally faults the military judge for not more thoroughly exploring and exhausting the various possibilities for alternative forms of live testimony that might have lessened or eliminated the trauma and/or impact of having TO testify in person. *See Maryland v. Craig,* 497 U.S. 836 (1990); R.C.M. 914A; MIL. R. EVID. 611(d). Once again, I respectfully disagree.

Requiring the exploration of "alternatives to live testimony" in light of the diagnosed psychiatric disorders in this case would seem the very antithesis of prudence. Dr. Bock's testimony was unequivocal that any participation by TO in the court-martial of the appellant could have a very serious and long-term impact on her ability to someday fully recover and go on to lead a normal life. This fully qualified expert, whose testimony on this issue was again unrebutted, made it clear that alternatives to live testimony by TO would not be adequate to prevent the trauma and potential suicide risk. The victim in this case is a young girl who at one point during her hospitalization was very close to "full mania" -- which Dr. Bock described as a form of psychosis. Record at 193. Dr. Bock was specifically asked on cross-examination whether alternatives to live testimony (e.g., being in another room) would alleviate the stress TO would suffer. Dr. Bock replied that, while remote testimony might help reduce the overall stress TO felt, it would

be insufficient to be of any value to TO in light of her diagnosis. Record at 203.

If "alternatives to live testimony" are traditionally employed to alleviate trauma in individuals who enjoy complete mental health, would it make any sense to require that such be resorted to in cases where firmly diagnosed psychoses and preexisting trauma are manifest? *See Gomez,* 103 Cal. Rptr. At 82 (declaring that, in cases where witness illness or infirmity is the cause of unavailability, it would be "an asinine bow to futility" to require "reasonable diligence" in attempting to secure the attendance of the witness). Judge Keller's case-specific findings concerning TO's unavailability represent a more than sufficient explanation of why remote live testimony (or similar measures) was not a reasonable option in this case.

d. Sufficiency of the Evidence.

Contrary to the assertions of appellant and his counsel, I believe the evidence in this case clearly established appellant's guilt beyond a reasonable doubt. TO's identification of the appellant at her deposition was unequivocal and was corroborated at trial (albeit reluctantly) by the testimony of the appellant's co-accused, Private First Class (PFC) McNamara. TO convincingly explained why she had not originally named the appellant as one of the many individuals she had engaged in sex with, and clearly affirmed afterwards the nature and extent her sexual relationship with the appellant. The asserted defense that TO had somehow "confused" the appellant with PFC Tapia (another "Latino" with whom she had engaged in sex) was weak and unpersuasive in light of TO's unambiguous testimony and the entire record of trial. The evidence in this case left little doubt regarding TO's positive identification of the appellant, and the members clearly agreed.

Also, I believe the majority is mistaken in their assertion that TO had communicated to the hospital assessment staff that she had been "gang-raped" by "four to six Marine officers." In a long discussion on the record with Dr. Bock concerning the origins of these alleged statements, it became abundantly clear that these were not the words of TO, but imprecise words and terms selected by hospital personnel and recorded in her medical records. Record at 215-18. Dr. Bock made it clear that the term "rape" was sometimes used by hospital staff personnel in cases involving minors because, legally, they lack the ability to consent to sexual acts. *Id*. and at 210-14. Also, Dr. Bock explained that she and the hospital staff had no understanding of military ranks, and they simply chose the wrong words to use to describe such. Importantly, Dr. Bock made it clear that the records were not quoting verbatim what TO had told them, and that those were their words, not TO's. *Id*. TO had no apparent motive to fabricate her allegations against the appellant. She never alleged that her sexual relationship with him was anything but consensual, and it was clear from the entire record that she had

an amicable relationship with the appellant. The evidence of appellant's guilt was more than sufficient.

e. Conclusion.

Because I am satisfied that the military judge did not abuse his discretion in ruling that TO was unavailable as a witness, or in admitting into evidence her deposition testimony, I would affirm the findings of guilty and the sentence in this case.

For the Court

R.H. TROIDL
Clerk of Court