

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20210276

Staff Sergeant (E-6)  
**MICHAEL L. WILSON**  
United States Army

Appellant

Tried at Fort Stewart, Georgia, on  
22 October and 30 November 2020,  
and 7 May, 10-13 May 2021, before a  
general court-martial appointed by the  
Commander, Headquarters, Fort  
Stewart, Colonel G. Bret Batdorff,  
Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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**PANEL 2**

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TO THE HONORABLE, THE JUDGES OF THE  
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**Assignments of Error<sup>1</sup>**

**I. WHETHER THE MILITARY JUDGE COMMITTED  
PREJUDICIAL ERROR BY ADMITTING APPELLANT'S  
JOURNAL UNDER MILITARY RULE OF EVIDENCE 404(B).**

**II. WHETHER THE EVIDENCE WAS LEGALLY AND  
FACTUALLY SUFFICIENT.**

**III. WHETHER IN LIGHT OF *RAMOS V. LOUISIANA*,  
APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS  
WERE VIOLATED BY THE NON-UNANIMOUS VERDICT IN  
HIS CASE.**

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<sup>1</sup> Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

## Statement of the Case

On 13 May 2021, an enlisted panel sitting as a general court-martial convicted Staff Sergeant Michael L. Wilson [appellant], contrary to his pleas, of three specifications of rape of child, three specifications of sexual abuse of a child, and one specification of sexual assault upon a child in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. §920b (2012)(2016)(2019) [UCMJ]. (R. at 658; Charge Sheet). On the same day, the military judge sentenced appellant to three life sentences, two of which are consecutive, a dishonorable discharge, and reduction to E-1.<sup>2</sup> (R. at 724).

On 11 August 2021, the convening authority approved the findings and adjudged sentence. (Convening Authority Action). On 13 August 2021, the

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<sup>2</sup> The military judge sentenced appellant as follows:

The Charge, Specification 1	Life with possibility for parole
Specification 2	Life with possibility for parole
Specification 3	Life with possibility for parole
Specification 4	10 years
Specification 5	10 years
Specification 6	10 years
Specification 7	20 years

The military judge ordered all sentences to confinement to run accordingly:

Group 1: The sentences to confinement for Specifications 1, 2, 4 and 5 shall be served concurrently with each other.

Group 2: The sentences to confinement for Specifications 3 and 6 shall be served concurrently with each other.

All other sentences to confinement shall be served consecutively.



military judge entered Judgment. (Judgment of the Court). This court docketed appellant's case on 24 January 2022. (Referral and Designation of Counsel).

### **Statement of Facts**

Appellant moved to the Dunham Marsh neighborhood of Richmond Hill, Georgia in 2016. (R. at 362, Pros. Ex. 1). Miss [REDACTED], appellant's fifth-grade daughter, became inseparable with [REDACTED], another child from the neighborhood, who spent every other day at appellant's house. (R. at 364). [REDACTED] testified that around this time appellant was friendly towards her at a time when she was lonely and socially isolated. (R. at 366).

From July 2018 to February 2019, appellant deployed to Kuwait. (Charge Sheet). While appellant was away, [REDACTED] mother no longer allowed her to visit [REDACTED]. (R. at 368). [REDACTED] was home schooled, and a Geo-Fence app would alert her parents if she left her street. (R. at 411). Despite her mother's restrictions, [REDACTED] tried to visit [REDACTED] twice during this time but was turned away by appellant's mother. (R. at 369). On the third try, in early March 2019, [REDACTED] found appellant, back from deployment. *Id.*

Due to her loneliness and their previous interactions, [REDACTED] began to develop romantic feelings for appellant and decided to tell him, which she did. (R. at 370-2). According to [REDACTED] testimony, appellant told her he liked her as well and gave her a hug. (R. at 372). [REDACTED] also testified that, within few days,

appellant met her at the neighborhood park and the next day, when they met again at a construction site near the park, he sexually assaulted her. (R. at 378). That evening, [REDACTED] went to her grandparents' and had a few phone calls with appellant. (R. at 374). Appellant pled guilty in federal court to two counts of attempted coercion and enticing a minor charge for the phone calls. (Def. Ex. H).

Around this time, [REDACTED] told her friends her father was inappropriately touching her. (R. 487). The school counselor was notified and confirmed the report. (R. at 496). Subsequently, [REDACTED] told law enforcement appellant had been raping and sexually assaulting her for years. (Charge Sheet).

Throughout the trial, appellant worked with several different attorneys. (Def. App. Ex. A). The assistant defense counsel did not meet appellant until the day of the trial. (R. at 67). During the months leading up to the trial, the lead counsel, [REDACTED], was on terminal leave. (Def. App. Ex. A). This is relevant because of the untimely rulings and litigation detailed below.

## **I. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S JOURNAL UNDER MILITARY RULE OF EVIDENCE 404(B).**

### **Facts Relevant to Assignment of Error**

On 19 September 2019, law enforcement agents seized appellant's personal journal containing stories he wrote for his wife. (R. at 436. App. Ex. IV pg. 6).

On 22 October 2020, the government provided notice of Mil. R. Evid. 404(b) evidence in accordance with the military judge's pretrial timeline. (App. Ex. VIII, encl). That notice did not include appellant's journal. *Id.* However, on 16 November 2020 the government filed a motion requesting to admit the journal under Mil. R. Evid. 401, 402, and 403. (App. Ex. IV). On 23 November 2020, the defense filed a motion objecting to the government's failure to meet Mil. R. Evid. 404(b) requirements. (App. Ex. V).

At an Article 39(a), UCMJ session on 30 November 2020, the court denied the government's motion to admit the journal due to a lack of foundation. (R. at 25-53). At the hearing, the government stated, its "position is that this journal is a statement of the accused. We do not believe it is 404(b) [evidence]." (R. at 40). When the military judge disagreed, the government reiterated its intention to offer the evidence as a party opponent admission. (R. at 41-43). The military judge asked, "Are you prepared to argue why it is 404(b), even though, according to the defense, you haven't noticed it as such?" (R. at 44). The government argued because one story in the journal was similar to [REDACTED] allegations, the entire journal could somehow demonstrate motive and intent. (R. at 44-45). The military judge denied the government's motion for lack of foundation but did not address the still-pending Mil. R Evid. 404(b) objection. (R. at 53). He added, "You can

still talk about it, as long as you have a good-faith basis to believe that it is going to be admissible during the trial.” *Id.*

Six months later, on 7 May 2021, the Friday before the trial, the military judge conducted another Article 39(a) session. (R. at 67). At this hearing, the military judge referenced an email he sent to the parties a few days prior. (R. at 70). In the email, which was not attached to the record, the military judge posed several questions to the parties. (App. Ex. XX). One question regarded the government’s theories of admissibility for portions of the journal, and whether it was Mil. R. Evid. 404(b). (App. Ex. XX). The military judge also asked which exact journal portions they would admit and “[i]f the Government’s theory of admissibility is a non-propensity purpose pursuant to MRE 404(b), to which specification(s) does the ‘journal evidence’ apply?” *Id.* Lastly, the military judge asked “Can the government provide case law to support admissibility...” *Id.* On 6 May 2021, the government answered the queries and submitted the specific portions of the journal entries it sought to use. (R. at 71).

Before the conclusion of the hearing on 7 May 2021, appellant entered not guilty pleas. (R. at 94).

The following Monday, right before panel selection, the court ruled “the defense’s 402, 403, and 404(b) objections to the three journal entries are overruled.” (R. at 99). The military judge found the journal entries could be used

to show motive, intent, and lack of mistake purposes. (App. Ex. XXIX). At trial, however, the military judge gave instructions to consider the evidence for intent and motive purposes. (R. at 459, App. Ex. XXXVII). The military judge's findings failed to segregate each story to the applicable specification, even though the government only sought to introduce specific entries for applicable specifications. (App. Ex. XXIX). For example, the government offered that the story involving the neighborhood girl applied to Specification 7, the sibling story applied to Specifications 1-6, and the foreign child story applied to all specifications. (App. Ex. XX). The military judge's findings failed to analyze each story as they relate to each specification. (App. Ex. XXIX).

### **Standard of Review**

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). A military judge abuses his discretion when his findings of fact are clearly erroneous, the military judge has an erroneous view of the law, or the military judge's decision is outside his range of choices according to the law. *Id.* (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)).

Ultimately, “[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” Art. 59(a), UCMJ. “For nonconstitutional

evidentiary errors, the test for prejudice ‘is whether the error had a substantial influence on the findings.’” *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (quoting *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017)).

## **Law**

Military Rules of Evidence 404(b) “generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor’s character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge.” *United States v. Tyndale*, 56 M.J. 209, 212 (C.A.A.F. 2001) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)). “One of the most basic precepts of American jurisprudence [is] that an accused must be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition.” *United States v. Hogan*, 20 M.J. 71, 75 (C.M.A. 1985). To safeguard against unduly prejudicial evidence, the courts must ensure that the evidence: (1) be offered for a proper purpose the under Rule 404(b); (2) be relevant; (3) if relevant, survive Rule 403 balancing test; and (4) be properly limited by instructions. *Huddleston*, 485 U.S. at 681.

