IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br>Appellee | ) | BRIEF ON BEHALF OF APPELLEE |
| v. | ) | Crim.App. Dkt. No. 201100516 |
| Donald J. BROWN,<br>Master-At-Arms<br>First Class (E-6)<br>United States Navy<br>Appellant | ) | USCA Dkt. No. 13-0244/NA |

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


DAVID N. ROBERTS
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7059, fax (202)685-7687
Bar no. 35491

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7427
Bar no. 28707

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7682
Bar no. 31714

## Table of Contents

## Table of Authorities

Page

Cases

UNITED STATES SUPREME COURT CASES



UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

UNITED STATES SERVICE COURTS OF CRIMINAL APPEALS CASES



UNITED STATES CIRCUIT COURTS OF APPEALS CASES



UNITED STATES DISTRICT COURT CASES

Rules



Other Authorities

## 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 VIOLATE APPELLANT'S PRESUMPTION OF INNOCENCE AND RIGHT TO A FAIR TRIAL?

## Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellant's sentence included a punitive discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

## Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of rape of a child, one specification of aggravated sexual assault 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 (2000), and 10 U.S.C. §§ 920 and 934 (2006)[1]. In announcing the findings as to the aggravated sexual abuse specification, the Members found Appellant guilty except for the words describing the sexual abuse act; consequently, the Military Judge entered a finding of not guilty to that specification. The Members sentenced Appellant to forty-five years of confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On November 28, 2012, the lower court affirmed the findings and sentence as approved. *United States v. Brown*, No. 201100516, 2012 CCA LEXIS 448 (N-M. Ct. Crim. App. Nov. 28, 2012).

**Statement of Facts**

A. Appellant began sexually abusing his stepdaughter, AW, within months after marrying her mother, and continued the abuse for several years.

Appellant married Robin Brown, the mother of AW, in August 2004. (J.A. 127.) AW was eleven at the time of the wedding. A

[1] The lower court's opinion incorrectly labels the offenses of which Appellant was convicted. In Charge I, Specification 1, Appellant was charged and convicted of Rape of a Child on divers occasions between February 2004 and September 2007, in violation of section (a) of the pre-2007 version of Article 120. In Charge I, Specification 2, Appellant was charged and convicted of Aggravated Sexual Assault of a Child on divers occasions between October 2007 and October 2008, in violation of section (d) of the version of Article 120 that was in effect from October 1, 2007, through June 27, 2012. (*See* Convening Authority's Action, Sept. 29, 2011.)

few months after the wedding, AW was in her bedroom playing a videogame while her mother was at work. (J.A. 64-65.) Appellant came into her room, undressed her, and then had sex with her. (J.A. 65.) He told AW that it was normal and she would get in trouble if she told anyone. (J.A. 66.) AW did not tell anyone: "I just remember feeling super gross and I thought it was my fault the whole time." (J.A. 66.) She testified that Appellant would have sex with her eight or nine times a month while her mother, was working. (J.A. 67.) Mrs. Brown was a registered nurse who worked the night shift from three to five days a week. (R. 665-66.)

Appellant frequently gave AW alcohol before having sex with her. (J.A. 68.) AW testified that she "would sometimes drink so much that I wouldn't remember what happened . . . ." (J.A. 69-70.) After they drank, Appellant would tell the other children that AW was giving him a massage and then have sex with her in either her bedroom or his bedroom. (J.A. 71-74.) All of the other children recalled that Appellant, after drinking, told them that AW was going to give him a massage and instruct them not to follow. (J.A. 21-22; R. 519, 656.)

Appellant put a lock on AW's bedroom after MB (AW's older half-sister) walked into the bedroom while he was inside with AW. (J.A. 74.) Subsequently, however, AW began to lock her door so Appellant could not come in, so Appellant took the lock off.

(J.A. 74.) Upon returning from a deployment, Appellant again began sexually assaulting AW. (J.A. 76.) AW testified that she began to resist more because she was older. (J.A. 76.)

Appellant finally stopped in 2008 when AW threatened to report him: "I started like yelling and screaming and I told him that I would tell on him, and I just couldn't do it any more." (J.A. 78.) She testified she never told anyone because she did not want to get in trouble, felt gross, and believed it was her fault. (J.A. 79.) At one point, she thought she was pregnant and miscarried because she went two months without her period and then had an abnormally heavy period. (J.A. 84.)

AW finally told her mother about the abuse in 2009, when she was fifteen. (J.A. 79, 128.) Mrs. Brown confronted Appellant, who said AW was only giving him massages. (J.A. 129.) Appellant told Naval Criminal Investigative Service agent that AW gave him massages of his neck, back, and hamstrings. (R. 762.) He testified at trial and again admitted he asked for, and received, massages from AW. (J.A. 145-46.) Appellant testified that "I asked [AW] next. And [AW] did a pretty decent job, not like a professional masseuse, but good enough." (J.A. 146.)

