

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY 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

Assignments of Error

**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.¹**

¹ Appellant rests on his opening brief on this assigned error.

Statement of the Case

On 22 September 2022, appellant filed his brief. On 16 February 2022, the government filed its brief. This is appellant's reply brief.

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

a. Military Rule of Evidence 404(b) notice was not provided.

The government misconstrues the significance of the Military Rule of Evidence [Mil. R. Evid.] 404(b) notice requirement and the proponent notice requirement. First, the government argues the notice requirement should be broadly construed, relying on federal civilian cases and one unpublished Army opinion. (Appellee Br. 7-8). However, all those cases predate Congress' 2020 adoption of more stringent requirements. *Cf.* Fed. R. Evid. 404(b). Simply noting the "general nature" of the evidence is no longer sufficient. "The pretrial notice must be in writing" and "the prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered." Fed. R. Evid. 404(b), Notes of Advisory Committee on 2020 Amendments. The Committee further emphasized, "*Advance* notice of Rule 404(b) evidence is important . . ." and "*must* be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of *good cause*." *Id.*

(emphasis added). The government’s reliance on old cases standing for the notion that a short and vague notice are sufficient is incorrect.

Military courts have long maintained stringent procedural requirements. S. Salzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual*, 4-107, [ii] (8th ed. 2015). The pretrial order in this case required the government to submit written notice of its intent to introduce all Mil. R. Evid. 404(b) evidence by 26 October 2020. (App. Ex. II). The military judge even warned, “Failure to meet this suspense may result in the exclusion of such evidence at trial.” (App. Ex. II, n.3). Thus, any submission beyond that date was in violation of that order. Second, the proponent of the evidence and the party required to provide notice is the “prosecution.” Mil. R. Evid. 404(b)(3). Here, the government conflates the court’s actions with the government’s when it insists it provided reasonable notice “not once but three times, prior to trial.” (Appellee Br. at 12). The government never issued notice per Mil. R. Evid. 404(b)’s requirements nor did it comply with the military judge’s pretrial order.

The government’s motion in limine to admit appellant’s journal never mentioned Mil. R. Evid. 404(b) implications. (App. Ex. IV). After a hesitant colloquy with the military judge, the government was ordered to submit documents outlining the allegations. (R. at 44; 48). The military judge told the government to “provide those by the end of the week.” (R. at 53). Yet, as of 7 May 2021, the last

business day before the trial, military judge was still asking for the same document. (R. at 76-77). The last communication about the journal admission was also initiated by the military judge. The government's only "notice" came in the form of answers to military judge's prompts.² (App. Ex. XX). Therefore, the only proponent was the military judge.

b. The government's argument that Rule for Courts-Martial 905(d) only applies to certain pretrial motions is misplaced.

The government argues Rule for Courts-Martial [R.C.M.] 905(d) applies only to certain pretrial motions listed under R.C.M. 905(b). However, the Court of Appeals for the Armed Forces (CAAF) has relied on R.C.M. 905(d) in addressing delayed motions falling outside R.C.M. 905(b). *See United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014) (citing R.C.M. 905(d) in discussing a military judge's delayed ruling on a defense request for continuance and a defense motion to compel an expert witness); *United States v. Helwig*, 32 M.J. 129, 133 (C.A.A.F. 1991) (questioning whether there is a meaningful distinction between motions under R.C.M. 905 and R.C.M. 906). Importantly, in *Helwig* CAAF stated motions

² Contrary to the government's assertion, the actual email communication is not attached to the record. (Appellee Br. at 10, n. 9). Instead, only the questions and answers are attached. (App. Ex. XX). On the record, the military judge simply referenced an email "I sent . . . earlier in the week." (R. at 71). Presumably there would have been at least three sets of email exchanges related to this document. As the parties are making timing, proponent, and absence of objection arguments, the content of the email exchange is important.

in limine “are broadly viewed as ‘any motion, whether made before or during trial, to exclude anticipated evidence before the evidence is actually offered.’” *Helwig*, 32 M.J. at 133 (citing *Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984)). The court further stated, “Such a motion works to prevent prejudice and even the sides ‘at the threshold,’ before litigation.” *Helwig*, 32 M.J. at 133 (citing *Luce* at n.2). Therefore, CAAF has emphasized the importance of R.C.M. 905(d)’s temporal requirement and delayed rulings may negatively impact litigation.

The military judge initially denied the government’s motion to preadmit based on lack of foundation and, until a week before trial and without good cause, ignored the defense Mil. R. Evid. 404(b) objection. The government asserts, appellant “did not raise a notice objection” to the military judge’s reengagement on the topic. (Appellee Br. at 10, n. 10). The government’s mischaracterization of the military judge’s action as proper notice leads it to conclude appellant was required to object. However, in his 23 November 2020 reply, appellant raised the Mil. R. Evid. 404(b) notice objection. (App. Ex. V). Because the military judge never ruled on this objection, re-raising it was unnecessary.

