11 July 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	REPLY TO APPELLEE'S ANSWER
v.	)	Crim. App. No. 38631
Technical Sergeant (E-6) JUSTIN L. FETROW, USAF, *Appellee.*	)	USCA Dkt. No. 16-0500/AF

APPELLANT'S REPLY TO APPELLEE'S ANSWER

TYLER B. MUSSELMAN, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 35325

GERALD R. BRUCE
Associate Chief, Government Trial
And Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

COMES NOW the United States, pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to Appellee's Answer Brief Concerning Certified Issues.

ISSUES PRESENTED

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS COMMITTED LEGAL ERROR WHEN IT FOUND THAT IN ORDER FOR CONDUCT TO CONSTITUTE CHILD MOLESTATION UNDER MIL. R. EVID. 414, THE CONDUCT MUST HAVE BEEN AN OFFENSE UNDER THE UCMJ, OR FEDERAL OR STATE LAW, AT THE TIME IT WAS COMMITTED AND, IF OFFERED UNDER MIL. R. EVID. 414 (d)(2)(A)-(C), THAT THE CONDUCT MUST MEET THE DEFINITION OF AN OFFENSE LISTED UNDER THE VERSION OF THE APPLICABLE ENUMERATED STATUTE IN EFFECT ON THE DAY OF TRIAL.

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS COMMITTED LEGAL ERROR WHEN IT FOUND THAT THE ERRONEOUS ADMISSION OF TWO ACTS OF INDECENT LIBERTIES COMMITTED BY APPELLEE ON HIS CHILD AGE DAUGHTER HAD A SUBSTANTIAL INFLUENCE ON THE MEMBERS' VERDICT REQUIRING SET ASIDE OF THE FINDINGS AND SENTENCE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review these issues under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

The United States adopts the statement of the case contained within its brief in support of the issues certified, dated 31 May 2016.

STATEMENT OF FACTS

The United States adopts the statement of facts contained within its brief in support of the issues certified, dated 31 May 2016. Additional facts necessary to the disposition of the issues are set forth in the arguments below.

ADDITIONAL ARGUMENT

Appellee's contention that AFCCA's interpretation of Mil. R. Evid. 414 conforms to the plain language of the rule is unconvincing as demonstrated below. Furthermore, despite Appellee's assertions otherwise, the United States' argument that the evidence at issue is alternatively admissible under Mil. R. Evid. 404(b) does not implicate the principles of due process, waiver, or estoppel, nor is such argument outside the scope of the certified issues.

a. AFCCA's interpretation of Mil. R. Evid. 414 does not conform to the plain language of the rule, but controverts it.

Appellee argues that a reasonable person would understand the reference to Article 120, UCMJ in Mil. R. Evid. 414(d)(2)(A) as referring to the current version of Article 120, UCMJ. (App. Br. at 15-16.) He asserts that "a reasonable person would not understand a cross-reference to a statute to include both its current and superseded versions without some additional signal indicating otherwise." (App. Br. at 16.) Appellee is, in effect, asking this Court to interpret Mil. R. Evid. 414 in a vacuum, as if to consider the Rule without knowledge of the multiple versions of Article 120, UCMJ. However, "statutory construction is a holistic endeavor." United States v. Murphy, 74 M.J. 302, 306 (C.A.A.F. 2015) (citing United States Nat. Bank of Oregon v. Indep. Ins. Agents of America, Inc., 508 U.S. 439, 454-55 (1993)). Surely the drafters of the Rule were aware of the multiple variations of Article 120, UCMJ when they crafted Mil. R. Evid. 414. Accordingly, this Court

should reject Appellee's attempts to persuade this Court to interpret the language of Mil. R. Evid. 414 as if the reader lacked knowledge of the statutory scheme that the Rule references.

Moreover, despite Appellee's attempts to minimize the United States' hypothetical advanced in its original brief by describing it as merely demonstrative of "the government's policy disagreement," one need look no further than that hypothetical to see why Appellee's plain language argument is unpersuasive. *See* (App. Br. at 18; Gov't Br. at 18-20.) This hypothetical reveals that under AFCCA's interpretation, prior conduct that formed the basis of an Article 120, UCMJ conviction would not constitute "conduct prohibited by Article 120, UCMJ." Such an outcome cannot be said to result from a plain language reading of the Rule.

Appellee also argues that his interpretation of Mil. R. Evid. 414 is reinforced by the phrase "and committed with a child" present in Mil. R. Evid. 414(d)(2)(A). *See* (App. Br. at 16.) Appellee contends that if Mil. R. Evid. 414(d)(2)(A) included the 1 October 2007 to 27 June 2012 version of Article 120, UCMJ, the phrase "and committed with a child" would be unnecessary surplusage because that version of Article 120, UCMJ includes sexual offenses against children. (App. Br. at 16.) The language of Mil. R. Evid. 414(d)(2)(B) directly undermines Appellee's argument.