B. Appellant's other offenses.

In addition to AW, Mrs. Brown had three other children from previous marriages——MB (sister), MB (brother), and JW (male),

all of whom were minors in 2004. (J.A. 127.) Mrs. Brown also had two children with Appellant. (J.A. 127.) While Mrs. Brown was working nights, Appellant regularly provided these children with alcohol. (J.A. 35-36, 141.) Appellant also admitted during his testimony that he gave all of the children alcohol, sometimes while he "play[ed] games" with them. (J.A. 141-42.) Appellant admitted teaching the children a drinking game called "chandeliers." (J.A. 152.)

C. The Military Judge allowed Ms. Deweese, AW's sexual assault counselor, to sit in the bailiff's chair during AW's testimony on the merits.

1. AW cried uncontrollably when she started testifying.

AW testified at trial. (J.A. 37.) After a few questions, she burst into tears. (J.A. 39.) When Trial Counsel began to inquire about the sexual abuse, AW began crying uncontrollably and declared, "I can't do this." (J.A. 40.) Trial Counsel asked if she wanted to continue or to take a break. (J.A. 40.) AW responded, "I want a break." (J.A. 40.) The Military Judge then excused the Members and commenced an Article 39(a) session. He addressed AW:

> I realize you may not want to look directly at me, but I'm going to say a couple things to you. I want you to be comfortable with the courtroom here for just a few minutes, all right? You know everybody that's going to be sitting in that jury box. It's going to be the same people when we bring them back out, and I'm going to go ahead and take a break from this session, and if there's anything you think would make

> it easier for you, you let [Trial Counsel] know, and then we can discuss that here in court . . . [M]y goal right now is to do anything, adjust anything that I can for you to make this as comfortable as possible because, ultimately, [Trial Counsel] is going to have to ask you some questions, and so is [Defense Counsel], who is [Appellant's] attorney, okay?

(J.A. 41.)

2. Trial Counsel asked to have Ms. Deweese sit next to AW while testifying.

Trial Counsel asked the Military Judge to have Susan Deweese, who was identified as AW's Victim Advocate, sit next to her in the bailiff's chair. (J.A. 45.) Defense Counsel objected and indicated it would be acceptable if Ms. Deweese sat in the gallery but objected to her sitting next to AW because it "presents her as weaker and more emotionally vulnerable than she actually is. I think she can——the victim advocate can sit in the gallery. She's within viewing distance. She can be seen by the alleged victim . . . ." (J.A. 46.)

The Military Judge ruled he would allow Ms. Deweese to sit in the bailiff chair, and would instruct the Members that he made an accommodation for AW, but he would not allow any contact between Ms. Deweese and AW: "I won't allow . . . any contact by Ms. Deweese and the witness, and if the witness turns to Ms. Deweese, 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." (J.A. 47.) He instructed Trial Counsel to

ensure that both AW and Ms. Deweese were aware that there would be no communication. (J.A. 47.) "I'll note any physical contact for the record to the extent that [the advocate] may need to touch her or nudge her to get her to focus back. . . ." (J.A. 47.) The Military Judge also stated that the Defense Counsel would be allowed to ask questions about Ms. Deweese's presence and explore any inferences from Ms. Deweese's presence that may "fit[] the defense theory." (J.A. 47.)

The following day, Defense Counsel renewed the objection, arguing that Ms. Deweese's presence would "be seen or have the effect of bolstering the credibility of the witness to the members." (J.A. 51.) The Military Judge again denied the Defense challenge, and noted that AW was "completely unintelligible and unable to speak because she was crying." (J.A. 56.) He said, "I am well aware of the due process implications, but if the government is willing to take that risk, I believe it is fair and any prejudice correctible with instructions to the members." (J.A. 56.) The Military Judge modified his previous ruling and ruled that there would be no contact between AW and Ms. Deweese, including physical contact. (J.A. 56.)

"I intend to tell the members that this is an accommodation 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 . . . ." (J.A. 57.) He added, "I will specifically tell [the Members] that they cannot infer from [Ms. Deweese] that she is a credible witness or that there is credibility to any claim that she makes in her testimony . . . ." (J.A. 57.) He then emphasized to both AW and Ms. Deweese that there was to be no communication or contact between them. (J.A. 58.)

3. The Military Judge instructed the Members that Ms. Deweese's presence was not an endorsement of AW's credibility and to infer nothing from her presence.

The Military Judge noted the presence of Ms. Deweese for the Members, describing her as "an advocate that has been assigned to [AW]." (J.A. 60.) The Military Judge did not refer to Ms. Deweese as a "victim advocate," and never referred to AW as a "victim." The Military Judge continued:

> My decision . . . should in no way be interpreted by you as an endorsement by me or the government or anyone else of the credibility of [AW's] testimony. You will evaluate the credibility of her testimony in the same manner you will any other witness . . . This is an accommodation that I have made. You will infer nothing from it.

