**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES, Appellee v. Donald J. Brown Master-at-Arms First Class (E-6) U.S. Navy, Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. No. 201100516 USCA Dkt. No. 13-0244/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issue Presented

GENERALLY, OUTSIDE THE MILITARY JUSTICE SYSTEM, WITNESS ATTENDANTS MAY ACCOMPANY A CHILD ON THE WITNESS STAND IF THE PROSECUTION SHOWS GOOD CAUSE AND THE TRIAL JUDGE MAKES A FINDING OF COMPELLING OR SUBSTANTIAL NEED. HERE, WITHOUT GOOD CAUSE SHOWN AND WITHOUT FINDINGS OF COMPELLING OR SUBSTANTIAL NEED, THE MILITARY JUDGE ALLOWED A VICTIM ADVOCATE TO SERVE AS A WITNESS ATTENDANT FOR A SEVENTEEN-YEAR-OLD; THEN THE MILITARY JUDGE REFERRED TO THE WITNESS ATTENDANT AS THE COMPLAINANT'S "ADVOCATE" BEFORE THE MEMBERS. DID THIS PROCEDURE VIOALTE APPELLANT'S PRESUMPTION OF INNOCENCE AND RIGHT TO A FAIR TRIAL?

Statement of Statutory Jurisdiction

Master-at-Arms First Class (MA1) Donald J. Brown, U.S. Navy, received an approved court-martial sentence that included a punitive discharge. His case fell within the Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), jurisdiction of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA). He invokes this Court's jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2006).

Statement of the Case

MA1 Brown was tried before a general court-martial composed of members with officer and enlisted representation. Contrary to his pleas, he was found guilty of two specifications of rape of a child, one specification of aggravated sexual abuse of a child, two specifications of child endangerment, and three

specifications of indecent liberties with a child, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934. MA1 Brown was sentenced to reduction in rank to pay-grade E-1, confinement for forty-five years, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

On November 28, 2012, the NMCCA affirmed. Appellant timely petitioned this Court for review on January 24, 2013. On that same date, Appellant also requested that his Supplement be accepted separately pursuant to Rules 19 and 30 of this Court's Rules of Practice and Procedure. This Court granted that motion on January 24, 2013. On March 22, 2013, this Court granted review of Appellant's case and ordered expedited briefing.

Statement of Facts

MA1 Brown met R.B. through *Yahoo!* profiles in July 2003. (JA at 126, 133.) R.B. had been married twice and already had four children, including two daughters: M.B., who turned fourteen in August 2004; and A.W., who turned eleven in July 2004. (JA at 26, 38, 127, 131.) In April 2009, accusations surfaced against MA1 Brown. Namely, it was alleged that he had endangered the welfare of M.B. and A.W. by providing them with alcohol and pornography. (JA at 289-95.) It was also alleged that he sexually assaulted A.W. on diverse occasions from 2004

until 2008 and took a nude photograph of M.B. on or about December 2004. (*Id.*) Other assaults were alleged as well.

A.W. testified at MA1 Brown's court-martial. (JA at 37.) At the time, she was five weeks away from her eighteenth birthday. (JA at 38.) She began crying soon after she took the witness stand. (JA at 39-40.) She was able to answer eighteen questions from the assistant trial counsel, but then she stated, "I can't do this." (JA at 37-40.) A.W. subsequently asked to take a break. (*Id.*) The military judge excused the members from the courtroom and had a conversation with A.W. on the record. (JA at 40-41.) He said, "my goal right now is to do anything, adjust anything that I can for you to make this as comfortable as possible . . . ." (JA at 41.) He told A.W. to tell the assistant trial counsel "anything you think would make it easier for you" to testify. (JA at 41-42.)

The military judge then placed the members on an overnight recess and conducted an Article 39(a) session. (JA at 43-45.) He asked the prosecution what its plan was to ensure that A.W. would be able to testify, and the assistant trial counsel said, "we would like to . . . have the victim's advocate, [Ms. D], seated next to her in the courtroom." (JA at 45.) The prosecution did not offer a reason why it believed this accommodation was appropriate. And the military judge never confirmed with A.W. that this requested accommodation was

accurate or necessary for her to testify. The defense objected. (*Id.*) The defense argued that if Ms. D were to be present in the courtroom, she should be seated in the gallery just like any other observer. (JA at 46.) Otherwise, having her seated next to A.W. while she testified "gives the wrong message to the members" that A.W. is "weaker and more emotionally vulnerable than she actually is." (*Id.*) The defense stated that a gallery placement would put Ms. D "within viewing distance" of A.W., and that it should be "sufficient" if A.W. were able to see Ms. D. (*Id.*)

The military judge responded, "All right, I understand your positions. The members already know that [A.W.] cannot get through her testimony, the reasons for that, I expect, will be explored by counsel." (*Id.*) The military judge did not explain his basis for this assertion. And counsel never explored those reasons. The military judge then immediately issued his ruling: "I will identify Ms. D[] to the members before we continue with the testimony, and identify that I have made the accommodation to allow her to sit there, and *I will also identify the position of which she is*." (JA at 47 (emphasis added).) He disallowed any communication between Ms. D and A.W. (*Id.*) The military judge stated, "[I]f the witness turns to Ms. D[], she's got to be able to give her nonverbal indication to continue with the testimony or else we will immediately go into a recess." (JA at

47.) The assistant trial counsel asked if the ruling proscribed physical contact, and the military judge answered that he would "note any physical contact for the record to the extent that Ms. [D] may need to touch [A.W.] or nudge her to get her to focus" back on her testimony. (*Id.*) He noted that the defense would be allowed to explore and argue any inferences from such contact that they would like. (*Id.*) He then made clear that the defense objection was overruled. (*Id.*) No findings of fact demonstrating compelling or substantial need accompanied this ruling. And the prosecution did not offer a response to the defense objection.

