IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee* v. Technical Sergeant (E-6) **ROBERT A. CONDON** U. S. Air Force *Appellant*	**REPLY TO FINAL BRIEF ON BEHALF OF THE UNITED STATES** Crim. App. No. ACM 38765 USCA Dkt. No. 17-0392/AF

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

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Cases

Pursuant to Rule 19(a)(7)(B), of this Court's Rules of Practice and Procedure, Technical Sergeant Robert A. Condon, the Appellant, hereby replies to the government's brief concerning the granted issues, filed on November 1, 2017.

I.

UPON REQUEST BY THE DEFENSE COUNSEL AND UTILIZING A DEFENSE PROPOSED INSTRUCTION, SHOULD THE MILITARY JUDGE HAVE PROVIDED THE MEMBERS WITH AN EXPLANATION OF THE TERM "INCAPABLE"?

A. Appellee argues that:

> Significantly, trial counsel did not argue that SA A.D. could not consent simply because she was intoxicated. Instead, *during findings argument* trial counsel focused on evidence that SA A.D. had, at the most conservative estimate, a .22 blood alcohol content, that she was passed out when Appellant arrived, and that she was passed out 40 minutes later when Appellant left her "naked on top of her bed with nothing but his ejaculate on her stomach." (J.A. 471, 521.)

(Gov't Br. at 24-25.) Here, Appellee is citing to trial counsel's argument to the members on findings at JA. 471 and rebuttal argument on findings at JA. 521. Appellee then argues:

> This was not case where the victim was minimally intoxicated or her behavior otherwise demonstrated that she could make competent decisions. The facts of this case establish (1) that SA A.D could not answer her door for several minutes when Appellant arrived because she was passed out or asleep; (2)

> that she could not clean off her body after Appellant ejaculated on her stomach during the sexual act; (3) that she did not have the presence of mind to put on clothes or covers after the sexual act; and (4) that she was completely unaware of Appellant leaving her house a mere 40 minutes after his arrival until she woke up later in the night. Given the egregious set of facts in this case, further definition of the word incapable would have had no impact on the court members' verdict.

(Gov't. Br. at 24-25). The testimony of SA A.D. on what happened at the hotel was less compelling, and perhaps not exactly as trial counsel argued at trial. Her testimony as to sexual assault—in a hotel—where she was "intoxicated" and doesn't remember all the details of that night begins at JA. 207. She testified to the memory of what happened in the room until she woke up and "it was obvious we had sex." (JA. 208.) She later describes a second similar incident where she believes she had sex with Appellant, beginning at JA. 231. The defense explored this incident with more detail, beginning at JA. 257. She admitted that after the sex she was "mad that [Appellant] left" when he did, likely because she "felt taken advantage of." (JA. 260.) A theme throughout SA A.D.'s testimony was a lack of memory. Lack of memory does not mean there was lack of consent, ability to consent, or that a person may not understand a person to be consenting to various acts or actions.

See, Lt Col Englert, testimony, JA. 372, which explores how alcohol can affect memory but not necessarily actions. Appellee's argument references, by inference, the testimony of Dr. Jain, a prosecution forensic toxicologist. His testimony should be balanced by that of Dr. Elam, a defense expert in the same field. (R. 1451.)[1]

Whether a person can capably consent to sexual activity after drinking alcohol is not subject to a specific blood or urine or breath test. Thus, rejection of the "one drink" training; and so too should an estimated blood alcohol content opinion should be rejected. Everyone is different: the number of drinks, experience with alcohol, and the individual effects on the body and brain. One person might register a .30 and be comatose, and another might be an alcoholic who is sensitized to large amounts of alcohol. Blood alcohol content has been measured above 0.4, and yet the person was still able to decide to drive. The use of an estimated blood alcohol content is even more difficult than one obtained from a blood sample because that "measure" relies on self-reporting of the numbers and type of alcohol imbibed—effectively a

[1] Appellant anticipates submitting a Motion to Supplement the Joint Appendix, when briefing is complete.

guesstimate. And Appellant would argue that drinkers are unreliable reporters of their alcohol use because they may lose track of how many drinks they had. Some drinkers underestimate the number of drinks for obvious reasons, and some overestimate for obvious reasons.