(J.A. 60.) He asked if the Members had any questions, and all Members responded in the negative. (J.A. 61.) He then asked, "Do all of you understand my instructions regarding Ms. Deweese's presence in the courtroom this morning? If you do,

please raise your hand." (J.A. 61.) All Members responded affirmatively by raising their hands. (J.A. 61.)

4. AW testified without further incident.

AW proceeded to testify and had no further difficulty testifying, with the sole exception of one instance of crying toward the end of her testimony. (R. 614.) The Defense did not object again to Ms. Deweese's presence, and no mention was made by any party of any contact between her and AW.

AW also testified during the sentencing portion of the trial, but the Record does not show whether she was accompanied by Ms. Deweese. (R. 1050-53.)

**Summary of Argument**

First, allowing the presence of a victim advocate is not structural error and this Court should not further expand the small class of structural errors. Second, under pertinent regulations, a victim advocate is not an agent of the Government, but rather represents a victim, and her sitting next to a child victim of sexual assault during testimony does not sound in due process. Third, the Military Judge properly allowed a silent, nontestifying victim advocate to sit beside the testifying Victim because the Victim demonstrated that she would otherwise unable to give meaningful testimony. Finally, even if it was error, no prejudice resulted given that the Victim Advocate did not testify, and there is no evidence in the Record to suggest

that she made any gestures or physical contact with the Victim, or that she impacted the Victim's testimony in any way, and because the Military Judge exhaustively instructed the Members not to consider the presence of the victim advocate as an endorsement of the Victim's credibility or any other matter.

**Argument**

NO PRECEDENT PROSCRIBES THE ACCOMMODATION MADE HERE BY THE MILITARY JUDGE AS A STRUCTURAL VIOLATION OF DUE PROCESS INHERENTLY PREJUDICIAL TO APPELLANT'S CONSTITUTIONAL RIGHTS. THE MILITARY JUDGE'S DECISION TO ALLOW AW, A CHILD VICTIM OF SEXUAL ASSAULT, TO BE ACCOMPANIED BY A WITNESS ATTENDANT DID NOT CONSTITUTE AN ABUSE OF DISCRETION, BECAUSE IT WAS AUTHORIZED UNDER MIL. R. EVID. 611 AND R.C.M. 801, AND JUSTIFIED BY THE FACTUAL CIRCUMSTANCES OF THIS CASE.

A. This Court should decline Appellant's invitation to expand the narrow class of structural errors to include a victim advocate sitting beside a testifying witness.

Structural error can only arise from constitutional error, and occurs where basic protections of a criminal trial are infringed so that the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006); *Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (citations omitted), *overruled on other grounds by Brecht v. Abrahamson*, 507 U.S. 637 (1993). Only when the "structural

protections" of the system have "been so compromised as to render the proceedings fundamentally unfair" is the presumption of prejudice warranted. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 256-7 (1988). The error must be a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *United States v. Wiechmann*, 67 M.J. 456, 463 (C.A.A.F. 2009).

Among the few cases with precedential value that Appellant cites in support of his "inherent prejudice" argument, the Supreme Court itself refused to find structural error. *See Deck v. Missouri*, 544 U.S. 622, 635 (2005) (analyzing the accused's wearing shackles in the courtroom for harmless error); *Holbrook v. Flynn*, 475 U.S. 560 (1986) (finding no constitutional error where guards were present in the courtroom). As Appellant notes, the *Deck* court determined that the trial court violated the accused's right to due process when, without any justification, it allowed the defendant to be brought into the courtroom in shackles. *Id*.

But these are not the facts here. As such there is no basis to expand upon the limited classes of structural error identified by the Supreme Court. The use of witness attendants for child victims of sexual assault is commonly practiced throughout the United States. *See* 18 U.S.C. § 3509(i) (2006) (Federal statute providing for child victims under eighteen

years old to be accompanied by adult attendants during testimony); *United States v. Grooms*, 978 F.2d 425, 429 (8th Cir. 1992); *see also New Jersey v. T.E.*, 342 N.J. Super. 14, 34 (N.J. Super. Ct. App. Div. 2001) (noting supportive state court cases in Georgia, North Carolina, Indiana, Arkansas, Connecticut, Florida, Pennsylvania, Oregon, West Virginia, Oklahoma, and Ohio); *New Hampshire v. Letendre*, 161 N.H. 370, 377 (N.H. 2011) (noting that state courts and statutes in Connecticut, Ohio, Pennsylvania, Texas, California, Idaho, and Michigan authorize a support person to accompany a child victim) Not only is this practice not "inherently prejudicial," but it carries little risk of actual prejudice so long as the attendant is properly cautioned and the fact finding panel is properly instructed. *See United States v. Thompson*, 29 M.J. 541, 543 (A.C.M.R. 1989), *aff'd*, 31 M.J. 168 (C.M.A. 1990).