Addressing the concern for admission of prejudicial evidence without fair process, Congress requires that the government give proper notice. The government *must*: (1) provide reasonable notice of the general nature of any such

evidence that the prosecution intends to offer at trial; and (2) do so before trial — or during trial if the military judge, for good cause, excuses lack of pre-trial notice. Mil. R. Evid. 404(b)(2). “The drafters clearly intend for these issues to be resolved *in limine*, and not postponed until trial.” S. Saltzburg, L. Schinasi, and D. Schleuter, *Military Rules of Evidence Manual*, 4-107, [ii] (8th ed. 2015), Editorial Comment to Mil. R. Evid. 404(b). The Saltzburg and Schlueter also observed that the military had a higher duty of disclosure and notice.

Rule 404(b)(2)(A)’s notice requirements are conditions precedent to admitting government extrinsic offense evidence. As a result, should trial counsel fail to provide adequate or timely notice, they have failed to establish basis for admission.

*Id.* at [iii].

Recently, the Advisory Committee on Rules of Evidence adopted more stringent notice requirements for other crimes, wrong and acts evidence.<sup>3</sup> Fed. R. Evid. 404(b) (2020 Amendments). The committee notes also provide that, since notice is a condition precedent, “the offered evidence is inadmissible if the court decides that the notice requirement has not been met.” *Id.* Further, “Notice must be provided before trial [...] unless the court excuses that requirement upon a

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<sup>3</sup> Rule 404(b)(3) now requires the Government in a criminal case to: (1) provide “reasonable notice” in writing prior to trial of any Rule 404(b) evidence to be offered at trial “so that the defendant has a fair opportunity to meet it;” and (2) articulate the “permitted purpose” for which it will be offered. *Id.* This rule removed the defense’s request requirement that triggered the notices.

showing of a good cause.” *Id.* Even before the rule change, courts held at least “two-to-three-week notice [is] sufficient, but a longer period may be appropriate depending on the circumstances . . .” *United States v. Falkowitz*, 214 F. Supp. 2d 365, 393 (S.D.N.Y. 2002).

Although, R.C.M. 905 permits military judge’s sua sponte reconsideration of any ruling before entry of judgment, (R.C.M. 905(f)), the rule also instructs:

A motion made before pleas are entered shall be *determined* before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings. . .

R.C.M. 905(d) (emphasis added). Read in conjunction with Mil. R. Evid. 404(b), the rule seemingly requires the military judges to determine the outcome of motions made before pleas to be resolved before entry of pleas, unless there’s good cause.

The rule also requires the military judge to “state the essential findings on the record.” In doing so, objections made at trial may not be “evaded or ignored.” *United States v. DeYoung*, 29 M.J. 78, 80 (C.M.A. 1989). It is the duty of the military judge to “affirmatively” rule. *Id.*; *see also United States v. Mullens*, 29 M.J. 398, 399 (C.M.A. 1990) (“We again hold that the military judge is required by Article 51(b) . . . and R.C.M. 801(a)(4) . . . to rule on these objections.”). “We do not expect record dissertations but, rather, a clear signal that



the military judge applied the right law. While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted.” *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

Lastly, the Supreme Court stated in *Greenlaw v. United States*, 554 U. S. 237, 128 (2008), that courts “rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *Id.*, at 243. “[C]ourts are essentially passive instruments of government.” *United States v. Samuels*, 808 F. 2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh’g en banc)). They “do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.” *Id.*

After proper notification or finding of good cause as necessary, courts still apply three part-test before admission:

1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
2. What “fact . . . of consequence” is made “more” or “less probable” by the existence of this evidence?
3. Is the “probative value . . . substantially outweighed by the danger of unfair prejudice”?

*United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010) (ellipses in original) (quoting *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A 1989)). The evidence in question must satisfy all three prongs to be admissible. *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010). “Since the policy of 404(b)’s notice provision is to protect the defendant by reducing surprise, the possibility of prejudice to the defendant from a lack of opportunity to prepare should weigh heavily in the court’s consideration.” *United States v. Perez-Tosta*, 36 F.3d 1552, 1561 (11th Cir. 1994)<sup>4</sup> (citing Fed. R. Evid. 404(b) Judiciary Committee note).

The Court of Appeals for the Armed Forces (CAAF) has long cautioned that “we do not approve ‘of broad talismanic incantations of words’” such as motive and intent to secure admission. *United States v. Ferguson*, 28 M.J. 104, 109 (C.M.A. 1989) (quoting *United States v. Brannan*, 18 M.J. 181, 185 (C.M.A. 1984)); see also *United States v. Schroder*, 65 M.J. at 58 (“[T]here is a risk with propensity evidence that an accused may be convicted and sentenced based on uncharged conduct and not the acts for which he is on trial”). “Where the evidence

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<sup>4</sup> The Eleventh Circuit developed a three-factor test for lack of notice for Rule 404(b) evidence: “1) when the government could have learned the availability of the witness [or evidence]; 2) the extent of prejudice to the opponent of the evidence from a lack of time to prepare; and 3) significance of the evidence to the prosecution’s case.” *Id.*, at 1562.

does provide ‘new ammunition’ an error is less likely to be harmless.” *Yammine*, at 78.

### **Argument**

The military judge abused his discretion by admitting the journal as proper Mil. R. Evid. 404(b) evidence based on an erroneous view of the law. The erroneous admission constituted an unfair surprise to the appellant when the government failed to give timely notice of the evidence, and the military judge admitted the evidence under a theory not presented by the government, and without a showing of good cause.

#### **A. Lack of notice and good cause denied appellant a fair trial.**

The recent change in the Fed. R. Evid. 404(b) notice requirement emphasizes its importance. Not only does this facilitate efficient litigation, but it also provides parties a fair opportunity to prepare for trial. *United States v. Foskey*, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980); Imwinkelried, *Uncharged Conduct Evidence* § 906 (1987) (Cumulative Supplement).

The government surprised appellant with its initial motion to pre-admit 404(b)(2) evidence without notice. (Pros. Ex. V). The military judge’s admission of the evidence on the day of panel selection, without good cause for delay, is disturbing. (App. Ex. XXIX). His one-sided e-mail questionnaire, which he didn’t attach to the record, and hurried Article 39(a) hearing the Friday before trial, with a

new assistant defense counsel and a lead counsel leaving the military, denied appellant a fair chance to fully argue his objections. Moreover, the late, poorly reasoned ruling diminished appellant's right to present an effective defense. This was foreseeable and preventable.

The government and military judge's apathy forced appellant into choosing to proceed to trial with the lead counsel familiar with his case or seeking a continuance to obtain yet another attorney. This put him at a tactical disadvantage and denied him fair process.<sup>5</sup>

***1. The military judge's erroneous admission of Mil. R. Evid. 404(b) without proper notice and good cause prejudiced appellant.***

The military judge abused his discretion when he admitted this evidence without proper notice. Moreover, the military judge ignored black letter law when he ignored appellant's objections to the lack of notice. This abuse of discretion is readily apparent because the military judge failed to inquire into whether good cause existed for the government's lack of pre-trial notice. The admission was erroneous because appellant never had a clear understanding of the proffered evidence's intended use, especially for Specifications one through six.

In *United States v. Hilliard*, a similar case involving an alleged non-consensual relationship with a child, this court found error in the absence of both

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<sup>5</sup> The court issued other evidentiary and procedural rulings on the same day.

notice and good cause in a military judge's admission of a father's other physical violence. No. ARMY 20170377, 2019 CCA LEXIS 21<sup>6</sup>, (Army Ct. Crim. App. Jan. 17, 2019) (remanded for clear rulings). *Hilliard* is instructive here because the government's excuse for lack of notice was a mistaken belief the evidence did not fall within Mil. R. Evid. 404(b). *Id.* Here, the government made a similar argument at the initial hearing. (R. at 41). In *Hilliard*, this court found this mistake was not good cause for the lack of notice. In appellant's case, the military judge did not bother to address notice or good cause.

“[W]hen the rules of evidence require notice as a *condition to admissibility*, a party can reasonably expect that absent such notice (and good cause) the evidence will not be admissible.” *Id.* at \*5 (emphasis added). While this court found *Hilliard* was not prejudiced by the erroneous ruling, the court emphasized its ruling was narrow.<sup>7</sup> “While we can imagine a case where the defense had detrimentally relied on the lack of notice to the prejudice of the accused, this is not that case.” *Id.* at \*8.

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<sup>6</sup> <https://www.jagcnet.army.mil/ACCALibrary/cases/opinions/MO>

<sup>7</sup> This court found a lack of prejudice because: 1) other evidence of physical abuse was admitted without objection, 2) the military judge allowed the defense additional preparation time, 3) the defense did not claim any specific prejudice to from the military judge's erroneous ruling, and 4) the father-daughter relationship overcame any consent. *Id.*

Unlike *Hilliard*, appellant was prejudiced by the lack of notice due to the military judge's previous ruling denying the evidence's admission. The military judge told the government that the journal was Mil. R. Evid. 404(b) months before trial, yet the government still did not provide notice or ask for reconsideration. (R. at 42). Indeed, the record indicates the government did not intend to introduce the evidence under Mil. R. Evid. 404(b). The government did so only after prodding by the military judge.