Before the Article 39(a) session ended, the military judge raised the possibility of "remote witness testimony." (JA at 48.) The judge said, "I expect the government is nowhere near able . . . to establish the predicates necessary for that". (*Id.*) The assistant trial counsel agreed, pointing out that the rule governing remote witness testimony "requires a child, and the definition of a child is under the age of 16." (*Id.*) The military judge replied, "All right, and I wasn't sure of that . . . and even then, the findings that I have to make . . . based on a factual record were just not there." (*Id.*) The military judge then recessed court for the day. (JA at 50.)

The following morning, during another Article 39(a) session, the military judge clarified that he "plan[ned] to have

[A.W.] come to the witness stand along with her advocate, [Ms. D], next to her, sitting in what has been the bailiff's chair." (JA at 51.) The assistant defense counsel renewed his objection to this procedure. He contended that "having the advocate sit next to the complaining witness here would be unfairly prejudicial to MA1 Brown because it bolsters--it will be seen or have the effect of bolstering the credibility of the witness to the members." (*Id.*) Though he acknowledged state case law allowing victim advocates to accompany complaining witnesses to the witness stand, the assistant defense counsel noted that those cases always dealt with child witnesses. (*Id.*) He highlighted the fact that A.W. was a seventeen-year-old and therefore not a child. (JA at 53.) He reiterated his main argument that having Ms. D sitting next to A.W. on the witness stand "would create [an] unfairly prejudicial situation for . . . MA1 Brown, because then it will be seen . . . by our members[] as unfairly bolstering [A.W.'s] credibility, . . . convey[ing] to the members that the complainant is telling the truth and it would deny [MA1 Brown] . . . the right to a fair and impartial trial." (*Id.*) The defense counsel also suggested closing the courtroom if A.W. was having difficulty testifying in open court. (*Id.*) The military judge immediately dismissed that suggestion, offering no analysis. (*Id.*) He stated, "[T]hat's not even worth addressing, so move on." (JA at 54.)

The assistant defense counsel accepted the military judge's invitation. He contrasted this case with *United States v. Romey*, 32 M.J. 180 (C.M.A. 1991), where the Court of Military Appeals allowed an eight-year-old child to whisper answers into her mother's ear, who then repeated the answers to the court. (*Id.*) That case was different, he argued, because it involved "the tender age of the child." (JA at 54-55.) This case was more like *State v. Suka*, he continued, where a Hawaii court found the presence of a victim counselor, placed beside a fifteen-year-old witness with her hands on her shoulders, prejudicial to the rights of the accused. (JA at 53-55.)

As before, the military judge did not ask the prosecution to respond to the defense or advance reasons for the accommodation. Instead, he stated:

> All right. So it's clear because I don't believe I made any specific findings yesterday.
>
> What we had yesterday with [A.W.] was not just crying during testimony, it was her completely unintelligible and unable to speak because she was crying. I will just say it again, and Commander McDonald, *I am well aware of the due process implications*, and if the government is willing to take that risk, I believe it is fair and any prejudice correctible with instructions to the members.

(JA at 56 (emphasis added).) He reiterated his limitation on physical contact, (*id.*), and continued:

> And I intend to tell the members that this is an accommodation that I have chosen to make. And I don't see this as one that they can interpret as bolstering

> her credibility. But frankly, I believe it's permissible for the defense to be able to argue that this potentially impacts her credibility, that this is a one way street that the government has chosen to move down. But the instructions, to me, are correctible. *The members can infer from this need of [A.W.] what they would like*, but I will specifically tell them they cannot infer from that that she is a credible witness or that there is credibility to any claim that she makes in here testimony, fact or otherwise.

(JA at 56-57 (emphasis added).) The military judge did not explain what inferences the members could infer from the need for the accommodation. He then brought Ms. D into the courtroom and informed her of his limits on the accommodation. (JA at 58.)

The members reentered the courtroom. The military judge gave the following instruction to the members:

> The government is about to continue their direct examination of [A.W.] where we were yesterday when we took an afternoon recess. You will notice that there is someone sitting next to [A.W.] this morning. This is Ms. [D]. She is an *advocate* that has been assigned to [A.W.], and I have made the decision to allow [her] to sit in the courtroom during [A.W.]'s testimony. My decision to do that should in no way be interpreted by you as an endorsement by me or the government or anyone else of the credibility of [A.W.]'s testimony. You will evaluate the credibility of her testimony in the same manner you will any other witness. And when I give you the instructions on the law that you must follow before you begin your closed session deliberations, and I do that in writing, I will further explain how you go about determining the credibility of a witness. This is an accommodation that I have made. You will infer nothing from it.

(JA at 60-61.) He asked the members if they had any questions; none of them did. (JA at 61.) He did not ask the members if any of them knew Ms. D. And he did not ask Ms. D. if she knew any of the members.