Within the definition of "child molestation," Mil. R. Evid. 414(d)(2)(B) includes "any conduct prohibit by 18 U.S.C. chapter 109A and committed with a child." Like the 1 October 2007 to 27 June 2012 version of Article 120, UCMJ, 18 U.S.C. Chapter 109A criminalizes sexual offenses committed against adults, as well as offenses committed only against children. *See* 18 U.S.C. §§ 2241(c), 2243(a), 2244(a)(3), 2244(a)(5). Despite this fact, Mil. R. Evid. 414 still includes the language "and committed with a child" in subsection (d)(2)(B). Accordingly, any argument that the same phrase within Mil. R. Evid. 414(d)(2)(A) would limit a reading of the rule to the current version of Article 120, UCMJ is unconvincing.

Likewise, other redundancies within Mil. R. Evid. 414 are fatal to Appellee's argument regarding the recent addition of Article 120b, UCMJ to Mil. R. Evid. 414(d)(2)(A). Appellee argues that the 1 October 2007 to 27 June 2012 version of Article 120, UCMJ encompasses the same conduct captured by Article 120b, UCMJ. (App. Br. at 17-18.) Based on this premise, Appellee argues that the addition of Article 120b, UCMJ to Mil. R. Evid. 414(d)(2)(A) would have been unnecessary if the phrase "any conduct prohibited by Article 120 and committed with a child" referred to the 1 October 2007 to 27 June 2012 version of Article 120, UCMJ. (App. Br. at 17-18.) Appellee fails to account for the fact that this type of overlap is inherent to Mil. R. Evid. 414(d)(2).

For instance, both Mil. R. Evid. 414(d)(2)(A) and (B) overlap in the sense that certain sexual offenses are captured by both subsections. More specifically, the offense of rape under the current version of Article 120, UCMJ encompasses conduct that can also be captured by the offense of aggravated sexual abuse under 18 U.S.C. § 2241. Furthermore, Mil. R. Evid. 414(d)(2)(D) and (E), which enumerate specific physical acts rather than criminal statutes, encompass conduct that can also be captured by sections (d)(2)(A) and (B). Thus, this Court should find unpersuasive Appellee's argument that the recent addition of Article 120b, UCMJ to Mil. R. Evid. 414(d)(2)(A) is an indication that the phrase "conduct prohibited by Article 120, UCMJ" refers to only the current version of Article 120, UCMJ.

b. The United States' argument that the evidence at issue is alternatively admissible under Mil. R. Evid. 404(b) does not implicate the principles of due process, waiver, or estoppel, nor is such argument outside the scope of the certified issues.

First, Appellee suggests that in United States v. Morrison, 52 M.J. 117 (C.A.A.F. 1999), this Court determined that attempts by the government to present alternative theories of admissibility not put forward at the trial level implicate "substantial due process concerns." (App. Br. at 31.) This Court's decision in that case does no such thing. In Morrison, this Court explicitly did not decide whether upholding a military judge's determination to admit evidence based on a theory not litigated at trial implicated due process. Id. at 123.

Appellee next contends that a "strong argument" exists that the United States has waived the ability to argue that the evidence at issue was alternatively admissible under Mil. R. Evid. 404(b). (App. Br. at 32-33.) As a foundation for his argument, Appellee solely relies on United States v. Pelullo, 399 F.3d 197 (3d Cir. 2005). The facts, procedural posture, and actual holding of Pelullo undermine Appellee's reliance on that decision.

In Pelullo, the Court of Appeals for the Third Circuit, reviewing the appellant's petition for collateral relief, held that "an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal." Id. at 222 (emphasis added). In the same decision, the Court refused to apply judicial estoppel to the government. Pelullo, 339 F.3d at 221-22. Simply stated, Appellant has not shown how a federal circuit court decision, relying on federal and local procedural rules to hold that a criminal appellant waives an issue unless he raises it in his opening brief on direct appeal, is applicable to this case.

Appellee alternatively asserts that the doctrine of judicial estoppel should preclude the United States from arguing the evidence was alternatively admissible. (App. Br. at 33.) For this proposition, Appellee relies heavily on federal circuit court decisions that pertain to civil, rather than criminal, actions. *See* (App. Br. at 33; JA at 51-52) (citing Patriot Cinemas v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987); Eubanks v. CBSK Fin. Group, Inc., 385 F.3d 894 (6th Cir. 2004);

Pennycuff v. Fentress County Bd. of Educ., 404 F.3d 447 (6th Cir. 2005)). Appellee has not articulated how these federal circuit civil cases would apply in a criminal context, such as in the case before this Court.