The Record here demonstrates that Ms. Deweese, the victim advocate, did not testify in the Government's case-in-chief. Nor did Ms. Deweese speak during AW's testimony. Nothing in the Record suggests that Ms. Deweese presented any testimony or that in any way interfered verbally, physically, or in any other manner with the testimony during direct or cross-examination. Rather, she sat next to the witness silently. This was not a "kangaroo court proceeding," as in *Rideau v. Louisiana,* 373 U.S. 723, 741 (1963), or *Estes v. Texas,* 381 U.S. 532 (1965), and

Appellant was not subjected to any type of arbitrarily distinctive restraint or apparel, as in *Estelle v. Williams,* 425 U.S. 501 (1976), and *Deck*. Consequently, this Court should decline Appellant's invitation to expand the narrow class of "inherently prejudicial" structural errors to the situation encountered here.

B. The Supreme Court has never found due process error in vouching, and vouching occurs only where the prosecution impermissibly places its imprimatur on the credibility of a witness. Where, as here, a victim advocate is institutionally separate from the prosecution, and does not testify, due process is not implicated.

No person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "[D]enial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). "In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Id*. In evaluating alleged violations of due process, appellate courts "are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which define 'the community's sense of fair play and decency,'" *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000)

(quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and *Rochin v. California*, 342 U.S. 165, 173 (1972)).

However, bolstering and vouching are not constitutional issues. Expert testimony bolstering the credibility of a witness, for example, is tested for non-constitutional evidentiary error. *See, e.g., United States v. Mullins,* 69 M.J. 113, 116 (C.A.A.F. 2010). And, "improper vouching occurs when the trial counsel 'places the prestige of the government behind a witness through personal assurances of the witness's veracity.'" *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (internal quotations omitted). However, as in the recent Air Force extraordinary writ case, victim advocates in the Department of the Navy are separate from the prosecution function——they represent the Victim, not the United States *qua* litigant. *LRM v. Kastenberg*, No. 2013-05, 2013 CCA LEXIS 286 (A.F. Ct. Crim. App. Apr. 2, 2013); *see also* argument C.5. *infra* at 26-27.

Appellant claims that *Deck*, *Holbrook*, and other cases require that the presence of a victim advocate be tested for due process error. However, Appellant points to no precedent, and the Government is aware of none, to support this proposition. Not only do Federal courts find no error in light of the clear statute allowing for the presence of an adult attendant, but Federal courts also reject due process error allegations in

similar circumstances. *See, e.g., United States v. Valencia-Riascos*, 696 F.3rd 938 (9th Cir. 2012) (rejecting claim of Fed. R. Evid. 615 and due process error for presence of prosecution's main witness, a law enforcement officer, at the prosecution's table during trial, and stressing "If Defendant could succeed by relying on nothing more than Miller's presence at the prosecution's table throughout the trial, compliance with Rule 615(b) would amount to a per se violation of due process"); *United States v. Charles*, 456 F.3d 249, 260 (1st Cir. 2006) (finding "no general constitutional principle . . . render[s] it impermissible for a case agent who was also the victim in the case" to sit at the prosecution's table so as to "prevent the district court from exercising its discretion in favor of allowing the case agent to sit there.").

This case——where the victim advocate was not even a prosecution witness——presents an even less colorable claim of due process error than those cases. Even if the victim advocate truly were an agent of the Government, "the Supreme Court has never specifically held that a prosecutor's vouching for the credibility of a witness resulted in a denial of due process." *Wilson v. Bell*, 368 Fed. Appx. 627, 632 (6th Cir. 2010). "The concept of 'bolstering' really has no place as an issue in criminal jurisprudence based on the United States Constitution." *Rodriguez v. Snow*, No. 87 CIV 4330, 1989 U.S. Dist. LEXIS 6173,

at *6 (S.D.N.Y. May 26, 1989); *see also Parker v. Scott*, 394 F.3d 1302, 1310 (10th Cir. 2005) (noting the appellant was unable to cite any published case holding that vouching was constitutional error). Put simply, Appellant's claim that vouching or bolstering is an issue of constitutional magnitude must fail.

Although Appellant now claims that the Military Judge failed to *sua sponte* ensure that the victim advocate's presence next to the Victim was videotaped (*see* Appellant's Br. at 32), and thus somehow "frustrate[s]" appellate review, Appellant never made that objection at trial, hence forfeiting any objection on appeal absent plain error. Mil. R. Evid. 103; *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Further, a Federal court's failure to comply with the videotape requirement has been deemed not constitutional error. *See Grooms*, 978 F.2d at 429. Nothing in the Record supports that the victim advocate's presence amounted to testimony, much less vouching testimony or evidence, and Appellant made no timely objection at trial requesting the the Military Judge make note of any such "vouching" evidence" beyond mere presence next to the Victim. Therefore, even if this Court determines that Ms. Deweese's silent presence somehow bolstered or vouched for AW's testimony, it should not analyze the error as a deprivation of constitutional due process, but as an evidentiary error under

Mil. R. Evid. 611(a), and evaluate for prejudice under Article 59(a), UCMJ.