Appellee essentially argues for a specific blood alcohol standard in a manner that is little different to one drink means no consent. Trial counsel, as Appellee argues, focused during findings on the estimated blood alcohol level. The instruction on the definition of incapable was, therefore, more necessary to ensure that the members properly considered SA A.D.'s acts and actions and not focus solely on an estimated blood alcohol content. Numbers matter—one drink, 0.08, 0.10, and so on. Without the *Pease* type guidance, members are left to base their decision on the numbers—the estimated blood alcohol content.

B <u>We are not in Arizona or Kansas</u>. Reliance on civilian cases is misplaced for courts-martial when determining the necessity of defining "incapable." Civilian juries are not infected with inaccurate SAPR training.

In Kansas, [t]he test for consent under this rape statute provision is:

> whether the individual understands the nature and consequences of the proposed act. [Citation omitted.] Therefore, in order to preserve the constitutionality of the provision, the definition of `nature and consequences' must be sufficiently clear to permit the person proposing sex, and the jury, to discern whether the individual can give legal consent. If an individual can comprehend the sexual nature of the proposed act, can understand he or she has the right to refuse to participate, and possesses a rudimentary grasp of the possible results arising from participation in the act, he or she has the capacity to consent. Anything more open-ended would become impermissibly vague.

State v. Requena, 30 Kan. App. 2d 200, 204, 41 P.3d 862 (Kan. App. 2001). The appellant in *Requena* failed to request an instruction. *Id.* at 206.

Meanwhile, the instruction in Arizona was:

> In order for you to find that [J.D.] could not consent to sexual activity due to her use of alcohol you must find beyond a reasonable doubt that she was unable to comprehend the distinctively sexual nature of the conduct or was incapable of understanding or exercising her right to refuse to engage in that conduct with another.

State v. Causbie, 241 Ariz. 173, 384 P.3d 1253, 1256 (Ariz. App., 2016). The court in *Causbie* refused to instruct that "The mere fact that [J.D.] may have consumed alcohol does not mean that she could not give

consent to sexual activity." *Id*. at 1257. Interestingly, the *Causbie* court cites *United States v. Solis*, 75 M.J. 759 (N-M Ct. Crim. App. 2016), but does not cite *United States v. Pease*, 75 M.J. 280 (C.A.A.F. 2016), which was decided a year before *Solis*, and which is cited in *Solis*. Thus, *Causbie* seems to be of little benefit to this Court's analysis.

II.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING APPELLANT'S INVOCATION OF HIS RIGHT TO COUNSEL IN HIS AFOSI INTERVIEW AT TRIAL OVER DEFENSE OBJECTION, AND, IF SO, WHETHER THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. Waiver? Appellee argues the issue is waived because Appellant "stat[ed] he had no objection to Prosecution Exhibit 6." (Gov't Br. at 25.) And that, "trial defense counsel did not object to the evidence of Appellant's request for counsel before or immediately after Prosecution Exhibit 6 was admitted into evidence." (Gov't Br. at 26.) Appellant objected under Mil. R. Evid. 403. The military judge went further and analyzed the objection for relevance as well. The objection is preserved.

Appellee does not address the interchange and discussion about Prosecution Exhibit 6 (PE-6) before the video was ultimately played.

Counsel objected, and the military judge understood there was an objection. (JA. 195.) The military judge ultimately admitted PE-6 and found this portion was "marginally" relevant and not prejudicial. (JA. 196-197.)

> You're (sic) *objection* is overruled in part, in part granted which is, I'm going to give a corrective (*sic*) instruction.