A.W. resumed her testimony--this time with Ms. D by her side. She offered evidence that led to MA1 Brown's convictions for rape, among other offenses. The military judge did not recess the court or excuse the members at any point due to communication or contact between Ms. D and A.W. (JA at 61-124.) When it came time for findings instructions, the military judge gave the standard credibility of a witness instruction. (JA at 190-91.) He did not mention the presence of the victim advocate during these instructions.

Summary of Argument

Allowing a victim advocate to accompany a complainant on the witness stand erodes the presumption of innocence and violates an accused's due process right to a fair trial. The accommodation is inherently prejudicial. Accordingly, findings of compelling and substantial need, coupled with procedural safeguards, are necessary to justify it. Because these findings and safeguards were omitted here, this Court should set aside the findings and sentence and authorize a rehearing.

If this Court decides that the accommodation is not inherently prejudicial, it should still set aside the findings

and sentence and authorize a rehearing. Here, the presence of the victim advocate, who was seated next to the seventeen-year-old complainant as she testified, eroded MA1 Brown's presumption of innocence and violated his due process right to a fair trial. This harmful error was compounded when the military judge introduced her to the members as A.W.'s "advocate". He did not even ask the members if they knew the victim advocate. When bedrock constitutional rights are at stake, this cannot be the right approach.

Argument

APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE MILITARY JUDGE: (1) ALLOWED A VICTIM ADVOCATE TO SIT NEXT TO A.W. ON THE WITNESS STAND WITHOUT GOOD CAUSE SHOWN OR FINDINGS OF COMPELLING OR SUBSTANTIAL NEED; AND (2) REFERRED TO THE WITNESS ATTENDANT AS A.W.'S "ADVOCATE" BEFORE THE MEMBERS. WHEN THE LOWER COURT AFFIRMED, IT ERRONEOUSLY APPLIED A FEDERAL STATUTE THAT THIS COURT PREVIOUSLY CONFINED TO FEDERAL DISTRICT COURTS. THIS COURT SHOULD SET ASIDE THE FINDINGS AND SENTENCE AND AUTHORIZE A REHEARING.

"The presumption of innocence is a longstanding feature of both military and civilian law. It is a critical part of our tradition of justice and deeply imbedded in our culture as well as our systems of justice." *United States v. Kaiser*, 58 M.J. 146, 153 (C.A.A.F. 2003) (citations omitted). That "presumption . . . flows from the fundamental right to a fair trial," a "fundamental liberty" secured by the Constitution. *Id.* at 150

(citations and internal quotations omitted). It "embodies the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, *and not on grounds . . . or other circumstances not adduced as proof at trial*.'" *Id.* (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)) (emphasis added).

As a result, "courts must be alert to factors that may undermine the fairness of the fact-finding process . . . [and] must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). If a trial practice poses a threat to the "fairness of the factfinding process," it is subject to "*close judicial scrutiny*." *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986) (discussing "conspicuous . . . deployment of security personnel in a courtroom") (citations omitted) (emphasis added). It will be struck absent demonstration of some compelling or substantial need. *Cf. Deck v. Missouri,* 544 U.S. 622, 630-635 (2005).

A. Seating the victim advocate next to A.W. was an improper accommodation. It was inherently prejudicial.

Appearances matter at trial. For example, the practices identified by the Supreme Court as "pos[ing] a threat to the fairness of the factfinding process", *Holbrook*, 475 U.S. at 568, all involved the common denominator of problematic appearance

before a panel of fact-finders. In *Holbrook*, it was the appearance of four uniformed state troopers seated in the front row of the gallery. *Id.* at 562. In *Estelle v. Williams*, it was the appearance of defendants in prison garb before the jury. 425 U.S. 501, 503-04 (1976). More recently, it was the appearance of shackles on a defendant during the sentencing phase of trial. *Deck*, 544 U.S. at 633. Similarly, state courts forbid trial practices that evince prejudicial appearance. In Colorado, it was the appearance of a trial judge meeting a child witness at the gallery gate and then escorting that child to the witness stand. *People v. Rogers*, 800 P.2d 1327, 1328-29 (Colo. Ct. App. 1990) (reversing and remanding for a new trial). In Louisiana, it was the appearance of a judge rewarding a child victim with candy at the conclusion of her testimony. *State v. Cook*, 485 So.2d 606, 609 (La. Ct. App. 1986) (reversing and remanding for new trial). And significantly, in Hawaii, it was the appearance of a member of the "Victim Witness Kokua Program" standing behind a fifteen-year-old complainant with her hands on the complainant's shoulders during testimony. *State v. Suka*, 777 P.2d 240, 242 (Haw. 1989) (vacating conviction and remanding for new trial).

All but one of these trial practices resulted in reversible error. *See Holbrook*, 475 U.S. at 568-72 (noting "close scrutiny of inherently prejudicial practices has not always been

fatal[.]"). Because appearances matter at trial.[1] They can implicate the Fifth Amendment guarantees to a fair trial and they can disrupt the presumption of innocence entitled to all criminal defendants.[2] Accordingly, as noted by the Supreme Court, these practices must be subject to "close judicial scrutiny[.]" *Id.* at 568. They cannot be upheld absent a demonstrated showing of compelling or substantial need.

