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	**REPLY ON BEHALF OF APPELLANT** Crim. App. No. 201100516 USCA Dkt. No. 13-0244/NA

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

A. The accommodation was inherently prejudicial. This Court need not "expand" anything to make that ruling.

The Government insists that Appellant is asking this Court "to expand the narrow class of 'inherently prejudicial' structural errors to the situation encountered here." (Appellee's Br. at 13.) But reversal requires no such finding, and Appellant asks nothing of the sort. Existing military and persuasive state case law already provide sufficient reason to reverse here.

A.W. should not have been afforded this accommodation in light of her advanced age. A victim advocate seated next to a complaining witness who is no longer a child is inherently prejudicial. A fair reading of existing case law, rules, and statutes supports this modest conclusion. For example, both the

President and Congress agree that the age of sixteen carries--to use the Government's phrase--"special significance," (Appellee's Br. at 25), in courts-martial.[1] Here, A.W. was nearly eighteen-years-old when she testified.

Appellant does not contend that witness attendants are always inherently prejudicial. This point must be stressed. In the military justice system, witness attendants may be perfectly appropriate when assisting children under the age of sixteen. Two military cases cited by the Government highlight this point. *See 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); *United States v. Johnson*, 15 M.J. 518 (A.C.M.R. 1983) (addressing use of Aunt as support person for a four-year-old boy). But no case offered by the Government establishes that witness attendants may be used for complaining witnesses who are not children. Even the federal statute, which does not apply here, speaks expressly of a "child testifying[.]" 18 U.S.C. § 3509(i). Of course, unlike military rules and statutes, that federal statute defines "child" at the age of eighteen. *Id.* at § 3509(a)(2). State case law further substantiates that the accommodation is for children, due in large measure to their immaturity and

[1] This point is developed further in Section D of this Reply, *infra*.

consequent emotional fragility. (Appellant's Br. 14-18, 24-25.) The Government, not Appellant, therefore, needs this Court to do something that other courts have not: find that a victim advocate can be seated right next to a complaining witness who the governing jurisdiction no longer considers a child.[2] This, the Court should not do.

B. M.R.E. 611(a) does not resolve this issue.

Throughout its Answer, the Government argues that Military Rule of Evidence (M.R.E.) 611(a) controls this Court's inquiry. (Appellee's Br. at 16-19, 22, 32.) Good reasons counsel against that insular approach.

First, both Hawaii and New Jersey empower their trial judges in precisely the same manner as the military. *Compare* Haw. R. Evid. 611(a), *and* N.J. R. Evid. 611(a), *with* Mil. R. Evid. 611(a).[3] Yet, those states still require findings of

[2] That the alleged criminal conduct occurred while A.W. was a child does not, as the lower Court expansively reasons, (J.A. at 6), allow for the accommodation here. (Appellant's Br. at 30-31).

[3] Those states share the same rule:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

compelling necessity and substantial need, respectively, before allowing the significant and visible witness-attendant accommodation. *See State v. Rulona*, 785 P.2d 615, 617 (Haw. 1990), *overruled on other grounds by* 76 P.3d 943 (Haw. 1990); *State v. T.E.*, 775 A.2d 686, 697 (N.J. Super. Ct. App. Div. 2001). If the Government's M.R.E. 611(a) approach was correct, then such extraordinary findings would be completely unnecessary, and the numerous balancing factors identified by Hawaii and New Jersey would be useless surplusage. That cannot be right. Accordingly, this Court should not adopt the Government's approach.

The military judge was on notice of this persuasive state case law. His remarks demonstrate as much: "*I am well aware of the due process implications* . . . ." (J.A. at 56 (emphasis added).) Yet, without balancing any factors to protect the rights of the accused or making any findings of compelling or substantial need, he made victim protection his paramount goal. Once again, his remarks demonstrate as much: "[M]y goal right now is to do *anything*, adjust *anything* that I can for you to make this as comfortable as possible." (J.A. at 41 (emphasis added).) That is error.

Haw. R. Evid. 611(a); N.J. R. Evid. 611(a). M.R.E. 611(a) differs only in so far as it substitutes "military judge" for "court[.]" *See* Mil. R. Evid. 611(a).