The United States thus now analyzes the procedural, bolstering, and vouching allegations for non-constitutional error.

C. There is no evidentiary or procedural error because the Military Judge's accommodation of AW comports with Mil. R. Evid. 611(a) and R.C.M. 801.

1. Standard of review.

The Court reviews a military judge's control of the mode of witness interrogation pursuant to Mil. R. Evid. 611 for abuse of discretion. *See United States v. Collier*, 67 M.J. 347, 353-54 (C.A.A.F. 2009). Likewise, the Court reviews a military judge's control of the mode of witness interrogation pursuant to Mil. R. Evid. 611 for an abuse of discretion. *See United States v. Collier*, 67 M.J. 347, 353-54 (C.A.A.F. 2009).

In any trial by court-martial, the military judge must "exercise reasonable control over the mode and order of interrogating witnesses . . . 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." Mil. R. Evid. 611(a). Pursuant to Article 36, UCMJ, the President has directed that military judges shall "[e]nsure that the dignity and decorum of the proceedings are maintained," and

"exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual." R.C.M. 801(a)(2)-(3).

Military judges exercise broad authority under these rules to "regulate court-martial proceedings to promote the purposes of the UCMJ and the Manual for Courts-Martial." *United States v. Royster*, 42 M.J. 488, 492 (C.A.A.F. 1995). The discretion afforded by these rules includes the authority to craft remedies to contingencies encountered during trial. *Id*.

Contrary to Appellant's argument, (Appellant's Br. at 16), there is no requirement that the Military Judge make determinations of good cause or compelling or substantial necessity prior to making a courtroom accommodation under Mil. R. Evid. 611(a) or R.C.M. 801. Appellant's reliance on *United States v. McCollum*, 58 M.J. 323 (C.A.A.F. 2003), is misplaced because that case interprets Mil. R. Evid. 611(d), which expressly requires a military judge to make special findings prior to allowing remote live testimony. Mil. R. Evid. 611(d)(3) (*see* Appellant's Br. at 18 n.6.). In this case, the Military Judge expressly rejected any resort to remote live testimony, stating, "the government is nowhere near able . . . to establish the predicates necessary for that." (J.A. 48.) Nothing in *McCollum* purports to apply its rationale to any other Rule; it is therefore inapposite to this Court's consideration of whether

the Military Judge's accommodation here constituted an abuse of discretion.

2. The Military Judge's accommodation was reasonable and supported by military, Federal, and state court practice and precedent.

The accommodation made here was reasonable in light of both R.C.M. 801 and Mil. R. Evid 611, and tended to promote the purposes of the UCMJ and the Manual for Courts-Martial. "A trial judge's actions in directing arrangements of the courtroom are, in general, well within his discretion as presiding officer of the court-martial." *Thompson*, 29 M.J. at 543 (A.C.M.R. 1989) (citing *United States v. Johnson*, 15 M.J. 518 (A.C.M.R. 1983), *rev. denied*, 15 M.J. 467 (C.M.A. 1983)).

The Military Judge's accommodation was also supported by military case law. In *Johnson*, the Army court evaluated an accommodation made to have a child witness's aunt sit next to him during testimony. 15 M.J. at 519. The support person was admonished not to provide any guidance during the testimony, and the court noted there was no "indication that the son in any way sought or received guidance" during his testimony. *Id*. And therefore, the court held that this accommodation was proper under Mil. R. Evid. 611.

And, the Military Judge's accommodation is consistent with Federal practice. *Cf.* Article 36(a), UCMJ. As the lower court noted, in Federal courts child "victims under the age of

eighteen years 'have the right to be accompanied by an adult attendant to provide emotional support.'" *Brown*, 2012 CCA LEXIS 448, at *15-*16 (*quoting* 18 U.S.C. § 3509(i) (2006)). This right has been upheld in Federal court in a case where the witness "testified in open court and the record is void of anything to suggest that [the adult attendant] prompted them in any way." *Grooms*, 978 F.2d at 429.

Finally, a vast majority of state jurisdictions have sanctioned analogous practices, either by statute or case law. *See New Jersey v. T.E.*, 342 N.J. Super. at 34; *New Hampshire v. Letendre*, 161 N.H. 370, 377 (N.H. 2011).

These precedents demonstrate that the accommodation made here by the Military Judge is widely acknowledged and practiced throughout the United States. The Military Judge instructed Ms. Deweese in like manner as the military judge in *Johnson*, and exercised reasonable control over the proceedings to ensure that AW did not receive any guidance from Ms. Deweese during her testimony. And since AW was under eighteen years of age at the time of her testimony, had the trial taken place in a Federal district court, she would have been entitled to an attendant as a matter of law and the court could, in its discretion, allow the attendant to sit in close proximity to her. Considering the finding that AW was not able to testify but for the accommodation, the accommodation made here was therefore a

reasonable one. For these reasons, the Military Judge's determination complied with the requirements of Mil. R. Evid. 611(a) and R.C.M. 801(a).