Here, the presence of the victim advocate denied MA1 Brown his right to a fair trial and his presumption of innocence. Ms. D's presence was inherently prejudicial. She fortified A.W. in plain view of the members, bolstering her credibility. *Suka*, 777 P.2d at 242 ("We are not convinced that [the witness attendant] sitting with the complainant and standing behind her with her hands on her shoulders . . . did not unfairly bolster complainant's credibility.") With Ms. D by her side, A.W.

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[1] For this reason, court-martial practice requires an accused to be properly attired in the courtroom, adorned with each award and decoration that he or she is entitled to wear. This requirement supports the presumption of innocence. It should be vigilantly guarded.

[2] Because the military judge's ruling implicates MA1 Brown's constitutional rights, Appellant argued below that his case should receive close judicial scrutiny under a *de novo* review. (*See* Appellant's NMCCA Br. at 11-14.) The lower court rejected this argument. *United States v. Brown*, 2012 CCA LEXIS 448, at *12-13 n.13 (N-M. Ct. Crim. App. Nov. 28, 2012). It did so in error. If this Court finds that close judicial scrutiny is inapplicable because the accommodation was not inherently prejudicial, it should still conduct a *de novo* review of the accommodation.

became an unfairly enhanced witness, doubled in presence and power. The advocate underscored the fragile, emotional state of A.W. as she sat silently beside her. Needing someone to blame, it became far too easy to point to the man seated at the defense table--MA1 Brown.

Because this accommodation had the effect of placing a thumb on the scales of justice, it deprived MA1 Brown of a fair and impartial trial. And importantly, because the accommodation was made without: (1) any reason offered by the government or (2) any findings of necessity or even compelling or substantial need, it cannot stand. *Cf. United States v. Collier*, 67 M.J. 347, 349-53 (C.A.A.F. 2009) (finding abuse of discretion where military judge invoked M.R.E. 611 without supportive findings on the record).

1. The military judge did not conduct a balancing test or make findings of compelling or substantial need before allowing this visible accommodation. He did not even require the Government to show good cause.

Before this case, military courts had not addressed the issue of allowing a victim advocate to accompany a reluctant witness on the stand. But state courts have. When doing so, those courts have applied the "close judicial scrutiny" required by *Holbrook*. *See* 475 U.S. at 568. New Jersey, for example, requires "a showing of *substantial* need, with appropriate safeguards imposed, and a cautionary instruction given" before

allowing the accommodation. *State v. T.E.*, 775 A.2d 686, 697 (N.J. Super. Ct. App. Div. 2001) (permitting therapist to sit next to child victim) (emphasis added). Even then, there are a number of factors a trial judge must balance before permitting the accommodation. *Id.* at 697-98 (discussing six primary factors and several sub-factors to weigh). Connecticut has upheld a similar accommodation where, after an evidentiary hearing, the state demonstrated by "*clear and convincing evidence*" a "*compelling need*". *State v. Menzies*, 603 A.2d 419, 429 (Conn. 1992) (permitting guardian *ad litem* to sit by child sex abuse victim) (emphasis added). Lastly, Hawaii requires the showing of "compelling necessity" before permitting a witness attendant to accompany a child witness. *State v. Rulona*, 785 P.2d 615, 617 (Haw. 1990), *overruled on other grounds by State v. Mueller*, 76 P.3d 943 (Haw. 2003).

Military Rule of Evidence (M.R.E.) 611 is also instructive.[3] This Court analyzed that Rule in *United States v. McCollum*. *See generally* 58 M.J. 323 (C.A.A.F. 2003). There, this Court held that M.R.E. 611(d) should be read as:

> limiting the use of remote live testimony to situations where the military judge makes a finding that the child witness would suffer more than *de minimis* emotional distress from testifying in the accused's presence, whether brought on by fear or some form of trauma. In other words, under M.R.E. 611(d)(3), such distress must

[3] M.R.E. 611 was addressed by the prosecution and the military judge during the Article 39(a) session. (JA at 48.)

> be sufficiently serious that it would prevent the child from reasonably testifying.

Id. at 330-31. While there may be no "specific evidentiary prerequisites", such as having the military judge directly interview the child witness, and while a military judge may base his opinion on expert testimony, the requirement still exists to make a clear finding of necessity on the record.[4] *Id.* at 333. This requirement is consistent with state courts that allow the accommodation of a witness attendant *only after* balancing factors and demonstrating compelling or substantial need.

In New Jersey, for example,

> *[a] preliminary showing must be made to establish a substantial need* for the procedure. It *must be demonstrated* that without accompaniment, the child is likely to be *substantially non-responsive*, and that with the accompaniment, the child is likely to provide meaningful, probative testimony. The court may consider the age of the witness, the nature of the testimony, evidence of fear, embarrassment or inability to testify, and the degree of trauma experienced by the witness in the underlying event and by the courtroom experience.

T.E., 775 A.2d at 697 (emphasis added). This is just factor one. Factor two provides that "[a] defendant should be given

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[4] To be sure, MA1 Brown does not--and has never--argued that his constitutional right to confrontation has been infringed. It is unclear, therefore, why the lower court's opinion devotes an entire section to the Confrontation Clause. *See Brown*, 2012 CCA LEXIS 448, at *13-19 (asserting "[t]he crux of Appellant's claim on appeal is that his constitutional rights to a fair trial and to confront witnesses against him were violated . . . ."). MA1 Brown looks to M.R.E. 611(d) simply because there is no controlling statute or Rule for Courts-Martial that governs this issue.

the opportunity to suggest alternatives, such as a recess to enable the witness to regain composure or testimony by closed circuit television." *Id.* at 698. That is precisely what the trial judge did in *T.E.;* he recessed and then had the four or five year-old child witness try to testify twice. *Id.* at 694. Only after these deliberate steps did the judge permit the child witness' therapist to sit with her. And this accommodation occurred after the judge made detailed findings about age, the nature of the testimony, the likelihood of fear and embarrassment, and the futility of future testimony without the accommodation. *Id.* at 695. Again, that case featured a child complainant who was four or five-years-old. That is different from A.W., who was nearly eighteen. (JA at 38.)