This evidence is prejudicial because the government did not introduce any similar evidence. Despite a thorough search of appellant's entire house and all electronic devices, the government did not notify appellant of any other extrinsic acts evidence it sought to introduce besides appellant's guilty plea in federal court. (App. Ex. VIII, encl.).

The government introduced appellant's fantasy writings as direct evidence of intent despite its failure to lay a foundation. (R. at 621). Given that the government characterized these writings as a hand-written journal, there is high probability that the panel made impermissible propensity inferences based on the content's graphic nature. Coupled with the military judge's instruction that direct evidence is that "which tends directly to prove or disprove a fact in issue," the panel must have inferred that the fantasy writings directly proved that appellant

had the motive and intent to sexually assault [REDACTED] and [REDACTED]. Therefore, appellant was greatly prejudiced by the introduction of this explicit evidence.

Since the military judge ignored defense's notice objection, there was no remedy for the lack of notice. Not only did the government fail to give notice, even as late as 7 May 2021, it didn't lay a proper foundation. (R. at 99). Though the military judge may have viewed his initial decision to exclude the evidence as a deferred ruling, a ruling for motions made before pleas can be made after the entry of plea, only if "the military judge for good cause orders that determination be deferred until trial of the general issue...." R.C.M. 905(d). The military judge's late decision violated this rule without explanation. But the reason for this delayed ruling was not because defense failed to commit to a strategy or theory, but because the government failed to produce the evidence.

Unlike in *Hilliard*, appellant detrimentally relied on the lack of notice and was unable to form a proper strategy. Although there is no record of a specific objection from defense for prejudice, the record is incomplete because the military judge did not attach the email exchange as an appellate exhibit. This court should give minimal weight to the lack of objection because of the military judge's failure to attach the email to the record.

In essence, the surprise introduction of this evidence impaired appellant's right to a full and fair trial.

**B. Appellant's journal was inadmissible even if there was notice and good cause.**

In *United States v. Reynolds*, the CAAF determined that, when courts look to evidence of uncharged misconduct, they test for admissibility under three standards: 1) does the evidence reasonably support the findings; 2) is a fact of consequence made more or less probably by the evidence's existence; and 3) is the probative value substantially outweighed by the danger of unfair prejudice. 29 M.J. at 109 (internal citations omitted). The proffered evidence is inadmissible if it fails to meet any one of these standards. *Id.*

Even if the government had provided notice, the evidence was not admissible under these factors. For the first *Reynolds* prong, the standard of proof is low: a mere preponderance. *United States v. Gallagher*, 65 M.J. 601, 610 (N.M. Ct. Crim. App. 2007), *aff'd*, 66 M.J. 250 (C.A.A.F. 2008). Appellant does not concede that his fictional writing meets this standard;<sup>8</sup> however, the balance of this portion will focus on both the second and third *Reynolds* prongs.

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<sup>8</sup> The military judge applied a Mil. R. Evid. 404(b) analysis to appellant's written fantasies. Consequently, the government counsel argued that this was a direct evidence of appellant's intent to have sex with children, qualifying the stories as fact, not fiction. The prejudice from this argument is discussed below.



***1. The military judge abused his discretion by concluding that a fact of consequence was made more or less likely by the three stories at issue.***

To satisfy the second *Reynolds* prong, the evidence must be logically relevant, meaning that it proves a fact of consequence. “The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.” *United States v. Diaz*, 59 M.J. 79, 94 (C.A.A.F. 2003) (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)). Furthermore, where uncharged acts are offered as proof of intent, the military judge “must consider whether [the accused’s] state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element.” *Gallagher*, 65 M.J. at 610. Ultimately, this analysis “mirrors the relevance concerns reflected under M.R.E. 401 and M.R.E. 402.” *Yammine*, 69 M.J. at 77.

The military judge erred when admitting the stories as evidence of motive by making the classic “broad talismanic incantation error.” Evidence of other crimes, wrongs, or acts is admissible to prove motive if a person’s motive is a consequential fact. *See, e.g., United States v. Earls*, 704 F.3d 466, 470–472 (7th Cir. 2012) (the court properly admitted pending state felony charges, where state court penalties were highly probative as to his motive to flee to Panama).

The cases the military judge and the government cited for both purposes involved inchoate offenses or knowledge-element offenses such as attempt,

solicitation, travelling with an intent to engage in illicit sexual conduct, knowing transmission of child pornography. (AE XX and XXIX). Inchoate offenses require extrinsic evidence to prove the alleged crime. However, the military judge mistakenly reasoned, that “[i]n the context of crimes involving sexual exploitation of minors, evidence of an Accused’s sexual attraction to and/or interest in minors may, obviously, be probative of the Accused’s alleged intent to engage in the charged child exploitation offenses.” (App. Ex. XXIX, pg. 10). Motive and state of mind evidence are highly consequential facts for solicitation, attempt, and knowing transmission cases but not for straight-forward statutory rape and sex assault cases. Therefore, analogies in the ruling were unsuitable and, because motive was not an issue of consequential fact, the admission was an abuse of discretion based on legally erroneous application of the law.

For most of the offenses, intent was also not at issue. In a case like appellant’s, the military judge did not view similar reading materials as per se relevant under Mil. R. Evid. 402 for intent and deferred ruling until presentation of the evidence. *United States v. Orsburn*, 31 M.J. 182, 185 (C.A.A.F. 1990).

After admitting the evidence, the military judge gave a lengthy instruction accompanying, admonishing the panel to only consider the stories for the limited purpose of considering specific intent for the any applicable lesser included

offenses. *Id.* Therefore, admission of the extrinsic evidence for offenses where intent was not at issue was an abuse of discretion.

Here, only Specifications Four and Six raised the issue of “*intent to gratify his own sexual desire.*” (Charge Sheet<sup>9</sup> and App. Ex. XXXVII) (emphasis added). Those were the only specifications where intent evidence was relevant. The military judge’s finding failed to limit the applicability of the intent evidence to these two specifications. Although the motive or intent issues were separated at the motion’s hearing and in the questionnaire, the military judge made no such distinctions at the trial. The government needed to establish the relevancy of the evidence these offenses, both involving [REDACTED], and it did not.

***2. The military judge abused his discretion by concluding that the probative value of the three fictional stories substantially outweighed the danger of unfair prejudice.***

Even if appellant was properly notified, there was good cause otherwise, and the stories were relevant, the military judge’s Mil. R. Evid. 403 balancing test was neither correct nor adequate. The third *Reynold* prong “reflects the concerns ordinarily handled under M.R.E. 403.” *Yammine*, 69 M.J. at 77. In applying that prong, the military judge should have done the following:

In conducting the M.R.E. 403 balancing test a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the

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<sup>9</sup> Specification 5 erroneously listed intent element, but the Instructions to the panel members had correctly omitted this extraneous element.

evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

*United States v. Barnett*, 63 M.J. 388, 396 (C.A.A.F. 2006) (quoting *United States v. Berry*, 61 M.J. 91, 95–96 (C.A.A.F. 2005)).

In *United States v. Curtin*, the Ninth Circuit dealt with the issue of salacious reading materials at length. 489 F.3d 935 (9th Cir. 2007). Overruling its earlier per se exclusion of these types of materials, the court held that such evidence can be relevant, although the concurrence disagreed with this point while agreeing with the outcome. *Id.* The court found relevance where the accused was convicted of traveling with the intent to engage in sexual acts with a juvenile, the evidence was “critical.” *Id.*, at 952. Yet, the court found the admission erroneous, partly because the judge’s failure to examine the stories thoroughly, and ordered the lower court to “assiduously to reevaluate their unedited admissibility in the light of Rule 403’s concerns about redundancy.” *Id.* The court further noted:

[E]ven the five stories remaining in the case convey in them more to the jury than is necessary for the government adequately to make its point. Unless objected to by the defense, careful editing of the stories would seem to be appropriate. We leave this task to the good offices of the district court.

*Id.* at 958. The case was reversed and remanded for the court’s failure to “ensure that the evidence’s potentially prejudicial effect did not outweigh its probative value.” *Id.* at 959.<sup>10</sup>

Here, the military trial judge also failed to properly conduct this necessary balancing test. The danger of unfair prejudice substantially outweighed the probative value of the admission of appellant’s stories because the evidence was admitted wholesale and used for every specification. The foreign girl story had no probative value to any offense. The sibling story had minimal, if any, value. While the neighbor girl story had higher probative value as to Specification Seven, it had no relevance because motive and intent were not contested issues. Ultimately, the evidence distracted the factfinder. The government presented evidence of appellant’s distasteful writings – and bad character – to support two uncorroborated allegations.

Accordingly, the probative weight of the evidence was outweighed by its prejudicial impact.