3. The Military Judge's accommodation was justified by the facts and circumstances of AW's testimony during Appellant's trial.

Additionally, the accommodation was justified in light of the circumstances of AW's testimony during Appellant's trial. Here, the most serious charges against Appellant involved the rape and sexual assault on divers occasions of AW while she was between eleven and fourteen years old. (J.A. 290-95.) AW was the principal prosecution witness to these offenses, and was the only eyewitness to the actual acts of rape and sexual assault. And when the time came to testify about these acts, AW lost her composure and began crying uncontrollably. The Record contains the remarkable observation that AW "[b]urst[] into tears." (J.A. 39.) Assistant Trial Counsel reacts by stating, "Are you going to be okay? Do you need some water or anything like that?" (J.A. 39.) The Record notes that AW's only response to this question was "Crying." (J.A. 39.) Finally, still crying, AW stated, "I can't do this." (J.A. 40.)

At the subsequent Article 39(a) session, the Record reflects that AW was so distraught that she did "not want to look directly at" the Military Judge while he talked to her. (J.A. 41.) AW did not verbally answer the Military Judge's

questions to her during this session, when he asked her if she had any questions for him, but responded only with gestures. (J.A. 42.) Based on his observations of AW, the Military Judge made a "specific finding[]" that "[AW] was not just crying during her testimony, it was her *completely unintelligible and unable to speak* because she was crying." (J.A. 56 (emphasis added).)

These facts demonstrate that, but for the accommodation, AW was "completely unintelligible and unable to speak," and therefore would have been unable to undergo any kind of effective interrogation from either party. Without her testimony, the tribunal would not have been able to ascertain the truth about the most serious charges alleged against Appellant. Therefore, this Court should determine, under Mil. R. Evid. 611(a), that the Military Judge did not abuse his discretion in determining the accommodation was justified under the circumstances of this case.

Additionally, the facts demonstrate that the Military Judge's accommodation was not "arbitrary, fanciful, or clearly unreasonable." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). On the contrary, the Record demonstrates that the Military Judge considered——and rejected——two other, more significant accommodations. Specifically, when considering the options at his disposal, the Military Judge stated that the

Government was "nowhere near able . . . to establish the predicates necessary for" remote witness testimony under Mil. R. Evid. 611(d). (J.A. 48.) The Military Judge also found, in response to argument by Defense Counsel, that the circumstances did not "even begin to approach" grounds necessary for closing the court. (J.A. 53.)

4. AW's testimony was not erroneously bolstered by Ms. Deweese's presence.

Even analyzed for non-constitutional error, contrary to Appellant's argument, nothing in the Record supports a claim that Ms. Deweese bolstered AW's testimony. (Appellant's Br. at 11-13.) "Bolstering occurs . . . when the proponent seeks to enhance the credibility of the witness before the witness is attacked." *United States v. Toro*, 37 M.J. 313, 315 (C.M.A. 1993). This Court rejected a bolstering claim in *United States v. Romey*, 32 M.J. 180 (C.A.A.F. 1991), where the child victim was allowed to testify by "whispering her testimony to her mother, who then gave her answer to the court." 32 M.J. at 182. During testimony, the mother sat to the right of her daughter. *Id*. This Court noted the age of the alleged victim and the "limited testimonial assistance" provided by her mother; the fact that the mother was not an eye witness and "did not provide any critical testimony against her husband"; and that the need for assistance was "apparent on the face of the record, and it was

accomplished in a neutral fashion." *Id*. at 184. Based on these facts, this Court found the claim of bolstering "most unpersuasive." *Id*.

This Record evinces an accommodation even more innocuous than that in *Romey*. First, the assistance was limited and neutral: Ms. Deweese was silent while the Members were present. Further, considering the Military Judge's instruction that no physical contact should occur between AW and Ms. Deweese, this Court must infer from the absence of objection or interjection by any party that no physical contact took place. *See* Mil. R. Evid. 103. Second, Ms. Deweese did not testify at all in this trial, much less give critical testimony. Third, the need for assistance was clear on the Record: when she was first asked to describe the sexual assault, AW broke down crying, said "I can't do this," and asked to take a break. (R. 561.)