(JA. 197.) (emphasis added). The defense objected on Mil. R. Evid. 403 grounds, the military judge analyzed the objection under that Rule and for relevance. This Court need not visit a waiver or forfeiture question. B. A bright-line? Appellee argues the issue raises a question of bright-line rules. Not so. Appellant does not ask for a bright-line rule. The Issue Presented does not ask if a bright-line rule should be applied.

Appellant's opening brief recognizes situations where the admissibility of the invocation would be permitted, for example, if the defense had challenged voluntariness before the jury. In this example, the evidence would not be offered as substantive evidence of guilt but to rebut the allegation that the statements were coerced. Appellant did not invite testimony about his invocation. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) citing *United States v. Robinson*, 485 U.S. 25, 32 (1988) (no constitutional infirmity in a prosecutor's statement

mentioning the invocation of an accused's rights in " a fair response to a claim made by defendant or his counsel"). The issue specified can be resolved on the facts of this case, not a different case.

C. Prudence, inconvenience? Appellee suggests that is permissible to admit Appellant's invocation for convenience—the position adopted by trial counsel and the military judge, and now as "res gestae." (Gov't Br. at 34.) Trial counsel did not argue the invocation was admissible as *res gestae*. Perhaps this was because the concept of res gestae is inapt.

> [Latin: "things done" or "thing transacted"] The events or circumstances at issue, as well as other events that are contemporaneous with or related to them. Courts previously employed this term in order to admit otherwise inadmissible hearsay. The term has since been put to disuse by scholars and legislators. In evidence law, for example, the Federal Rules of Evidence, Rules 803(1)["present sense impression"], 803(2)["excited utterance"], 803(3)["declaration of existing physical condition"], and 803(4)["declaration of past physical condition"] now specifically encompass and limit what was previously used as *res gestae*.

Wex, Legal Information Institute, Cornell Law School. [2] Blacks Law Dictionary is more cryptic: "Any facts that are needed to accompany, constitute, or explain a transaction that is being questioned." [3]

As Appellee admits, trial counsel reasoned and "feared that excising certain portions of the video would confuse the members." (Gov't Br. at 34.) Appellant notes that various prosecution exhibits were redacted before publication—without objection, concern, or a limiting instruction. Further, the Senior Trial Counsel acknowledges experience with "redactions on video's and things like that" in other cases while discussing playing recorded phone calls. (R. 536-67.)[4] Appellee ignores a colloquy where the trial counsel started "editing" the play of the video.

> Your Honor, there are just some gaps here that are several minutes in length where he's sitting there waiting to write a statement. So, I was asking defense counsel if they mind us to skip forward to skip past those gaps, so we're not just sitting here staring at the screen.

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[2] Available at: https://www.law.cornell.edu/wex/res_gestae [last visited, 12 November 2017].
[3] Available at: http://thelawdictionary.org/res-gestae/ [last visited, 12 November 2017].
[4] *See* separate Motion to Supplement the Joint Appendix.

(R. 695.) The trial counsel then continued playing the video while skipping parts—without an instruction to the jury or apparent concern for confusion.

D. Should the military judge and trial counsel be excused for admitting evidence of Appellant's invocation of rights because it was not offered "as substantive evidence."

So, the first question is, why was it deliberately offered and then admitted?

Appellee cites *Splunge v. Parke*, 160 F.3d 369 (7th Cir. 1998). There are at least two significant differences with Appellant's case: Splunge testified, Appellant did not, and it was during Splunge's in-court testimony the issue of invocation arose, and Splunge invoked at the beginning of the interrogation, not some-way into the interrogation as Appellant did.

> Any hint that the silence is inconsistent with later statements produces the inference forbidden by Doyle and imperils the verdict. Unless the defendant tries to persuade the jury that any statement he made was involuntary, why take the risk? Splunge did not argue that the statement had been obtained by improper police tactics; his defense--that he did not know how Fox got the gun, did not expect her to commit a crime, and did not steal Wallace's car--was based on the statement.