And it is different for another good reason. Here, the military judge granted an overnight recess. He did not order the prosecution to try to have A.W. testify again, however. Because of A.W.'s age and resultant level of maturity, and given MA1 Brown's right to a fair trial, this attempt would have been appropriate.

The military judge also erred by failing to weigh alternatives to having the *victim advocate* serve as the witness attendant. A third factor that should be considered is the

"[c]hoice of the support person."[5] *T.E.*, 775 A.2d at 698. This choice "should minimize potential prejudice. A parent or other close relative will more likely be viewed as family support than vouching for the witness' credibility, as might result with a counselor, therapist or other professional." *Id.; see also Suka*, 777 P.2d at 242 n.1 ("[A]ccompaniment by a *parent* or *other close relative* would be less prejudicial than would accompaniment by a victim/witness counselor as the former is more likely to be seen as a family support rather than as vouching for the witness' credibility.") (emphasis in original). Because Ms. D is a victim advocate, her presence had the effect of vouching for A.W.'s credibility.

Admittedly, the military judge was not governed by these state-law factors. But it makes sense that he should have looked to them. After all, the idea of a victim advocate serving as a witness attendant is foreign to our military justice system.[6]

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[5] Three other factors addressing logistics and instructions should also be balanced. *T.E.*, 775 A.2d at 698.

[6] Research uncovers only one military case dealing with the presence of a witness attendant or support person. *See generally United States v. Romey,* 32 M.J. 180 (C.M.A. 1991) (addressing third-party-whisper procedure employed by eight-year-old child and her mother on the witness stand). But that case was decided years before the adoption of M.R.E. 611(d), which sets the age limit for witness accommodation at sixteen years. *See United States v. McCollum*, 58 M.J. 323, 330 (C.A.A.F. 2003); see *also* Mil. R. Evid. 611.

Here, no evidentiary or show cause hearing was held before allowing Ms. D, A.W.'s victim advocate, to sit next to A.W. on the witness stand. The military judge did not even ask the prosecution to advance reasons in support of this visible and significant accommodation. Though the military judge instructed Ms. D on her deportment while sitting next to A.W., he made no finding of necessity, or even compelling or substantial need, before he allowed her to sit next to A.W. He simply found--the day after his ruling--that A.W. was crying and unintelligible after fielding questions by the prosecution. Surely these actions are incompatible with the "close judicial scrutiny" required by *Holbrook* and followed by the states. This is all the more puzzling because it is not as if the military judge was unaware of his duty to make such findings. Indeed, it was the military judge who raised the issue of A.W. testifying remotely. But he quickly recognized that remote witness testimony required the Government "to establish the predicates necessary for that." (JA at 48.) The military judge failed to hold the Government to that same standard with respect to the victim advocate accommodation.

2.* Holbrook *and* Rogers *reveal further error here.

In *Holbrook*, the Supreme Court addressed the placement of extra security guards in the courtroom. *Holbrook*, 475 U.S. at

562. Specifically, "four uniformed state troopers" were seated "in the first row" of the gallery. *Id.* These troopers were in addition to the "customary courtroom security force". *Id.* At trial, the defense objected to the "display of 'strength' in the presence of the jury." *Id.* at 563. It was the uniform, the defense argued, that signaled to the jury that the "defendants were of bad character." *Id.* (internal quotations omitted). The trial judge made an inquiry to determine if the state troopers could wear civilian attire while seated in the courtroom. *Id.* After receiving a report that such an accommodation was not practical, the judge allowed the troopers to remain in uniform, seated in the first row, for the rest of the trial. *Id.* The defense then sought relief *via* interlocutory appeal to the Rhode Island Supreme Court. *Holbrook*, 475 U.S. at 563.

The Rhode Island court noted that the presence of the uniformed officers was "a departure from the practice usually found in the trial courts of this state". *Id.* at 564 (quoting *State v. Byrnes*, 357 A.2d 448, 449 (1976)). Accordingly, it was "a decision that must be resolved solely by the trial justice *after consideration* of *all relevant factors*." *Id.* (emphasis added). The case was sent back, and the trial judge conducted an evidentiary hearing on the matter. *Id.* at 564-65. Significantly, he reserved his judgment until after jury selection. *Id.* at 565. When he finally granted the state's

request to have the uniformed troopers present, the trial judge noted the responses of prospective jurors during *voir dire*. *Id*. The vast majority expressed indifference to the presence of the troopers in the courtroom. *Id.* To be sure, if a practice is inherently prejudicial, then it should not matter what prospective jurors think of it. *Id.* at 570 ("Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused."). But *voir dire* here could have answered two important questions.