Appellee has also previously relied on United States v. Zedner, 547 U.S. 489 (2006) to advance this argument. *See* (JA at 51.) Although Zedner is a criminal case, the Supreme Court expressly refused to apply the doctrine of judicial estoppel to the facts at issue. Id. at 504-06. Moreover, in Zedner, the Supreme Court emphasized that estoppel applies when a party's later position is "clearly inconsistent" with its earlier position. Id. at 504 (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51, 749 (2001)). The United States' current position regarding the admissibility of the alleged erroneously admitted evidence under Mil. R. Evid. 404 is not inconsistent with its efforts at trial. Nothing in the record indicates that the government at trial, or on appeal, conceded that the evidence at issue was not also admissible under Mil. R. Evid. 404(b). *See* (JA at 55-80, 137-162, 389-425, 432-41.) Furthermore, it cannot be said that the government was successful in persuading the military judge to forgo ruling on the admissibility of the uncharged offenses under Mil. R. Evid. 404(b), as the government never argued that the military judge should do so. *See* Zedner, 547 U.S. at 504.

Not only do Appellee's arguments regarding due process, waiver, and judicial estoppel lack a foundation in applicable precedent, they also seemingly

conflict with this Court's decision in United States v. Gorence, 61 M.J. 171 (C.A.A.F. 2005). In Gorence, the CCA found evidence admissible under an alternative foundational basis not presented at trial. Id. at 174. Specifically, the CCA found that evidence of the appellant's rehabilitation potential introduced by the defense had opened the door for the prosecution to ask a question about appellant's pre-service drug use to challenge the defense witness' basis for her opinion. Id. at 173. However, at trial, the government did not argue that theory and the military judge did not allow the question on that basis. Id. at 172-73.

On appeal to this Court, the appellant challenged the CCA's reliance on an alternative basis for admissibility that had not been advanced or relied on at the trial level. Id. at 171. In upholding the CCA's analysis, this Court found that the CCA "did not resurrect any excluded evidence; rather, it found an alternative foundation basis for the rebuttal evidence considered by the military judge." Id. at 174. At no point in its opinion, decided after Morrison, did this Court allude to any concerns relating to waiver, estoppel, or due process.

Finally, Appellee argues that the United States' alternative admissibility argument is outside of the scope of the certified issues. (App. Br. at 33-34.) Generally citing to United States v. Williams, 75 M.J. 244 (C.A.A.F. 2016), Appellee asks this Court to reject the "government's effort to broaden the scope of the issues before it." (App. Br. at 33-34.) First, Williams, a case reviewing

whether a second government reconsideration motion tolled the 60-day deadline for filing a certificate for review with this Court, is not applicable to this case. *See* Williams, 75 M.J. at 244.

Second, Appellee himself cited this Court's declaration that when "evidence in question would not have provided any new ammunition, an error is likely to be harmless. Conversely, when the evidence does provide new ammunition, an error is less likely to be harmless." (App. Br. at 26) (citing United States v. Yammine, 69 M.J. 70, 78 (C.A.A.F. 2010) (quoting United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007) (internal quotation marks and ellipses omitted)). Logically, if evidence alleged to have been erroneously admitted under one rule was alternatively admissible under another, it would not provide "new ammunition," thereby lessening the potential for prejudice. It follows then, that the United States' Mil. R. Evid. 404(b) argument is encompassed by the certified issue of whether AFCCA erred in finding prejudice in this case.

AFCCA erred in its interpretation of Mil. R. Evid. 414, and its decision must be overturned on that ground. However, in the event this Court finds it necessary to review whether AFCCA erred in finding prejudice in this case, this Court should, like it did in Gorence, consider whether an alternative foundational basis exists for the alleged erroneously admitted evidence. Neither waiver, estoppel, nor due process precludes this Honorable Court from doing so.

CONCLUSION

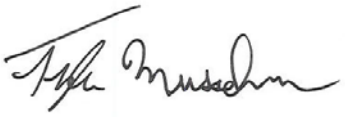
WHEREFORE, the United States respectfully requests this Honorable Court reverse AFCCA's legally erroneous interpretation of Mil. R. Evid. 414, as well as AFCCA's decision to set aside the findings and sentence in this case. Alternatively, the United States requests this Honorable Court reverse AFCCA's legally erroneous finding of prejudice in this case, as well as its related decision to set aside the findings and sentence. This Court should remand Appellee's case to AFCCA for consideration of the other issues raised by Appellee.

TYLER B. MUSSELMAN, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 35325

GERALD R. BRUCE
Associate Chief, Government Trial
And Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 11 July 2016.



TYLER B. MUSSELMAN, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 35325

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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/s/

TYLER B. MUSSELMAN, Capt, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 11 July 2016