**C. The government cannot prove the military judge’s abuse of discretion was harmless error under a traditional prejudice analysis**

The journal prejudiced appellant because: (1) the government’s case was weak; (2) the defense’s comparatively stronger case; (3) the materiality of the

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<sup>10</sup> On remand, the lower court only admitted one of the stories. *United States v. Curtin*, 588 F.3d 993 (9th Cir. 2007).

significantly prejudicial evidence; and (4) the questionable quality of the evidence. However, appellant urges the court to apply either a *Hilliard* like balancing or adopt *Perez-Tosta*'s second factor to substitute it as "lack of opportunity for defense preparation," given the error was due to lack of notice and good cause.

***1. The strength of the government's case***<sup>11</sup>

██████ testimony was the result leading questions and contained scant details. She even failed to testify to essential elements. (R. at 488). The initial outcry was based on leading questions by a school counselor. (R. at 496). Despite alleging years of abuse, allegedly occurring near family members, no other evidence corroborated the allegations. All six specifications involving ██████ testimony were weak but greatly aided by lawfully deviant fantasy stories. As the string of circumstantial and tenuous evidence weaved in with appellant's fantasies, it undoubtedly filled the gaps in the government's story.

***2. Lack of opportunity for the defense's preparation***

Courts examine the effect of the improper admission when weighing the strengths of each parties' cases. *Yammine*, 69 M.J. at 78. In *Yammine*, graphic descriptions of sexual behavior evidence found on the accused's computer were characterized as "new ammunition" that strengthened prosecution's case. *Id.*

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<sup>11</sup> For full analysis of the quality of the government's cases analysis see *supra* Assigned Error II.

(internal quotation marks omitted) (citation omitted). In *United States v. Steen*, where CAAF applied the same reasoning, text messages discussing a drug deal that members were able to take into the deliberation room also significantly strengthened the prosecution's case. 81 M.J. 261. (C.A.A. F. 2021). The same is true here.

Because the defense was not given proper notice and a fair chance to prepare for this evidence, it would be improper to weigh the strength of its case at trial. Instead, the court should look to possible strategies appellant *could have* taken if he received proper notice. As such, the court must examine “the extent of prejudice to the opponent of the evidence from a lack of time to prepare” *Perez-Tosta*, 36 F.3d at 1561.

Nearly a half-year after the first defense objection, the government still had not given notice or shown good cause for its failure. (App. Ex. V). Appellant did not know this evidence would be admitted until the day of panel selection. Given the highly prejudicial nature of this evidence, appellant may have had a completely different trial strategy. Assuming *arguendo* the evidence was properly admitted in November, and the defense given sufficient time to prepare, it is possible that appellant would have pursued a plea deal. Unfortunately, the court issued its ruling, in violation of R.C.M 905, after appellant entered his plea. The late ruling should not penalize appellant.

In *Hilliard*, to support its ruling the defense was not disadvantaged, this court noted that by “providing the defense additional time [...], the ruling helped ensure that appellant was not prejudiced by lack of notice” to cure the government’s lack of notice and good cause. *Hilliard*, at \*6. In the instant case, there was no attempt to cure for prejudice. Appellant did not ask for a continuance so his lead attorney who was on terminal leave, could try his case. Therefore, the military judge’s erroneous ruling deprived appellant of a fair chance to present a defense.

### ***3. Materiality of the evidence.***

An accused may be able to combat admission of Rule 404(b) evidence by “advancing a theory that makes clear that the object the evidence seeks to establish, while technically at issue, is not really in dispute.” 2 Moore's Federal Rules Pamphlet § 404.9 (2021), *see also United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986) (“materiality of such evidence [may] not arise until ... the accused asserts that he is innocent due to lack of criminal intent or other affirmative defense.”). For example, a defense theory that the defendant did not commit the charged act effectively removes issues of intent from the case. *United States v. Siddiqui*, 699 F.3d 690, 702–703 (2d Cir. 2012).

As discussed in factors two and three of the *Reynolds* analysis, the stories were not material and relevant to the case. Also, the characters in the *Curtin* and



*Orsburn* stories were distinctly children. *Orsburn*, 31 M.J. at 185. *Curtin*, 489 at 954. Here, as appellant pointed out, the subject matters of the graphic stories were not as apparent, since appellant has dedicated these stories to his petite wife. (Def. Ex. E –F). The military judge references “small stature and features” and “what she would do with the American Soldier is ‘illegal’ in ‘his country’” as indications, but there was no direct reference to these characters as minor children. (App. Ex XXIX). Therefore, the materiality of the intent evidence was minimal, yet highly prejudicial.

#### ***4. Quality of the evidence***

The quality of this evidence was weak. In addition to the lack of specificity regarding the applicability of the evidence for the corresponding allegations, the lack of any explanation of the evidence spilled over into the other specifications. The government invited the panel members to take the three marital fantasy stories as evidence of appellant’s “intent to have sex with children.” (R. at 621). This is backdoor propensity evidence. Moreover, the government failed to qualify the stories as fictional and argued they were direct evidence of appellant’s intentions:

In the judge’s instructions, it specifically says, direct evidence as to an accused’s intent is not always available. Members of the panel, it is today. You have his journal. You have to read it. It was awkward. But the bottom line is, he told you what he wanted to do. The accused told you he had the intent to have sex with children, that he had a motivation to have sex with children.

(R. at 621).

Writing sexual fantasies and acting on them are not the same. Fiction is often intended to be shocking, salacious, or disturbing, especially when intended for private use. Therefore, the government's argument no doubt confused and misled the panel members. It also directly contradicted the military judge's instruction. Therefore, the prejudice is apparent: the trial counsel invited a conviction for sexual offenses against minors because the appellant and his wife share distasteful fantasies.

The government also violated the first factor of *Reynolds* by characterizing the evidence as documentary evidence, which it never proved. The government couched the stories as evidence akin to an admission by a party-opponent. (R. at 40). But neither of the parties considered the stories to be a factual retelling of actual incidents with actual victims. As such, these stories are not evidence of anything other than poor taste.

The *Curtin* court highlights the critical importance of a Mil. R. Evid. 403 analysis to an accused's right to a fair trial. The government's failure to properly qualify the evidence in presentation and argument and the military judge's failure to limit its purpose irreparably tainted the panel members' findings.

## II. WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT.

### Facts Relevant to Assignment of Error

█████ initially only told her friends that her dad was touching her. (R. at 496). Her friends asked if her dad was having sex with her, and █████ said “No.” (R. at 534). She later told the school counselor she was touched in the bathing suit area, in response to a leading question. (R. at 543).

█████ was articulate and responsive to counsels’ questions and was able to elaborate on them when given the chance. (R. at 471). However, lots of the essential elements of the evidence were not told by the witnesses but were instead posed in trial counsel’s leading questions. For example, trial counsel asked: “When he continued—you said that he also, with these sexual acts, did he put his penis in your mouth at Richmond Hill?” and █████ answered “Yes.” (R. at 476). The government continued, “What about when he put his penis in your anus? Did he ever do that?” and █████ again agreed. (R. at 477). Moreover, the trial counsel even asked questions about facts that were not in evidence: “Did this happen—when he put his penis in mouth, and in your anus, your bottom, --did that happen more than once while you were living at the second house?” and █████ again said, “Yes.” (R. at 472). At this point of the trial, the witness never testified that appellant put his penis in her mouth at the second house. When elaborating on this question, █████ said “I know it felt like every few days.” *Id.*

Trial counsel used the phrase “whenever he wanted to,” a phrase [REDACTED] never used previously, to ask a leading question “I know you said that at Fort Leonard Wood, it was every couple of days, whenever he wanted to. How frequently did it happen at Richmond Hill before he deployed?” (R. 476). After this point, the phrase “whenever he wanted” was attributed to [REDACTED] and was used once in a mid-trial Article 39(a) session and twice in closing argument to bolster [REDACTED] credibility. In closing, the trial counsel stated, “But think about those granular details that she’s discussing. ‘Whenever he wanted,’” despite [REDACTED] [REDACTED] never uttering these words in her testimony. (R. at 614).

[REDACTED] was unable to describe appellant’s penis despite the alleged frequency, and when asked whether the penis was hard or soft in one instant she answered “I don’t remember.” (R. at 466). When defense counsel asked “How would you characterize his penis?,” [REDACTED] answered “I have no idea. I don’t—I don’t compare.” (R. at 499). She denied seeing any markings on it, despite appellant’s diagnosis of vitiligo<sup>12</sup> on his penis. (Def. Ex. C and F).

The trial counsel asserted a fact not in evidence that became the basis of an important ruling. During the R.C.M. 917 motion hearing regarding Specification 2

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<sup>12</sup> Vitiligo is a skin condition where the loss of skin color occurs in irregular patches because the pigment cells of the skin are destroyed. (Def. Ex. C). Appellant had large pale vitiligo spot around the base of his penis. (Def. Ex. F).

of the Charge, defense argued that the witness only testified to “licking the penis,” but the trial counsel interjected to say “[...] she said that it went past her lips at that time,” something she never said about this specification. (R. at 569). The military judge took trial counsel’s word for it and made his ruling without elaboration on his rationale.

### **Standard of Review**

This court reviews factual and legal sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

### **Law**

The test for legal sufficiency is “whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt.” *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). This court must conduct a de novo review and may “affirm only such findings of guilty” as we find are “correct in law and fact.” Article 66(c), UCMJ; *Washington*, 57 M.J. at 399.