First, it could have helped determine whether the presence of the victim advocate would create an adverse inference or upset the deliberative process in this particular case. Second, and more importantly, it could have revealed whether any of the members knew Ms. D, either professionally or personally.[7] This simple, efficient measure would have been appropriate given this significant departure from standard court-martial practice. It did not happen.

In place of *voir dire*, the military judge gave an instruction to the members to not infer that the accommodation is "an *endorsement* by . . . anyone" of the "credibility" of A.W.'s "testimony". (JA at 60-61 (emphasis added).) This instruction is insufficient. Finding differently, the lower

[7] The record is noticeably silent on this important question.

court relied on the presumption that members follow a military judge's instructions. *Brown*, 2012 CCA LEXIS 448, at *18 (citing *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)). But in an analogous case, a Colorado appellate court found a like instruction incapable of "unring[ing] the bell." *Rogers*, 800 P.2d at 1329. There, the trial judge met the child witness at the gallery gate and escorted her to the witness stand. *Id.* at 1328. The judge then instructed the jurors:

> By doing these things I'm not implying, nor are you to understand that I am implying, any opinion as to [the victim's] credibility or any weight to be given to her testimony. You're to apply the same standards judging her credibility that you would to any other witness. I merely do these things to try to make testimony for younger children easier.

Id. at 1329. On review, the Colorado appellate court ruled:

> Neither this instruction, nor any other, professing impartiality can "unring the bell" of prejudice to the defendant and partiality to the witness that the very open and dramatic act of the court creates. We reject the actions of the trial judge in this case as improper and rule that her actions warrant the granting of a new trial for this defendant.

Id. Granted, the military judge in this case did not physically escort A.W. to the stand. He did, however, tell the jurors that the presence of A.W.'s "advocate" was an accommodation that, as he put it, "*I* have made[.]" (JA at 60-61 (emphasis added).) He then gave an instruction similar to that of the Colorado trial judge. But the presumption that members follow a military judge's instruction cannot drown out the sound of this bell.

Even if the members followed the instruction and did not consider the accommodation to be an "endorsement" of credibility, the military judge failed to thoroughly instruct the members on how to properly evaluate the credibility of A.W. (JA at 60.) He said, "You will evaluate the credibility of her testimony in the same way you will any other witness." (*Id.*) But he waited until the end of trial to explain to the members how to accomplish this task. (*Id.*) And even then, there was no mention of the victim advocate, specifically, or of the witness attendant, more generally. (JA at 166-205.) The military judge gave the standard credibility of a witness instruction, seemingly looking past the issue.[8] (JA at 190-91.) Given the significant departure from standard court-martial practice that occurred here, this procedure failed to safeguard MA1 Brown's constitutional rights. It should not be countenanced by leaving the lower court's decision undisturbed.

B. The presence of the victim advocate actually prejudiced the accused here.

Even if this Court finds that the victim advocate accommodation was not inherently prejudicial, this Court should still set aside the findings and sentence and authorize a rehearing. MA1 Brown was actually prejudiced here.

[8] That instruction given can be found on page 975 of the Military Judges' Benchbook. *See* Department of Army Pamphlet 27-9, Ch. 7, para. 7-7-1 (Jan. 1, 2010).

Several factors flowing from this specific accommodation eroded MA1 Brown's presumption of innocence and right to a fair trial. But age is the factor that must be emphasized here. Aside from the discussion on the record that M.R.E. 611(d) could not apply to A.W., age was a factor that went unnoticed by the military judge. The common thread of the state cases upholding witness attendants is a child of tender years. *State v. Rowray*, 860 P.2d 40, 42 (Kan. Ct. App. 1993) (child witnesses eight and six years old); *State v. Presley*, 2003 Ohio 6069, P45 (Ohio Ct. App. 2003) (child witness "mildly developmentally delayed" and thirteen years old); *State v. Letendre*, 13 A.3d 249, 251 (N.H. 2011) (child witness ten years old); *State v. T.E.*, 775 A.2d 686, 689 (N.J. Super. Ct. App. Div. 2001) (child witness four or five years old); *Commonwealth v. Pankraz*, 554 A.2d 974, 975 (Pa. Super. Ct. 1989) (child witness four years old); *State v. Delacruz*, File No. A03-129, 2004 Minn. App. LEXIS 104, at *2 (Min. Ct. App. Feb. 3, 2004) (child witness ten years old). Defense Counsel highlighted this point when he objected. (JA at 52-53.) That is because "the prejudicial impact of accompaniment would generally diminish as the witness' age declines because the jury would be less likely to perceive the accompaniment as vouching for the witness' credibility. Instead the jury would view it as needed assistance to a tender and fragile witness." *Suka*, 777 P.2d at 242 n.1. Conversely then,

the prejudice from the accommodation increases as the child grows in age. Because here, A.W. was nearly eighteen when she testified next to her victim advocate, the prejudice was maximized. This factor militates in favor of reversal.

Second, the decision to allow the victim advocate to serve as the witness attendant further increased the prejudice because it enhanced the credibility of A.W. Had Ms. D been her aunt or grand-mother, the members could have discounted her presence based on familial loyalty. But that option was not present here because Ms. D was a professional who remained committed to A.W.'s cause. The members knew this fact because the military judge conspicuously introduced her as A.W.'s advocate.