In attempting to excuse the military judge’s untimely ruling, the government contends appellant never filed a motion. (Appellee Br. at 12). This is misleading. Appellant already objected to the improper notice, in writing and at oral argument. Filing a motion to exclude would lead to appellant waiving the notice objection

(also, the military judge had previously denied pre-admission of this evidence for a lack of foundation). As of 7 May, the government had not submitted foundational documents. (R. at 77). Had the government filed a timely Mil. R. Evid. 404(b) notice with all required evidence, and had the defense filed a motion to exclude, the necessity for a timely ruling would have been indisputable. The assertion that a late ruling was justified because there was no motion pending is perverse. Such an interpretation condones government negligence and tardiness and renders Mil. R. Evid. 404(b) notice requirement meaningless.

Only on 6 May 2021 did appellant receive the final foundational documents, the government's theory as to the evidence's relevancy to each specification, and the government's theory of admissibility. Appellant was afforded only a few hours to respond. (R. at 71). This late introduction of highly prejudicial evidence should have been excluded per the military judge's pretrial order. Moreover, the military judge had no discernible good cause for his late ruling. Therefore, the late ruling was also erroneous.

c. The erroneous admission of the evidence prejudiced appellant.

The government's contention that the military judge's erroneous admission did not prejudice appellant is unsupported. The government filed the motion in limine to showcase this evidence in their opening statement as "direct evidence" of appellant's intent. (App. Ex. IV). The military judge eventually admitted the

evidence over appellant's objection. (App. Ex. XXIX). The government argued in closing that the journal was "direct evidence" of appellant's intent and referenced the military judge's instruction about direct evidence. (R. at 621). Appellant was convicted based on this evidence and was sentenced to multiple and consecutive life sentences. Therefore, the government cannot meet its burden to show the outcome would not have been different without this significance that was at the center of both the government's findings and presentencing case.

II. WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT.

Appellant disputes the sufficiency of all charges and specifications.³

However, appellant specifically challenges the direct and compound questioning of ■■■. To validate those unjustified methods, the government now argues facts not in evidence. The government's claim that "the child testifying in front of her sexually abusive father" justified the special treatment is unsupported and violates the presumption of innocence. (Appellee Br. 31). Appellant agrees that witness examination through leading questions may be "necessary to develop the witness' testimony" and that rules allow remote testimony of a child. *See United States v.*

³ Contrary to the government's assertion, appellant is challenging the legal and factual sufficiency of Specification 7, per *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982). (Appellee's Br. at 22).

Archdale, 229 F.3d 861, 866 (9th Cir. 2000); Mil. R. Evid. 611(c); R.C.M. 914A. However, that necessity must be demonstrated by the circumstances. In this case, nothing supports a necessity for special treatment. The *Rodriguez-Rivera* case is not analogous. There was no special treatment bestowed to the victim who was only five years old. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006). Likewise, in *Wood*, the victim was only six years old and “it became apparent that [she] was having difficulty discussing the events.” *United States v. Wood*, 36 M.J. 651, 655 (A.C.M.R. 1992). In this case, there is no such evidence of difficulty. The government’s claim of intimidation is baseless and irrelevant.


Appellant is asking the court to examine whether a series of “yes” answers to leading and compound questions can uphold a guilty verdict beyond a reasonable doubt. The government contends, without explanation, the instant case “can easily be distinguished” from *Bramley* where “[t]he court was concerned that these witnesses were predisposed to be overly cooperative and would give answers beyond their personal knowledge.” (Appellee Br. at 31) (referencing *United States v. Bramley*, 2015 U.S. Dist. LEXIS 183656 (W.D. Okla. Sep 16, 2015)). However, it is also true that the children can be highly suggestible.

The government’s contention about the witness’ credibility is irrelevant. (Appellee Br. at 26; 38). Each specification must stand on its own. The government’s argument that the witness’s testimony about detailed accounts of

some of the incidents justify all the findings violates CAAF’s ruling in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). (Appellee Br. 32-33); *see also* *United States v. Hukill*, 76 M.J. 219, 222 (C.A.A.F. 2017). Here, the court can only approve those specifications that, on their own, are factually sufficient. Appellant, therefore, asks this court to exercise its plenary and awesome power to affirm “only such findings” that “should be approved on the basis of the entire record.” Article 66(c).

Conclusion

Based on the foregoing, this court should set aside appellant's convictions and multiple life sentences.




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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
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