The test for factual sufficiency is, “whether after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of [appellant’s] guilt beyond a reasonable doubt.” *Walters*, 58 M.J. at 395. Beyond those allowances, there is no deference

to the trial court for a factual sufficiency review. *United States v. Billings*, 58 M.J. 861, 867–68 (Army Ct. Crim. App. 2003). Rather, the evidence is given a “fresh, impartial look.” *Id.* at 867. “In sum, to sustain appellant’s conviction, [this court] must find that the government has proven all essential elements and taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (citing *United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005)). The term “reasonable doubt” does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff’d*, 54 M.J. 37 (C.A.A.F. 2000).

Insufficient evidence such as testimony developed by leading questions are disfavored. Under Mil. R. Evid. 611(c), leading questions “should not be used on direct examination except as necessary to develop the witness’s testimony.” *Id.* In an unpublished opinion, a federal district court explained the necessity of leading questions and their limits:

Even on contested issues, leading questions on direct examination are usually nothing more than, at most, a minor annoyance. An occasional lapse into a leading question is understandable. But leading questions do make it more likely that false testimony will roll easily off the tongue of a compliant witness. Of course, the hazard is radically increased when the leading question is put by a prosecutor who, after the trial is over, will be at the table when decisions are made about what the future will hold

for the witness and [the] family. It may well be that, with some (perhaps most) witnesses, a leading question will not substantially increase the likelihood that the witness will knowingly give false testimony. The greater hazard is that a leading question will lull a witness — especially one who is predisposed to be cooperative — into testifying beyond the limits of his actual knowledge. The examiner incorporates into his leading question a proposition he hopes to prove and the witness gives an affirmative answer because he assumes the truth of the matter to which the examiner has, in effect, testified.

*United States v. Bramley*, No. CR-13-063-F, 2015 U.S. Dist. LEXIS 183656, at \*44-45 (W.D. Okla. Sep. 16, 2015).

The courts sometimes have upheld child witness' examination through leading questions if it was "necessary to develop the witness' testimony." *United States v. Archdale*, 229 F.3d 861, 866 (9th Cir. 2000). In *Archdale*, the court found leading questions were necessary when the minor witness failed to respond to seven of the prosecutor's questions seeking specific details concerning the abuse. *Id.* The witness' silence to those questions and the prosecutor's repeated inquiries whether she was "okay" demonstrated her difficulties. *Id.* The witness was unable to answer any of the questions and sat in silence until the prosecutor eventually asked leading questions to develop her testimony.

Evidence contained in leading questions can be permissible if other properly admitted evidence establishes the same fact. *See Owens-Corning Fiberglas Corp.*

*v. Malone*, 916 S.W.2d 551, 568 (Tex. App.—Houston [1st Dist.] 1996), *aff’d*, 972 S.W.2d 35 (Tex. 1998) (appellant could not show harm because the testimony elicited through leading questions was cumulative of other, properly admitted evidence).

### **Argument**

The government failed to establish many elements of the specifications it charged. [REDACTED] testimony, which the government argued proved the essential elements of six specifications, consisted largely of her conformities to leading questions. Moreover, the trial counsel occasionally referred to facts not already in evidence. The record does not show that [REDACTED] demonstrated any difficulty answering questions or testifying to details when given the chance. The details government counsel put in the leading questions were not supported by other established facts.

#### **A. Specification 1 of the Charge is legally and factually insufficient.**

The government was supposed to prove beyond the reasonable doubt “at or near Richmond Hill, Georgia, between on or about 18 November 2016 and 31 December 2018, on divers occasions, the accused commit a sexual act upon [REDACTED] [REDACTED] [...] by penetrating [REDACTED] anus and mouth with his penis.” (Charge Sheet). [REDACTED] never testified in detail about the oral penetration. (R. at 476-477). Trial counsel asked, “did he put his penis in your mouth at Richmond Hill?”



the witness agreed. (R. at 476). There were no other details or other evidence establishing penetration of the mouth. Absent the witness putting the essential elements on the record, this evidence is legally and factually insufficient for oral penetration.

The fact that the witness' memory maybe fading and the sensitivity of the topic discussed is no excuse for such presentation. As *Bramley* court put:

Inability or unwillingness to ask a non-leading question on direct examination of a compliant witness on a sensitive issue is atrociously bad trial lawyering and a prime example of the fact that experience can count for nothing when it amounts to nothing more than the accumulated residue of bad habits, endlessly practiced. Simply put, this intractable practice of putting leading questions to compliant witnesses subverts the search for the truth that should be as important to government counsel as it is to anyone else in the courtroom.

*Bramley*, at \*52. This practice was especially unnecessary in this case, where [REDACTED] [REDACTED] was compliant and was able to give detailed testimony about certain events. A simple yes to a leading question containing essential element of the specification without any other corroborating evidence makes this specification legally insufficient for oral penetration.

This court found such evidence as factually insufficient even after giving the trial court a greater deference, deciding “evidence in this case did not ‘exclude every fair and reasonable hypothesis of the evidence except that of guilt.’” *United States v. Crews*, No. ARMY 20130766, 2016 CCA LEXIS 127, at \*17 (A. Ct.

Crim. App. Feb. 29, 2016) (internal citation omitted). In *Crews*, the fact that the outcry came from leading questions from the mother, the witness' uncertainties were enough for the appeals court to find factual insufficiency. Therefore, the court had insufficient facts to find appellant guilty beyond the reasonable doubt, even after making allowance for not having personally observed the evidence due to lack of details and corroborating evidence. Despite the scant evidentiary basis, appellant received lifetime of confinement for this specification.

**B. Specification 2 of the Charge is legally and factually insufficient.**

Initially, the government charged appellant with committing rape of a minor “between on or about January 2019 and on or about 11 March 2019, on divers occasions [...] by penetrating [REDACTED] anus and mouth with his penis.” (Charge Sheet). On 10 May 2021, before panel selection, the government moved to strike the words “on divers occasions,” as well as the words, “anus and” from Specification 2 of the Charge, leaving oral penetration as the only act to prove. (R. at 100). At trial, [REDACTED] initially denied remembering seeing appellant’s penis when asked “Was there any -- did he ever take out his penis after the deployment?” (R. at 480). The government counsel tried jogging her memory and asked if she remembered March 2019 and she answered it depends. (R. at 480). When asked if she remembered “daddy-daughter date,” and she did. *Id.* However, when the

counsel asked if that was before or after the deployment, [REDACTED] said she “was not sure.”

[REDACTED] also answered “No,” when trial counsel asked “So, did he touch you with his penis at this time?” (R. at 488). However, she said “Yes,” when asked “Did he ask you to touch his penis?” *Id.* She eventually described licking appellant’s penis “like a stripe down,” and when the government asked, “Was your mouth on his penis when you licked it?” she said “Yes.” (R. 488). No other clarifying question about the penetration was asked. Despite trial counsel’s claim “she said that it went past her lips at that time” at trial, no such record could be found. Therefore, this specification is legally and factually insufficient.

The courts require some evidence, either circumstantial or interpretive, to conclude penetration occurred. *United States v. Ruppel*, 45 M.J. 578, 587, (A.F.C.M.R. 1990) (citing *United States v. Milliren*, 31 M.J. 664, 665 (A.F.C.M.R. 1990) (licking alone neither proves nor disproves penetration)). The *Ruppel* court, dealing with a similar situation involving a minor witness, found “the use of the term mouth in connection with the fact that it tasted bad implies penetration.” *Id.* at 578. However, the court caveated: “We cannot leave this issue without a reminder to trial practitioners to ask the simple, but sometimes awkward, questions to prove penetration.” *Id.*

Here, the witness did not utter the word mouth and she provided no details to indicate penetration. She also denied having been touched by his penis. (R. at 488). Despite trial counsel's insistence, this minor victim never testified to words akin to "it went past her lips." Failure to establish circumstantial or direct fact of penetration makes the proof of this specification factually insufficient. Moreover, [REDACTED] failed to establish the dates of the alleged act and could not answer the government's leading question definitively when asked whether this event occurred before or after the deployment. This onetime the trial counsel gave [REDACTED] a choice she failed to commit. Therefore, the entirety of the specification is factually insufficient. Since the government failed to establish essential elements of this specification that the penetration occurred beyond a reasonable doubt, the specification is also not legally insufficient. This court must put aside this finding and the sentence of yet another life sentence.

**C. Specification 3 of the Charge is legally and factually insufficient.**

In Specification 3, the government alleged appellant "at or near Fort Leonard Wood, Missouri, between on or about 13 August 2012 and on or about 17 November 2016, on divers occasions, [...] commit sexual acts upon [REDACTED] by penetrating her anus and mouth with his penis..." (Charge Sheet).