The Record demonstrates that M.R.E. 611(a) is a *post hoc* justification offered by the Government for the first time on appeal. The military judge did not cite Rule 611(a) when he issued his ruling. (J.A. at 46-59.) Neither did the Government.[4] (*Id.*) The Government invokes that rule now to try to save a conviction that resulted from a prejudicial trial practice. For all these reasons, this Court should look beyond M.R.E. 611(a) in examining this issue.

Finally, even if M.R.E. 611(a) was dispositive, which it is not, the military judge made no findings to support its application. In *United States v. Collier*, this Court held that a military judge abused his discretion in excluding bias evidence when he "made no findings about the likelihood that [the witness] would suffer from undue embarrassment or harassment as a result of cross-examination or the presentation of bias evidence." 67 M.J. 347, 353 (C.A.A.F. 2009) (analyzing military judge's use of M.R.E. 611(a)(3) powers). In so holding, this Court noted that, "[l]ike the identical federal rule, M.R.E. 611 'calls for *a judgment* under the particular circumstance whether interrogation tactics entail harassment or

[4] In fact, at no point during trial did the Government cite any rule, statute, or case in support of this significant, visible accommodation. The Government merely stated, "we would like to . . . have the victim's advocate, [Ms. D], seated next to her in the courtroom." (J.A. at 45.) And the military judge obliged.

undue embarrassment.'" *Id.* (citing Fed. R. Evid. 611 Advisory Committee's Note, *reprinted in* 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* 320 (1993)). Here, the military judge made no judgment that A.W. needed protection from "harassment" or from "undue embarrassment." Mil. R. Evid. 611(a)(3). He made no judgment that the victim advocate was needed to "avoid needless consumption of time[.]" Mil. R. Evid. 611(a)(2). And he made no judgment that the victim advocate was needed to "make the interrogation and presentation effective for the ascertainment of the truth." Mil. R. Evid. 611(a)(1). Under *Collier*, this utter lack of judgment is error. Because Appellant was prejudiced as a result, this Court should set aside the findings and sentence and authorize a rehearing.

C. *State v. Suka* is relevant and applicable here.

The Government's attempt to distinguish *State v. Suka*, 777 P.2d 240 (Haw. 1989), *overruled on other grounds*, 904 P.2d 912 (Haw. 1995), is unavailing. (Appellee's Br. at 24-25.) To begin, the victim advocate accommodation there was not, as the Government puts it, "in direct contravention of Hawaii statute." (Appellee's Br. at 24.) The statute capping witness accommodation at age fourteen was merely "inapplicable[,]" as the "complainant was 15 years old at the time she testified at trial[.]" *Suka*, 777 P.2d at 243 (citing Haw. Rev. Stat. § 621-28). Much like the case here, then, there was no governing

statute to guide that court. The Government's misleading characterization suggests that *Suka's* analysis started and stopped at the statute. It did not. Instead, the Supreme Court of Hawaii relevantly observed:

> The State argues and the trial court agreed that Jackie's presence [from the Victim Witness Kokua Program] was necessary for the trial to go forth. But the record does not support the conclusion that the complainant could not testify without Jackie being present next to her. *The complainant was fifteen years old and could generally be expected to testify more easily than would a younger child. The record only indicates that the complainant was having difficulty testifying without crying*; that Jackie's presence would "help" her to testify; that Jackie's presence was "comforting," and that she would "like to have Jackie with" her while testifying. *The complainant, however, was never asked whether she would be able to testify alone* (possibly after a longer recess), or with Jackie sitting in the audience of the courtroom in complainant's line of sight as alternatives to allowing Jackie's presence with and touching of the complainant.