160 F.3d at 373. Trial counsel made a significant argument about the lies and inconsistencies in Appellant's statements to investigators before and after the invocation. Further, because the prosecution introduced the invocation into evidence, the military judge was put in the position of highlighting the invocation with a limiting instruction. So, there is no passing reference to the invocation. *Cf. Lindgren v. Lane*, 925 F.2d 198, 201 (7th Cir. 1991). In *Lindgren*, the testimony about an invocation was found "inadvertent." Unlike the deliberate, apparently minimally relevant, invocation by Appellant.

Appellee cites *Noland v. French*, 134 F.3d 208 (4th Cir. 1998). Unlike Appellant's case, the *Noland* prosecutors elicited passing reference about an invocation to introduce a specific statement to help rebut Noland's insanity defense. Thus, the prosecutor was able to tie the invocation and statement with actual relevance.

Appellee cites *Grieco v. Hall*, 641 F.2d 1029 (1st Cir. 1981). Again, the defendant in *Grieco* testified, and the issue of invocation arose during cross-examination. The prosecutor was "challenging the defendant's trial testimony regarding post-arrest behavior." *Id.* at 1033 (no error in allowing the cross-examination questioning in part because

the "petitioner's direct testimony could arguably have created an inference that he had been cooperating with the police.").

Appellee cites *Jones v. Stotts*, 59 F.3d 143 (10th Cir. 1995). The prejudicial nature of a witness incidentally mentioning an invocation was viewed through the ineffectiveness of counsel prism for failure to object to the testimony. The appellate court found no *Strickland* error. *Id*. 146-47. The case is of little value in resolving Appellant's issue. Appellee's citation to *United States v. Stubbs*, 944 F.2d 828 (11th Cir. 1991), is inapt because it deals with a separate issue of post-arrest silence.

Appellee cites *Morrison v. Gaetz*, No. 06-CV-0183-MJR, 2010 U.S. Dist. LEXIS 7173 (DC SD Ill. 28 January 2010) (unpub.), a habeas corpus case. The invocation came at the end of the videotape, unlike in Appellant's case, Morrison argued ineffective assistance of counsel for failure to object, unlike Appellant's case.

The sum of these cases is that the prosecution was able to establish some relevance for the testimony or that it was in response to evidence from the defense.

E. *Res gestae*? Appellee seeks a rule that an accused's invocation of rights is admissible to show the res gestae of events surrounding the taking of the statement.

Appellee cites *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001), a case examined for plain error. The Army Court of Criminal Appeals, as does Appellant, views *Gilley* as a case where the defense opened the door and testimony was a fair response. *United States v. Carrasquillo*, 72 M.J. 850, 856 (A. Ct. Crim. App. 2103) summarily aff'd on other grounds, 2014 CAAF LEXIS 826 (C.A.A.F. 8 August 2014). The Army Court cautions:

> As such, counsel and trial judges must approach any discussion of an appellant's invocation of right to silence and right to counsel with trepidation. The invocation of these constitutional and statutory rights are simply too important to reveal to a panel, directly or indirectly, without careful forethought and a full understanding of the underlying principles that govern them. Military judges must be vigilant when counsel take seemingly small, but tremendously perilous forays into this area, "and take steps to insure a constitutional or codal shield for the criminal accused is not improperly transformed into a prosecutorial tool by the Government."

Id. at 860 (citations omitted). *Gilley* should be limited to its facts and a situation where the defense first puts evidence into issue to which evidence of an invocation is a fair response. *See also*, *United States v.*

Moran, 65 M.J. 178 (C.A.A.F. 2007). In *Moran*, defense counsel did not object, unlike Appellant's counsel.

The statement here was not reasonably necessary to describe the events about which the witness had been examined; there was no testimony of the agent to be explained. 65 M.J. at 183. Neither *Moran* nor *United States v. Ross*, 7 M.J. 174, 175-76 (C.M.A. 1979), support Appellee's *res gestae* theory in general or on the facts in Appellant's case. And, "it appears that any advantage to be obtained in this case in admitting such evidence was clearly outweighed by the confusion such testimony could cause in the minds of the members, and its significant potential for prejudice for the appellant." *Ross*, 7 M.J. at 176. Appellant's primary objection at trial raised Mil. R. Evid. 403. The *Ross* court cited to *Fagundes v. United States*, 340 F.2d 673 (1st Cir. 1965), for the *res gestae* principle.