1. The military judge compounded the error by referring to Ms. D as A.W.'s "advocate" before the members.

This Court should ask the following question: what did the members think when they heard the word "advocate"? In the context of Appellant's court-martial, the members would have been thinking "victim advocate." All servicemembers are required to undergo sexual-assault training. In fact, question four of the supplemental members' questionnaire asked what type of sexual assault training the members had received, and question five asked whether the member had ever served as a SAVI.[9] (JA at 379-426.) Every member responded that they had

[9] Sexual Assault Victim Intervention Program.

attended mandatory general military training on the topic of sexual assault. (*Id.*) And the governing instructions most likely covered in those trainings all discuss the victim advocate. *See generally* Department of Defense Directive 6495.01, (Oct. 6, 2005); Department of Defense Instruction, 6495.02 (June 23, 2006); OPNAV Instruction 1752.1B (Dec. 29, 2006). Thus, in this context, the term "advocate" is synonymous with "victim advocate". In today's times, this phrase stirs passions that are likely to invade reason and cool, rational judgment of guilt or innocence. The result is the erosion of the presumption of innocence and an unfair trial.

Furthermore, because the well-trained members are aware of the perfunctory service of a victim advocate, the prejudice envisioned by New Jersey and Hawaii comes to fruition. Ms. D is the very type of "professional", *T.E.*, 775 A.2d at 698, or "unrelated victim/witness counselor", *Suka*, 777 P.2d at 242 n.1, that is "more likely to be viewed as . . . vouching for the witness' credibility." *T.E.*, *supra*, at 698. This prejudice results from her presence alone; she does not need to make physical or verbal contact.[10] The fact that Ms. D stayed alongside A.W., from appointment to trial, tacitly demonstrated her belief in A.W.'s cause. And that belief, to a panel of

[10] The military judge did not offer the defense an opportunity to *voir dire* Ms. D.

members, increased the chances of conviction "*on grounds . . . or other circumstances not adduced as proof at trial*." *Kaiser*, 58 M.J. at 150.

When the Government told the military judge that it wanted A.W.'s victim advocate to serve as her witness attendant, the military judge did not question the propriety of this accommodation.[11] He did not suggest an alternate person. Instead, he granted the prosecution's bald request and introduced Ms. D to the members as A.W.'s "advocate".

First impressions mean a lot. A term like "comfort person" or "support person" would have been far less prejudicial because it does not imply that the accused has already been found guilty and that the complainant should already be classified as a "victim" or in need of an "advocate". *Cf. Delacruz*, 2004 Minn. App. LEXIS 104, at *3-4 (finding reversible error where the trial court closed the courtroom without issuing findings of fact).

As a result, it is far too likely that MA1 Brown was convicted of the sexual assault crimes against A.W. based not on "evidence introduced at trial", but on "grounds . . . or other

[11] Nor did the military judge ask A.W. if the Government accurately represented her position on the witness attendant. He simply asked, "What is the government's plan?" (JA at 45.) This fact is noteworthy. *See Suka*, 777 P.2d at 243 (observing "[t]he complainant . . . was never asked whether she would be able to testify alone (possibly after a longer recess)[.]").

circumstances not adduced as proof at trial." *Kaiser*, 58 M.J. at 150. Aside from the accommodation itself, the fairness of the fact-finding process was further undermined because of what the military judge said. This Court should set aside the findings and sentence and authorize a rehearing.

2. The federal child witness statute does not apply to courts-martial. The lower court erroneously applied it here.

In finding "no error in the military judge's decision", the lower court relied upon a federal statute that is inapplicable to courts-martial. *Brown*, 2012 CCA LEXIS 448, at *15-18. The lower court reasoned:

> In analyzing the judge's decision to allow an adult attendant to accompany the minor child during her testimony, we look to the federal courts as well as our own service courts of review. In the federal courts, victims under the age of 18 have the right to be accompanied by an adult attendant to provide emotional support.

Id. at *15 (citing 18 U.S.C. § 3509(i)) (internal quotations omitted). The lower court went on to cite specific provisions of 18 U.S.C. § 3509, entitled "Child victims' and child witnesses' rights." *Id.* at *16. That statute authorizes child witnesses to have adult attendants accompany them on the witness stand:

> A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close proximity to or in

> contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the proceeding or otherwise prompt the child. *The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.*

18 U.S.C. § 3509(i) (emphasis added). But under the statute's own terms, a "child means a person who is under the age of 18. . . ." *Id.* at § 3509(a)(2).

In the military justice system, by contrast, a child means a person who is under the age of sixteen. 10 U.S.C. § 843(b)(2)(B); Mil. R. Evid. 611(d)(2). Here, A.W. was five weeks away from her eighteenth birthday at the time of Appellant's court-martial. (JA at 38.) Therefore, she was not a child under relevant military law at the time she testified, rendering 18 U.S.C. § 3509 inapplicable.

If more is needed, this Court expressly found that "[t]he text of § 3509 demonstrates congressional intent to apply its provisions in federal district courts, not courts-martial . . . ." *United States v. McElhaney*, 54 M.J. 120, 125-26 (C.A.A.F. 2000) (analyzing the statutory terms and finding "[n]one of the foregoing terms apply in the military justice system . . . .").

Even if 18 U.S.C. § 3509 applies--which it does not--the lower court misapplied it here. In footnote seventeen of its

opinion, the lower court rejected MA1 Brown’s argument that this procedure was improper due to A.W.’s age:

> We reject the appellant’s argument that [A.W.] was a “non-child” due to her trial age of 17. Although the military recognizes the age of 16 as the “age of consent” for sexual activity, we reject the appellant’s argument that victims who are 17 years old are thus not “children” for purposes of an accompanying support person, *particularly when the scope of the testimony details years of sexual abuse dating well back before any misplaced notions of consent were in play*.