Id. (emphasis added). Given those observations, the court there held that the appellant's due process right to a fair and impartial trial was violated. *Id.*

Pointedly, those facts are remarkably similar to the facts here. Just as in *Suka*, this record does not support the conclusion that A.W. could not have proceeded without the advocate seated next to her.[5] There was an overnight recess in

[5] The Government's bald assertion to the contrary should be rejected: "AW was not able to testify but for the accommodation[.]" (Appellee's Br. at 20.) That finding was never made. And the military judge's observation that "[t]he

between her initial testimony and the placement of the advocate next to her. Further, if a fifteen-year-old "could generally be expected to testify more easily than would a younger child[,]" *Suka*, 777 P.2d at 243, it follows that a near-eighteen-year-old could be expected to testify more easily as well.[6] Additional similarities are telling. Just as in *Suka*, the Government asked for the accommodation--though here, no Government *argument* was presented in favor of it--and, just as in *Suka*, the judge did not ask A.W. "whether she would be able to testify alone . . . or with [the advocate] sitting in the audience of the courtroom in [her] line of sight . . . ." *Id.* Surely that simple question would have been helpful, as it impacts an important issue for this Court's review. Further, just as in *Suka*, the witness attendant here served as a victim advocate. *Id.* at 242. And finally, just as in *Suka*, the witness attendant here was audibly identified to the members as having a professional relationship to the complaining witness. *Id.* at 241.

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members already know that [A.W.] cannot get through her testimony[,]" is merely an assumption. (J.A. at 46.)

[6] This point is significant. As discussed in Section A, *supra*, jurisdictions that allow this accommodation have generally done so when confronted with a child of tender years. (Appellant's Br. at 24-25.) The case cited by the Government, *United States v. Johnson*, 15 M.J. 518 (A.C.M.R. 1983), *review denied*, 15 M.J. 518 (A.C.M.R. 1983) (reviewing witness attendant accommodation for a four-year-old boy), only substantiates this point. (Appellee's Br. at 19.)

The Government is correct that the attendant in *Suka* "did more than sit silently next to the witness[.]" (Appellee's Br. at 24.) For example, she also placed "her hands on the complainant's shoulders[.]" *Suka*, 777 P.2d at 243. But any gains made by this distinction are lost by another, important one; A.W. was nearly eighteen-years-old when she testified. Thus, she was nearly three years older than the complainant in *Suka*, with the resultant prejudice maximized. (Appellant's Br. at 24-25.)

The Government also tries to distinguish *Suka* by arguing that "Hawaii's Constitution expressly provides more extensive, positive due process rights than the United States Constitution . . . ." (Appellee's Br. at 25.) But the Government does not provide this Court with an applicable example of one of these "extensive, positive due process rights[.]" Instead, the Government vaguely invites this Court to compare the Fifth Amendment of the U.S. Constitution with Sections Five, Fourteen, and Twenty-Five of the Hawaii Constitution. (*Id.*) This Court should reject this argument. *Suka* is relevant and applicable here.

D. Like the lower court, the Government erroneously advances 18 U.S.C. § 3509. That statute does not apply here.

In arguing that "Hawaii's Constitution . . . *also places special significance on the age of fourteen years in child*

sexual assault cases[,]" (Appellee's Br. at 25 (emphasis added)), the Government heralds Appellant's main point: the *military* places special significance on the age of *sixteen years*. Sixteen serves as the age of consent, 10 U.S.C. § 843 (b)(2)(B), and sixteen serves as "the age at which the witness accommodation of remote live witness testimony disappears." (Appellant's Br. at 30 (citing Mil. R. Evid. 611(d)).) Further, M.R.E. 414 defines a child "[f]or purposes of th[e] rule" as "a person below the age of sixteen[.]" Mil. R. Evid. 414(d).

Given the "special significance," (Appellee's Br. at 25), that military justice places on the age of *sixteen*, it is remarkable that the Government accuses Appellant of seeking to create new law. (Appellee's Br. at 31-32.) To save this visible and significant accommodation, the Government asks this Court to apply to courts-martial a statute confined by Congress to federal district courts *only*. *See United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000) (finding Congressional intent limiting application of 18 U.S.C. § 3509 to federal district courts). (Appellee's Br. at 32-33.) It does so because, under 18 U.S.C. § 3509(i), special significance is placed on the age of eighteen which, if applicable, would save the accommodation by five weeks.

On this point, a Government citation is worth repeating here: "[T]he authority to add exceptions to the codified

privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government." *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007). If Congress wanted 18 U.S.C § 3509 to apply to courts-martial it would have said so. And if Congress and the President did not agree that the age of sixteen has special significance in the military justice system, *see* 10 U.S.C. 843; Mil. R. Evid. 414(d), 611(d), they could have used a different age.