[REDACTED] testified to oral penetration that took place in their first house, earlier in the timeline, but stated she did not remember that happening again in that

house. (R. at 465). [REDACTED] testified that appellant did not put his penis in her mouth in the second house. (R. at 471). Despite this testimony, the trial counsel injected a fact not in evidence by asking “Did this happen when he put his penis in mouth, and in your anus, your bottom did that happen more than once while you were living at the second house?” (R. at 472). The witness did not correct this error and agreed with the counsel. The government’s injection of facts into makes the member’s finding of this specification ambiguous and factually insufficient beyond the reasonable doubt. When essential elements and facts are injected into leading question, the court cannot be sure that “taken together as a whole, the parcel of proof of credibility and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *Gilchrist*, 61 M.J. at 793. Therefore, the evidence here is legally insufficient for oral penetration occurring on divers occasion. Despite this convoluted testimony, without any corroborating evidence, appellant received another life sentence for this specification.

**D. Specification 4 of the Charge is legally and factually insufficient.**

In specification 4, the government alleged that appellant touched “directly and through the clothing, the vulva, anus, groin, breasts, inner thighs, and buttocks of [REDACTED],” (Charge Sheet) in Richmond Hill, Georgia, before appellant’s last deployment. [REDACTED] testified that appellant touched her breasts, genital area, and her butt. (R. at 476). The trial counsel followed up by asking “[W]ould that also

include inner thighs?” and she said “Yes.” *Id.* The evidence did not establish that appellant touched the vulva and the anus of this witness. Therefore, the evidence provided is factually insufficient to find appellant guilty beyond the reasonable doubt. Furthermore, the government failed to prove every element beyond “an honest, conscientious doubt” and beyond “mere conjecture.” Despite the government’s failure to prove every element of the specifications, appellant was sentenced to ten years of imprisonment for this specification and this manifest injustice should be corrected.

**E. Specification 5 of the Charge is legally and factually insufficient.**

Specification 5 of the Charge involved identical lewd acts alleged to have occurred after appellant’s deployment. (Charge Sheet). [REDACTED] was able to testify about how appellant touched her breasts and her bottom, without being lead. (R. at 480). However, the trial counsel continued the leading questions when asking about other acts: “Did he touch in between your legs after he got back from deployment?,” she said “Yes.” *Id.* For this specification, the government did not introduce any other evidence. Therefore, this charge is factually and legally insufficient for finding that appellant touched the vulva, anus, and inner thighs of [REDACTED]. Even viewing the evidence in light most favorable to the government, there was no evidence for the fact finder to conclude all elements were met. Taking a fresh look at the evidence, the testimony did not prove beyond a

reasonable doubt that appellant touched those areas beyond the reasonable doubt. Appellant was sentenced for ten years for this specification alone and asks this court to set aside the finding and the sentence.

**F. Specification 6 of the Charge is legally and factually insufficient.**

This specification alleges yet again the same acts involving the same body parts but during the time when appellant lived in Fort Leonard Wood. (Charge Sheet). This specification also suffers from the same error of inundation of leading questions and missing facts.

Q. Let's talk first—and did he ever just touch you with his hands?

A. Yes.

Q. While at Fort Leonard Wood?

A. Yes.

Q. Where would he touch you that you found to be inappropriate—that you felt uncomfortable?

A. My breast, and my genital areas.

Q. Did he ever touch your bottom?

A. Yes.

Q. When you say genital area, would that be inside of your thighs?

A. Yes.

Q. As well as your pubic are?

A. Yes.

(R. at 469). Again, [REDACTED] did not testify to appellant touching her vulva or anus. Therefore, there is insufficient evidence to establish the elements of this offense. Just as she had done in the previous two specifications, the witness did not provide enough facts to support every alleged act had occurred. Therefore, the finding was factually insufficient, even providing allowance for fact finders.

Again, appellant received ten years of confinement for this specification and asks this court to set the finding and sentence aside.

### **Conclusion**

The testimony of [REDACTED] consisted mostly of yeses. The government counsel even argued in closing, “‘Yes’ ‘Yes’ ‘Yes’ That was her testimony.” (R. at 614). Agreeing with government counsel’s statements are not evidence. Since no other evidence available to support evidence admitted through leading questions, the evidence itself is insufficient to support the finding beyond the reasonable doubt.

Therefore, this court should set aside appellant’s convictions and multiple life sentences appellant received based on legally and factually insufficient evidence.

### **III. WHETHER THE MILITARY JUDGE ERRED DENYING APPELLANT’S REQUEST TO INSTRUCT THE PANEL THAT A UNANIMOUS VERDICT WAS NECESSARY TO FIND APPELLANT GUILTY IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL PANEL<sup>13</sup>**

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<sup>13</sup> The court is bound by *United States v. Pritchard*, 2022 CCA LEXIS 349 (A.C.C.A., June 9, 2022) (writ-appeal petition denied in *Dial v. United States*, No. 22-0218/AR, 2022 CAAF LEXIS 593 (C.A.A.F. July 29, 2022)). However, CAAF granted review of unanimous verdict decision of the Air Force Court of Criminal Appeals in *United States v. Anderson*, 2022 CAAF LEXIS 529 (C.A.A.F., July 25, 2022).



## **Conclusion**

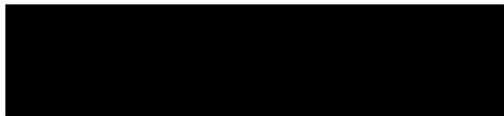
Based on the foregoing, appellant requests this court to grant requested relief.



Tumentugs D. Armstrong  
Captain, Judge Advocate  
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Defense Appellate Division



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# APPENDIX A

## **Appendix A: Matters Submitted Pursuant to *United States v. Grostefon***

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

### **I. WHETHER SPECIFICATION 7 OF THE CHARGE WAS LEGALLY AND FACTUALLY INSUFFICIENT.**

#### **Facts Relevant to Assignment of Error**

As their first witness, the government called [REDACTED]. (R. at 360). One of the first questions was about her age, and she stated she was thirteen years old. (R. at 360). The next witness, [REDACTED] mother, [REDACTED], stated that her daughter was born in 2006, (R. at 405), and that she was fifteen years old, (R. at 407).

At times, [REDACTED] testimony defied logical explanation. She testified that [REDACTED], appellant's daughter was not allowed to see people. (R. at 364). Yet, she was playing with [REDACTED] "about every other day." *Id.* However, after appellant deployed, she was no longer allowed to visit [REDACTED]. (R. at 368). [REDACTED] testified that she knocked on [REDACTED] door twice and was not allowed in before appellant came back. (R. at 369). When appellant opened the door in March of 2019, she was turned away because her mom did not allow her to play with his daughter. *Id.* [REDACTED] never explained why she was not allowed to play with [REDACTED] during appellant's deployment.

According to [REDACTED], three days after appellant turning her away in early March, she again came to visit him. (R. at 371). She testified this time, appellant did not open the door for her, but she could hear his son yelling, “Dad, the door, somebody’s at the door.” (R. at 372). After walking down the street, she went back again and told him that she liked him. *Id.* [REDACTED] testified she visited him again “about [two] days later [one] night, when my mom was getting my baby brother ready for bed.” *Id.* She said in the next sentence, “it was around [four] o’clock in the afternoon.” However, earlier she testified that her mother and brother took naps between 1130-1430 every day. (R. at 369). Later yet, she claimed her mom had not fallen asleep until 1430 on the day she met appellant. (R. at 375).

Apparently, [REDACTED] and appellant made plans to meet up at the playground on Thursday. (R. at 373). Despite testifying how appellant came outside to hug her a few days prior, (R. at 372) on this day appellant apparently said, “I never got to hug you yet,” and hugged her again. (R. at 376). Appellant and [REDACTED] made plans to meet the next day. (R. at 377). After the incident, [REDACTED] made it back home for her grandparents to pick her up at 1600. (R. at 388).

[REDACTED] testified appellant gave her a piece of paper with his phone number, and she was able to call him from her grandparent’s phone. *Id.* However, [REDACTED]

█ disposed of the number. (R. at 423). Although █ has been telling her mom that she had to tell her something inappropriate, █ never followed up. (R. at 415-416). █ claimed that when the investigators called about appellant is when she finally said “time is up now” asked if appellant had sexually assaulted her to which she assented. (R. at 422).

█ also stated that since the Friday was the day her grandparents came to pick her up, she remembers it was 9 March. (R. at 374). However, according to the calendar judicially noticed by the military judge, Friday was 8 March. (App. Ex. XXXVI). This was significant because the government not only charged the date for 9 March and claimed the events happened on 9 March in opening statement and throughout the trial but focused their investigation for that date. The agent specifically stated that he re-shot some photos in the neighborhood area focusing on the images from what he assumed was the day of the assault:

I focused mostly on the picture of the tree with the arches, because it was taken the morning of March 9th, and that was the date was most important for me to set the phone is a specific date.

(R. at 446). The government admitted these other photos agents took at the location to match the photo from 9 March. *Id.*

When █ was describing how normal her initial interactions with appellant were, the trial counsel asked, “Did the accused give you – did he ever

give you anything?” (R. at 366) and admitted a bracelet with skull and bones patterns into evidence. (Pros. Ex. 3). Other than the fact that she was sitting at the kitchen table when appellant gave it to her, ██████ offered no other context or clues about the significance of the bracelet.