Appellant's reliance on *State v. Suka*, 77 P.2d 240 (Haw. 1989), *overruled on other grounds*, 904 P.2d 912 (Haw. 1995), is misplaced, for four reasons. (*See* Appellant's Br. at 12.) First, *Suka* is legally distinct because the accommodation made there was in direct contravention of Hawaii statute. Haw. Rev. Stat. Ann. § 621-28 (Lexis 2013) (restricting witness accommodation in Hawaii courts to children under fourteen years of age). Second, *Suka* is factually distinct because the support person there did more than sit silently next to the witness;

rather, the support person "st[ood] behind her with her hands on [the complainant's] shoulders during the complainant's testimony." 77 P.2d at 242. Third, Hawaii's Constitution expressly provides more extensive, positive due process rights than the United States Constitution, and also places special significance on the age of fourteen years in child sexual assault cases. *Compare* Haw. Const. §§ 5, 14, 25, *with* U.S. Const. amend. V. Finally, perhaps reflecting the unique provisions of its Constitution, Hawaii courts have generally granted the state's prosecutor less latitude in presenting sexual assault evidence than that permitted in the Federal system. *Compare Suka*, and *State v. Rulona*, 785 P.2d 615 (Haw. 1990)(reversible error where witness attendant held child victim on lap), *with Sexton v. Howard*, 55 F.3d 1557 (11th Cir. 1995)(no reversible error where prosecutor held child victim on lap).

For these reasons, *Suka* is inapposite. As in *Romey*, this Court should reject Appellant's bolstering claim.

5. Ms. Deweese did not vouch for AW, and any potential vouching effect was controlled by the Military Judge's instruction, which all Members affirmed they understood and would follow.

Similarly, there is no evidence of vouching here. Again, Ms. Deweese was silent for the entire duration of her presence before the Members, and there is no indication that she made any

contact with AW or any gestures or facial expressions during AW's testimony.

The Record does not reflect the detailing authority for Ms. Deweese, and Appellant never requested that such a record be made. However, even assuming she was appointed under the "Victim Assistance" regulations, she was not an "agent" of the United States, but was present solely on the victim's behalf. Victim Advocates conducting victim advocate duties report directly to a Sexual Assault Response Coordinator. Department of Defense Directive 6495.01 (amended April 30, 2013)(to be codified at 32 C.F.R. pt. 103). The Sexual Assault Response Coordinator, further, is responsible for providing services to victims of sexual assault. *Id*. Under the Department of Defense program, Victim Advocates provide information to and take actions "on behalf of" victims. *Id*. In the Navy's Directive establishing the Sexual Assault Victim Intervention Program, which implements the DoD Directive and ensures provision of Victim Advocates, "victim" is defined as "any person who . . . reports the commission of a sexual assault upon themselves or is [so] identified, based on the report of another person or other person. . . . " OPNAVINST 1752.1B, Encl 1 at 3 (Dec. 29, 2006). Appellant provided no evidence at trial, and provides no evidence now, that a Victim Advocate is an agent of the prosecution, as vouching would require, much less that the mere

appointment of a Victim Advocate presumes the truth of a reported sexual assault. Victim Advocates do not represent the prosecution——and hence do not vouch.

Additionally, Ms. Deweese's presence was exhaustively explained to the Members. The Military Judge sternly instructed that her presence was merely an "accommodation," and not intended to be an "endorsement by me or the government or anyone else of the credibility of [AW's] testimony." (J.A. 60.) The Military Judge further instructed the Members, "You will evaluate the credibility of [AW's] testimony in the same manner you will any other witness." (J.A. 60.) All Members affirmatively indicated that they would follow this instruction. (J.A. 61.)

Members are presumed to follow the instructions of the military judge, absent evidence in the record that they did not. *United States v. Harrow*, 65 M.J. 190, 201 (C.A.A.F. 2007). But here there is more than a presumption, there is confirmation—— all Members affirmatively indicated that they would evaluate AW's credibility the same as any other witness, regardless of the fact she was accompanied by Ms. Deweese. (J.A. 61.) In light of the factual circumstances of AW's testimony and the instructions given by the Military Judge, this Court should determine that Ms. Deweese's mere presence did not amount to vouching.

D. Even if the Military Judge erred, there is no prejudice because any error was corrected by the Military Judge's instructions and the Government's case was strong.

1. This Court must test for Article 59(a), UCMJ, prejudice.

If this Court concludes that the Military Judge abused his discretion under Mil. R. Evid. 611 and R.C.M. 801, *arguendo*, this error was non-constitutional and Appellant fails to demonstrate, as he must, that material prejudice to a substantial right occurred. Article 59(a), UCMJ. 10 U.S.C. § 859 (2006).

2. Appellant fails to demonstrate prejudice because Ms. Deweese did not testify or add to AW's testimony in any way.

Here, Appellant fails to demonstrate prejudice because Ms. Deweese did not testify or communicate with AW, and because any error was cured by the Military Judge's exhaustive instructions. Ms. Deweese only sat next to AW, and was not allowed to speak or to have any physical contact with AW. (J.A. 47, 56, 61.) Ms. Deweese was a silent observer and did not testify at trial. *See Romey*, 32 M.J. at 184 (noting the mother who accompanied the child did not provide any critical testimony). Accordingly, her presence was more akin to an observer in the gallery than someone actively coaching the witness.