In discussing 18 U.S.C. § 3509, one additional point is worth noting. Appellant does not contend that the victim advocate should have been videotaped throughout A.W.'s testimony.[7] Appellant highlights the videotape issue simply to show the lower court's unfairly piecemeal approach in importing 18 U.S.C. § 3509 to courts-martial. (Appellant's Br. at 31-32.) Both the lower court and the Government fail to address the relevant safeguard of videotape when they invoke the federal statute as relevant authority. If that statute applied, which it does not, the videotaping requirement was not followed. Yet the statute states in non-discretionary terms, "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

[7] Though if she had been, appellate review would not now be frustrated.

(emphasis added). The Government mischaracterizes Appellant's argument then, when it craftily argues, "Appellant now claims that the Military Judge failed to *sua sponte* ensure that the victim advocate's presence next to the Victim was videotaped . . . ." (Appellee's Br. at 16.) This Court should reject that argument. It should set aside the findings sentence and authorize a rehearing.

E. The Government cannot meet its burden under *Delaware v. Van Arsdall*. Appellant was prejudiced here.

The Government focuses its prejudice analysis under *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), on Ms. D, the victim advocate. That approach is misguided; if *Van Arsdall* is applicable here, its five-factor focus should be on the testimony of A.W. After all, she is the one who, with the advocate unfairly by her side, testified against MA1 Brown.

For reasons already stated, her testimony was critical to the Government's case. (Appellant's Br. at 32-33.) Her testimony was not cumulative, though Nurse Practitioner Haner did address a subject area of her testimony. (J.A. at 8.) Next, there was conflicting testimony once MA1 Brown testified, but there was no corroborating evidence to support her claims. (Appellant's Br. at 32.) The fourth factor also weighs in favor of Appellant. Admittedly, trial defense counsel conducted a thorough cross-examination. But throughout it, A.W.'s advocate

sat next to her in full view of the members. Her sympathetic presence softened any blows landed by defense counsel on cross-examination, especially once she was identified as A.W.'s professional "advocate". (J.A. at 60.) Finally, the fifth factor dovetails with the first; the Government's case would have fallen apart without the testimony of A.W. The Government recognizes as much, though in a curious fashion:

> The only cognizable effect of Ms. [D's] presence is that, without it, AW likely would have been too distraught to testify against Appellant, and may have been rendered unavailable to testify. Consequently, due process was not prejudiced by the witness accommodation made here; indeed, due process and the administration of justice were quite *enabled* by the accommodation.

(Appellee's Br. at 31 (emphasis in original).) Assuming for the sake of argument that the Government is correct, and that A.W. would not have been able to testify without this accommodation, this Court should cease its prejudice analysis here. The Government concedes that the error directly contributed to Appellant's conviction by enabling the testimony of the complaining, key Government witness. (*Id.*) The Government styles this reality as "due process and the administration of justice[.]" (*Id.*) But due process for whom?

Under the Fifth Amendment, it is a "*person*" who shall not be deprived of "life, liberty, or property, without due process of law[.]" U.S. Const. amend. V (emphasis added). This right

ensures some basic protections for an accused against the awesome power of the government. It does not ensure a conviction.

Conclusion

MA1 Brown was denied his presumption of innocence and right to a fair trial when the military judge allowed the victim advocate to sit right next to A.W., a seventeen-year-old witness, while she testified. The military judge compounded this error when he introduced the victim advocate to the members as A.W.'s "advocate[.]" (J.A. at 60.) And he, much like the lower court, neglected the close judicial scrutiny required for a practice that undoubtedly poses a threat to the "fairness of the factfinding process." *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). Instead of balancing relevant factors identified by persuasive state case law or making findings of compelling necessity or substantial need, the military judge erroneously allowed this accommodation in summary fashion. In so doing, the military judge achieved his stated goal; he did "anything" he could to make A.W. testify. (J.A. at 41.) MA1 Brown was prejudiced as a result.

For all these reasons, this Court should set aside the findings and conviction and authorize a rehearing.

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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 May 8, 2013.

Certificate of Compliance

This reply complies with the type-volume limitations of Rule 24(c) because it contains no more than half of the type-volume specified in Rule 24(c)(1). Using Microsoft Word version 2003 with 12-point-Court-New font, this reply contains 3,292 words.

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