### **Law and Argument**

This court finds cases factually insufficient even after giving the trial court a greater deference, if “evidence in this case did not ‘exclude every fair and reasonable hypothesis of the evidence except that of guilt.’” *United States v. Crews*, No. ARMY 20130766, 2016 CCA LEXIS 127, at \*17 (A. Ct. Crim. App. Feb. 29, 2016) (internal citation omitted). Absent additional evidence, inconsistencies and incongruent logic make ██████ testimony factually insufficient.

Just as in *Crews*, the witness’ report started with her mother, ██████ leading questions. *See Crews*, at 17. To bolster and to cover the inconsistencies, the government introduced other acts and extrinsic evidence unrelated to the charged specification. In addition to establishing material elements using leading questions, the government introduced irrelevant and tangential evidence to bolster witness testimony.<sup>1</sup> In addition to arguing appellant’s fictional writing as direct

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<sup>1</sup> *See supra* Assigned Error I.

evidence of appellant's intent, the government also used a skull patterned bracelet appellant gifted to [REDACTED] in 2018. (R. at 366). The government is obligated to lay a foundation for each piece of evidence, and they failed to establish the bracelet's relevancy.

[REDACTED] testified that Friday, 9 March 2019 was the day she was assaulted because her grandparents had picked her up on Friday and that is how she remembered that day after looking at a calendar with her mother during her interrogation. (R. at 374 and 393). Despite 9 March 2019 was judicially noticed as Saturday, (App. Ex. XXXVI), thus establishing that the offense could not have occurred on that date. (R. at 439). There are tens of photos but no labels or time stamps to orient the evidence in the timeline, despite the agent testimony that the information was readily available. (R. at 439). [REDACTED] elaborate and inconsistent story was only boosted by irrelevant and weak circumstantial evidence. Therefore, even after making the allowances for not having personally observed the witness, this court cannot be convinced that evidence was factually sufficient to establish appellant's guilt beyond the reasonable doubt. Furthermore, considering the evidence in a light most favorable to the government, essential elements of the specification did not demonstrate beyond the reasonable doubt that

appellant committed a sexual act upon [REDACTED] on or about 9 March 2019. This specification must be set aside.

## **II. WHETHER MILITARY JUDGE ERRED IN DENYING A UMC MOTION DESPITE GOVERNMENT’S CONCESSIONS TO MERGE SPECIFICATIONS FOR SENTENCING**

On 17 November 2020, defense filed a motion for unreasonable multiplication of charges (UMC). (AE VI). In their response dated 23 November 2020, the government agreed to merge “specifications 1 and 2 and specifications 4 and 5 of the Charge for sentencing,” agreeing that only reason they divided the specifications was based on Military Justice Act of 2016. (AE VII, R. at 56). Despite, this (R. at 720-721), the military judge decided to sentence appellant separately for each offense without proper reasoning. Instead, the military judge misconstrued the concession and appellant’s request as a request for concurrent sentencing. This was erroneous and the military judge abused his discretion when he decided not to merge the specifications.

## **III. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS COURT-MARTIAL BECAUSE HIS DEFENSE COUNSELS PERFORMANCE FAIL BELOW THE STANDARD.**

### **Facts Relevant to Assignment of Error**

Appellant was raised by a drug-addicted single mother in a broken and troubled household. (R. at 452). Growing up, appellant and his siblings were



physically and sexually assaulted by his mother's many boyfriends. (R. at 452). Despite this, appellant was successful in school and attended college for some time. (Pros. Ex. 11). Appellant went on multiple deployments and was under a care of a behavioral health professionals at the time of the investigation. (Def. App. Ex. A). Appellant was experiencing PTSD-like symptoms from his upbringings and multiple deployments. During the presentencing hearing, no evidence of mental health issues were presented.

Appellant was facing three specifications with a maximum sentence of confinement for life without the possibility of parole. *Manual for Courts-Martial, United States* (2016 ed.), pt. IV ¶ 56.d.(2). After going through multiple attorneys, appellant ended up with [REDACTED] and [REDACTED]. [REDACTED] was on his way out of the Army and was on terminal leave for two and half months leading up to the trial. (Def. App. Ex. A). [REDACTED], on the other hand, was a relatively new attorney who had never tried a case before. Appellant chose to be tried by an enlisted panel. After two days of presentation and about three hours of deliberation, the panel announced a full conviction. Defense counsel presented only 40 minutes of mitigation evidence. (Certified Record of Trial Index). The military judge sentenced appellant to serve three life sentences, two which are consecutive, and

an additional 50 years of confinement some of which are consecutive, some concurrent.

### **Law and Argument**

The Sixth Amendment guarantees an accused the right to the “effective assistance of counsel.” *United States v. Cronin*, 466 U.S. 648, 653-656 (1984). To prevail on a claim of ineffective assistance of counsel, the appellant must show both deficient performance and prejudice. *Strickland*, 466 U.S. at 687. Appellant need not “make an ‘outcome-determinative’ showing that ‘counsel’s deficient conduct more likely than not altered the outcome in the case.’” *United States v. Howard*, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 693). Also, “the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (quoting *Strickland*, 466 U.S. at 686). Multiple instances of defense counsels’ failure to object, challenge, and present evidence rendered the result of this proceeding unreliable.

### **A. Ineffective assistance in failure to challenge a biased member**

The Sixth Amendment guarantees a criminal defendant the right to be tried by an impartial jury, and this right is secured, in no small part, by the system of challenges exercised during the *voir dire* of prospective jurors. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976) (internal citations omitted). An error in the composition of a court-martial can constitute a structural error. *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008) (finding structural error requiring reversal where the court-martial fell below a quorum and lacked enlisted membership as requested). Appellate courts “apply the Supreme Court’s structural error analysis, requiring mandatory reversal, when the error affects the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *United States v. Upham*, 66 M.J. 83 (C.A.A.F. 2008) (internal quotations and citations omitted); *see also United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F. 2011).

When defense counsel failed *voir dire* and challenge a clearly biased member, it resulted in a composition of panel that constituted a structural error. Assistant defense counsel asked if a penal member can think of a reason “other than guilt, an accused may elect to remain silent and not testify,” and this member answered “That’s what I would’ve said, guilt.” When followed up with “Is there a

constitutional right not to testify against yourself?” the panel member said “Yes.” (R. at 146). The panel member was never disabused of this notion during her *voir dire*. The member was subsequently selected for the panel. Therefore, this panel member was biased against appellant who chose to remain silent. Whether deemed structural or not, a trial by a biased member is not tested for prejudice.

**B. Ineffective Assistance in investigation in presentencing**

One of the ways in which a defense counsel’s performance may be deficient is when they fail to investigate the case adequately. *United States v. Scott*, 1987 CMA LEXIS 2557, \*19 (C.M.A. 1987). The American Bar Association (ABA) Standards of Criminal Justice specify the duties of defense counsel during sentencing. Defense counsel should:

take particular care to make certain that the record of the sentencing proceedings will accurately reflect *all relevant mitigating circumstances* relating either to the offense or to the *characteristics of the defendant* which were not disclosed during the guilt phase of the case.

*United States v. Weathersby*, 48 M.J. 668, 671 (Army Ct. Crim. App. 1998).

The defense presentencing case ran only around 40 minutes. (Certified Record of Trial). Appellant’s mother and brother each testified for a short period resulting in three pages of testimony each. (R. at 701-704 and R. at 704-707). Both witnesses were called telephonically. The witnesses were unprepared. One

witness was surprised to hear about appellant's conviction and seemed to be uninformed about the purpose of his testimony. (R. at 696). It shows that in preparation for pre-sentencing case, defense counsel failed to conduct an in-depth interview to explain the purpose of their testimonies and get in-depth answers. They never interviewed friends, teachers, coaches, or neighbors. Most importantly, the defense counsels failed to allow for appellant's family's in-person testimony.

In addition, appellant requested his defense attorneys to investigate his pending diagnosis of PTSD based on his childhood abuse, sex assault and his later deployments. It was essential to investigate these facts for a client who was facing multiple life sentences without parole. This failure to investigate, prepare, and present a full sentencing case for appellant, resulted in severe sentence of consecutive life sentence, because there was a lack of information on why appellant ended up in the situation he was.

**C. Ineffective Assistance in failure to object to the government's inadmissible evidence and presentation**

Defense counsels have duty to challenge and exclude inadmissible evidence. *See DeFreitas v. State*, 701 So.2d 593, 602 (Fla. Dist. Ct. App. 1997) (explaining the court is unlikely to "excuse counsel for his failure" to object because a defense counsel "has the duty to remain alert to such things in

fulfilling his responsibility to see that his client receives a fair trial.”). Failure to do so may give rise to meritorious ineffective assistance of counsel claims. *See* F. Emmitt Fitzpatrick & NiaLena Caravassos, *Ineffective Assistance of Counsel*, 4 Rich. J.L. & Pub. Int., 67, 81 (2000) (citing *Williams v. Washington*, 59 F.3d 673, 684 (7th Cir. 1995); *Henry v. Scully*, 78 F.3d 51, 52-53 (2d Cir. 1996)).