Additionally, Appellant had ample opportunity to cross-examine the witness, and the Record contains no indication that

his cross-examination of AW was affected in any manner by the Ms. Deweese's presence. The presence of Ms. Deweese, which enabled AW to testify without crying, provided Appellant a meaningful cross-examination of his principal accuser.

Appellant argues that the identification of Ms. Deweese as an "advocate" somehow deprived Appellant of his presumption of innocence. (Appellant's Br. at 12-14.) Appellant posits that the Members, hearing the word advocate, would think of "victim advocate," and accordingly presume Appellant guilt. (Appellant's Br. at 15.) But this connection is entirely speculative and is utterly unsupported by the Record. In fact, it is contradicted by the Members' unanimous, positive, affirmative declaration that they would follow the Military Judge's instructions and evaluate AW's credibility in the same manner as all other witnesses. (J.A. 61.)

3. Any error was addressed and cured by the Military Judge's instructions.

Members are presumed to follow the Military Judge's instructions, and there is no indication in the Record that the Members failed to follow the Military Judge's instructions. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

Here, the Military Judge instructed the Members that they were to infer nothing from his decision to allow Ms. Deweese to sit near AW. He then instructed the Members that her presence

was not an "an endorsement by me or the government or anyone else of the credibility of [the victim's] testimony." (J.A. 61.) He instructed them to evaluate her credibility in the same manner as other witnesses: "This is an accommodation that I have made. You will infer nothing from it." (J.A. 61.) All Members responded affirmatively that they understood and would follow these instructions. (J.A. 61.)

4. Even if this Court tests for harmless error beyond a reasonable doubt, it should find no prejudice.

Assuming *arguendo* a constitutional due process violation occurred, the Supreme Court's five-factor test articulated in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), demonstrates the lack of constitutional prejudice. These factors are: (1) the importance of the witness's testimony; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradicting evidence affecting witness testimony on material points; (4) extent of cross-examination permitted, and (5) the overall strength of the prosecution's case.

As noted above, Ms. Deweese provided no testimony, let alone critical testimony; therefore, the first three *Van Arsdall* factors weigh in the Government's favor. While Ms. Deweese was not cross-examined, AW was subject to a searching cross-examination, and the Military Judge expressly stated that

Defense Counsel could interrogate AW about the fact that she needed Ms. Deweese to sit in close proximity to her. (J.A. 47.) Therefore, the fourth *Van Arsdall* factor weighs in the Government's favor. Finally, the Government's case was very strong: AW's testimony established the critical facts for the child rape and aggravated sexual assault charges against Appellant, and the critical points of her testimony were supported by several other witnesses, including Appellant himself.

The only cognizable effect of Ms. Deweese'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. Therefore, this Court should deny Appellant any relief on the question presented.

E. <u>This Court should reject Appellant's calls to make policy by judicially expanding Mil. R. Evid. 611(d) beyond its scope, requiring videotaping of Victim Advocates absent Appellant requests at trial, and creating new structural errors</u>.

"[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. *See, e.g.*, Article 36(a),

UCMJ, 10 U.S.C. § 836(a) (2000)." *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007). Similarly here, Appellant asks this Court to create an exception to the broad general rules of R.C.M. 801 and Mil. R. Evid. 611(a) where none exists, to expand the scope of Mil. R. Evid. 611(d) beyond its plain language, to require the videotaping of and to create a new structural error tied to the presence of a victim advocate beside a victim, despite a complete lack of binding precedent supporting such a change in military law. This Court should decline Appellant's invitation.

Furthermore, although no legislative history suggests Congressional intent to directly apply 18 U.S.C. § 3509(i) in trials by courts-martial, Appellant's request for this Court to tie military judges' hands and restrict them from permitting a similar accommodation, despite rules that permit military judges broad discretion to make interrogation effective for the ascertainment of truth, asks too much. Congress has tasked the President with crafting a system that, insofar as practicable, applies "the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts..." Article 36, UCMJ. The Code and Rules for Courts-Martial permit judges to provide just that sort of parity urged by Congress. It would be an absurd result indeed if our system of courts-martial and appeals restricted the ability of

military judges to provide child victims of sexual assault and sexual abuse similar procedural safeguards and support allowed as a matter of right in the Federal system.

## Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.


DAVID N. ROBERTS
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059
Bar no. 35491

PAUL M. ERVASTI
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679
Bar no. 35274

SAMUEL C. MOORE
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 35101

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7427
Bar no. 28707

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7682
Bar no. 31714

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I certify that the foregoing was electronically filed with the Court on May 1, 2013. I also certify that this brief was electronically served on Appellate Defense Counsel, LT David DZIENGOWSKI, USN, on May 1, 2013.

DAVID N. ROBERTS
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059
Bar no. 35491