Brown, 2012 CCA LEXIS 448, at *18 n.17 (emphasis added).

This analysis is incorrect for three reasons. First, the age of sixteen is not only “the ‘age of consent’ for sexual activity,” as suggested by the lower court. It is also the age at which the witness accommodation of remote live testimony disappears. *See* Mil. R. Evid. 611(d). The President determined that a seventeen-year-old in a military courtroom does not warrant the same accommodations of a six, eight, ten, or even fifteen year-old. Given the reasoning of *State v. T.E.* and *State v. Suka*, that decision was likely premised on the understanding that as a witness grows in age, prejudice from the accommodation grows in size. This point was not addressed by the lower court.

Second, the lower court seems to suggest the age of the witness is immaterial so long as the witness was a child when the alleged misconduct occurred. *Brown*, 2012 CCA LEXIS 448, at

*18 n.17 (rejecting the argument that seventeen-year-old witnesses are not children, "particularly when the scope of the testimony details years of sexual abuse dating well back before any misplaced notions of consent were in play."). This expansive reasoning sets a dangerous precedent because it invites witness attendants for all witnesses, regardless of their age at the time of trial. Under the lower court's view, the probative factor is the age of the witness at the time of the alleged criminal conduct. This cannot be the right result.

Finally, the lower court applied the federal statute in an unfairly piecemeal fashion. As the Second and Eighth Circuits recognize, the statute requires the witness attendant to be videotaped while he or she sits next to the witness on the stand. *See Sexton v. Howard*, 55 F.3d 1557, 1559 (2d Cir. 1995); *United States v. Grooms*, 978 F.2d 425, 429 (8th Cir. 1992). The text of the statute leaves no doubt: "The image of the child attendant, for the time the child is testifying or being deposed, *shall be recorded on videotape.*" 18 U.S.C. § 3509(i) (emphasis added). This requirement serves as a "safeguard" for this visible and significant accommodation. *Sexton*, 55 F.3d at 1559. It facilitates close judicial scrutiny of a trial practice that poses a threat to the fairness of the factfinding process. In other words, appellate review is frustrated without it. And it is because appearances matter at trial. Yet, the

lower court did not even mention this mandatory safeguard when it looked to the statute to affirm MA1 Brown's conviction. Surely a court, after deciding to import a statute, cannot jettison provisions that are essential to its safekeeping. And because the military judge did not order videotaping here, appellate review of this process is now frustrated.

3. Appellant did not receive a fair trial due to these errors.

"Error of constitutional dimensions requires either automatic reversal or an inquiry into whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Davis*, 26 M.J. 445, 449 n.4 (C.M.A. 1988) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

MA1 Brown was convicted of multiple sex-related offenses based solely on the testimony of A.W. There were no corroborating eye-witnesses for A.W.'s sexual assault allegations. There were no audio recordings of phone intercepts with admissions made by Appellant. There were no e-mails or text messages with admissions made by MA1 Brown. There was no video footage of Appellant committing the acts in question. And there was no forensic evidence indicating that A.W. was sexually assaulted by MA1 Brown. In essence, this was a he-said-she-said

case in which the credibility of the complaining witnesses formed the centerpiece of the Government's case.

Given that fact, it is impossible to say that the significant and visual accommodation afforded to A.W. did not contribute to MA1 Brown's conviction. The military judge's introduction of Ms. D to the members as A.W.'s "advocate" only contributed to this harm. As this case impacts MA1 Brown's constitutional rights, it is the Government who must now demonstrate that the military judge's ruling did not contribute to MA1's convictions. It cannot.

The members' findings with respect to M.B. are instructive on this point. MA1 Brown was also accused of illicit conduct and assault-like offenses against another child, M.B., the half-sister of A.W. (JA at 289-95.) Like A.W., M.B. testified at trial. (JA at 25.) Importantly, MA1 Brown was found *not guilty* of four out of the six specifications for which M.B. was the complainant. (JA at 206-07, 296-99.) Of course, M.B. testified without a victim advocate sitting next to her.

Conclusion

The military judge erred when he allowed the victim advocate to serve as a witness attendant for A.W., a seventeen-year-old. He erred when he failed to consider alternative attendants. And he erred when, after an overnight recess, he failed to attempt to have A.W. testify again. Appearances

matter at trial. Here, the appearance of the victim advocate unfairly enhanced the testimony of A.W. Her presence underscored A.W.'s fragile emotional state. The military judge compounded this harmful error when he introduced the victim advocate to the members as A.W.'s "advocate." This name further emphasized the preferred status of A.W. It eroded the presumption of innocence of MA1 Brown, and together with the accommodation, deprived him of his right to a fair trial. For all these reasons, this Court should set aside the findings and sentence and authorize a rehearing. MA1 Brown was entitled to be tried based on the evidence, not on grounds or other circumstances not adduced at trial.

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on April 11, 2013.

Certificate of Compliance

This brief complies with Rules 24(c) and 37. Under the type-volume limitations, this brief contains less than 14,000 words. Using Microsoft Word version 2003 with 12-point-Court-New font, this brief contains 9,064 words.

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