Throughout the trial the defense counsel failed to raise objections at multiple instances of prosecutorial overreach. These failures to exclude inadmissible evidence or to challenge the scope of the evidence prejudiced appellant. Defense’s shirking of their “duty to remain alert to such things” has contributed to appellant’s unfair trial. *Defreitas*, 701 So.2d at 602.

***1. Leading questions by trial counsel***

The prosecution’s main elements of proof came from their leading questions. The government continually asked leading questions in violation of Mil. R. Evid. 611 and the defense counsel failed to object. In some instances, certain specifications were entered solely based on the phrasing of the prosecutors’ questions. (*See supra* AE II). If counsel had objected early and often, the panel may not have had *any* evidence to convict appellant for.

***2. Admission of a bracelet appellant gifted to [REDACTED] a year before the alleged incident.***

The defense counsel did not object when the government offered the bracelet appellant gave [REDACTED] about a year prior to the alleged incident. (R. at 367).

[REDACTED] did not give any context to the meaning of the gift except that she was sitting at the table in the kitchen, but the evidence was admitted without objection.

*Id.* There was no apparent relevant reason for the admission of this evidence.

Despite this, the evidence was shown to [REDACTED] mother who further elaborated that her daughter was making bead bracelets for [REDACTED] and appellant because he had given her a bracelet. (R. at 414). Despite having no probative value, the evidence was admitted without objection and this admission was highly prejudicial to appellant because the presentation of evidence constituted waste of time and likely caused confusion among members. Since the purpose of the gift was never explained, the panel member must have made impermissible propensity type of conclusions.

### 3. [REDACTED] testimony

[REDACTED] testimony should have been objected to, since [REDACTED] testimony was cumulative of [REDACTED] at best. (R. at 407). [REDACTED], [REDACTED] mother, testified about the purpose of the bracelet [REDACTED] was making and other inadmissible hearsay evidence. [REDACTED] was also allowed to talk about her vibes and red flags and how she always knew appellant was the bad guy, although she

admitted at cross that appellant's name was not the obvious first choice, when inquired by law enforcement. (R. at 421).

██████, without proper foundation, testified to appellant having a definite "vibe." (R. at 408). ██████ also insinuated that she cut ██████ relationship with ██████ because of this "vibe." Yet, ██████ and ██████ both alluded to the fact that the excommunication occurred during appellant's deployment, while he was away, not because of him. (R. at 370).

Her characterization of appellant having a "vibe," can readily be taken as members as appellant general propensity to creep on little girls. Therefore, this highly prejudicial evidence should have been objected to and omitted.

***4. Admission of the photo appellant had taken the day after the incident and the photos the investigators took based on that photo***

The defense counsel successfully established through ██████ that the day of the assault was on Friday and based on the calendar of that year the date of the assault thus was on 8 March 2019. (R. at 393). They failed to use this fact to exclude a photo of a tree from 9 March and the photos agents later took to match that tree. Appellant taking a photo of a tree, the day after the alleged assault was not relevant to the incident. Since the alleged location was within their small neighborhood, tree photos around appellant's neighborhood did not contribute to anything. Therefore, these tree photos should have been objected to.



**5. ██████ testimony and his reading his wife's unsworn**

The government was trying to highlight ██████ rank and duty position throughout the trial. At first, they asked ██████ about what her stepdad did, but she simply laughed and stated she didn't know. (R. at 36). ██████ then was asked about who her husband was and where he was and his rank. (R. at 406-407). At presentencing, the government called the ██████ and specifically asked him about how, as a Master Sergeant, he feels about appellant's offense. (R. at 677). ██████ went onto give an opinion about how appellant had never lived by Army Values and asked the court to punish him "to the full extent of the law." *Id.* Defense counsels objected to ██████ improper sentence recommendation but did not object to his improper aggravation opinion evidence. *United States v. Ohrt*, 28 M.J. 301, 307 (testimony lacked a proper foundation to demonstrate opinion was personalized and based upon the accused's character and potential). Later and without objection, ██████ read his wife's unsworn testimony on her behalf. Although R.C.M. 1001(c) permits parents of victims to deliver unsworn statements, not anyone can read a statement on behalf of a purported victim. The CAAF stated, "All of the procedures in R.C.M. 1001A contemplate the actual participation of the victim, and the statement being offered by the victim or through her counsel." *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018).

“Provision is also made for the appointment of an individual to assume the Article 6b, UCMJ, rights of a victim who is under the age of eighteen, or "incompetent, incapacitated, or deceased.” *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (citing Article 6b(c), UCMJ.). ████████ did not have any of these impairments. The girls, despite having the court appointed designees, were able to take the stand read their unsworn statements. Moreover, ████████ had testified at the merits portion of the trial. Allowing ████████ to read the statement was objectionable and prejudicial.

***6. Inclusion of the element “child not obtained the age of 12” in sexual abuse of child offense charge sheet and flyers***

The sexual abuse of a child offense does not contain such element. Instead, it only requires the government to prove that the alleged victim had not attained the age of 16 years at the time of the lewd act. In other offenses, the age below 12 can be an aggravating factor. Therefore, adding those ages in the charge sheet and the flyer was unnecessarily prejudicial.

***7. Imprecise instructions***

Defense team failed to object to the vague and imprecise instructions for the Mil. R. Evid. 404(b) and Mil. R. Evid. 414 instructions. Although the military judge’s late ruling may have contributed to this, the team should have been alerted to these oversights that resulted in prejudice.

### **C. Failure to object to the biased military judge**

A structural error is a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v.*

*Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

Prime example of structural error is trial by a partial (biased) judge, *Tumey v. Ohio*, 273 U.S. 510 (1927). The military judge disclosed that he was the Deputy Chief Army’s Trial Counsel Assistance Program (TCAP), while the [REDACTED], [REDACTED], worked directly under his leadership. (R. at 22). TCAP is a small office that has hyper focus into mentoring and developing attorneys in prosecution. It was foreseeable that this relationship would have influenced the military judge as he had spent significant time developing his subordinate for this exact work. This was evidenced by the military judge’s unusual involvement in the admission of 404(b) evidence. Therefore, the defense counsel’s failure to object resulted in structural error and unfair trial.

### **D. Failure to provide advice regarding guilty plea and sentencing potentials**

At the arraignment on 22 November 2020, appellant elected the procedures effective on 1 January 2019 and after. The panel found appellant guilty of all specifications of the charge. (R. at 658). Afterwards, the military judge inquired whether appellant is ready to make his selections to be sentenced by members or

the military judge alone or if they needed some time to discuss the options. The defense attorney answered, “Maybe 15 minutes, Your Honor.” R. at 659.

Appellant ultimately elected to be sentenced by the military judge. (AE XLII, R. at 660). Appellant asserts that he was never fully explained the implications of segregated sentencing and its danger for a case such as his. Due to a lack of proper explanation appellant did not make an informed choice.

Overall, the defense team was lacking in preparation, and it was due to the lead counsel being practically out of the military by the time of the trial. The assistance defense counsel was inexperienced came on the record the day of the trial and met the client for the first time that day. Therefore, this finding and sentence should be set based on ineffective assistance of counsel.

#### **IV. WHETHER APPELLANT’S SENTENCE WAS INAPPROPRIATELY SEVERE.**

Article 66(c), UCMJ, mandates that this court “affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Given this statutory mandate, this court has “wide discretion” in determining whether a particular sentence is appropriate. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). When assessing sentence appropriateness, the service courts consider the sentence severity, the particular appellant, the nature and

seriousness of the offenses, and all matters contained in the record of trial. *United States v. Martinez*, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Appellant's approved sentence is inappropriately severe, as it neither fits the circumstances detailed in the appellate record or the offender. This sentence is inappropriately severe because of the sentence disparity between the present case and other cases receiving similar punishment, and the fundamentally unfair trial that resulted from the many irregularities and his defense attorneys figurative and actual absence during the trial as explored in the assigned errors and *Grostefon* matters.

Appellant serving multiple life sentences that is running consecutively, is comparable to LWOP. Such a sentence is reserved for the most serious and violent crimes. *See United States v. Chiaravallotti*, ARMY 20130166, 2015 CCA LEXIS 448 (Army Ct. Crim. App. 21 October 2015). Chiaravallotti was guilty of unpremeditated murder, aggravated sexual assault of a child, rape of a child, and assault consummated by a battery upon a child under sixteen years of age. *Id.* The crime was especially violent and heinous. In contrast, the Air Force Court of Criminal Appeals concluded that a sentence of LWOP is unduly severe for an

appellant who had confessed to molesting three children with various body parts and objects, as well as manufacturing and distributing child pornography. *United States v. Smith*, No. ACM 37816, 2013 CCA LEXIS 504, at \*10 (A.F. Ct. Crim. App. June 19, 2013). Smith had advertised for his babysitting service to lure his victim and posted video recordings of his molestation of his victims. *Id.* The *Smith* court reassessed the sentence to single life sentence with parole despite numerous egregious and aggravating factors. *Id.* Appellant here had fewer aggravating factors, yet he is serving multiple life sentences. Therefore, the record and the case law support reassessment of this unusually harsh sentence.

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to Army  
Court and Government Appellate Division on September 22, 2022.



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