In *Fagundes*, the defendant was found hiding, was told he was "under arrest," but was not, apparently, warned in accordance with *Miranda*, at which point the defendant said that "he did not want to say anything and wanted to see a lawyer." 340 F.2d at 675. Fagundes testified at trial, and the prosecution asked him to explain why he'd not

offered his alibi when first confronted with his arrest. *Id*. at 677. *Fagundes* was reversed, and it does not support Appellee's *res gestae* argument.

The doctrine of *res gestae* continues to arise from time to time. In Appellant's view, res gestae is now a concept sometimes expressed as being inextricably intertwined or intricately related conduct surrounding a crime. When offered such evidence is still subject to a Fed. R. Evid. 403 balancing test. Courts can be critical of the broad admission of conduct surrounding the crime.

> Thus, although this fine distinction has traditionally existed, the inextricable intertwinement doctrine has since become overused, vague, and quite unhelpful. To ensure that there are no more doubts about the court's position on this issue--the inextricable intertwinement doctrine has outlived its usefulness. Henceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility.

United States v. Gorman, 613 F.3d 711, 719 (7th Cir. 2010).

> Our resistance to the "inextricably intertwined" standard has not diminished since *Cross*, and today we make clear that this is not our test for intrinsic evidence. Like its predecessor *res gestae*, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b).

United States v. Green, 617 F.3d 233, 248 (3d Cir. 2010). "There is, as well, a danger that finding evidence "inextricably intertwined" may too

easily slip from analysis to mere conclusion. . . . The fact that omitting some evidence would render a story slightly less complete cannot justify circumventing Rule 404(b) altogether." *United States v. Bowie*, 232 F.3d 923, 928-29 (2000).

The sum of these cases is that the application of *res gestae* to an admissibility question should be looked at with a healthy dose of skepticism.

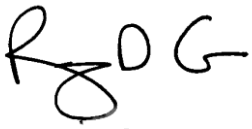
F. Instructions. A limiting instruction was given at the time PE-6 was played, but the military judge did not follow through with his commitment to giving more in writing. Neither the defense nor trial counsel reminded him of the commitment at the time of instructions. Appellee is correct that the defense could have given a reminder, but so could and should have the trial counsel—everyone appears to have forgotten. The question for Appellee is, which is worse—or to quote Appellee "more prudent?" (Gov't Br. at 35.)

1. Members of the court, some portions of the video have been redacted for convenience and to ensure only admissible evidence is before you. You are not to speculate about any redactions. Or,

2. Members of the court, the accused, invoked his rights when questioned. You are not to think about that.

This Court has often held that a curative or limiting instruction can render an error harmless. *United States v. Armstrong*, 53 M.J. 76, 82 (C.A.A.F. 2000). However, this Court should express care that an instruction can always cure the error. This case presents an example where the request for and giving of a "limiting instruction" should be looked at skeptically. Factors to consider include: the significance of a constitutional right in issue, it is not always the number of errors but can be the severity of one; and how the error was injected into the trial. Here, the prosecution, in Appellant's view, deliberately and unnecessarily interjected Appellant's invocation before the members. *See, e.g., United States v. Skerrett*, 40 M.J. 331, 333 (C.M.A. 1994). Finally, the military judge did not give a final written curative instruction as promised and trial counsel did not ask him to—but had an obligation at that point to protect the fairness of Appellant's trial. (Appellant acknowledges that the defense could also have asked but didn't.)

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of the Court on November 13, 2017, and that a copy was served

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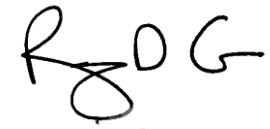

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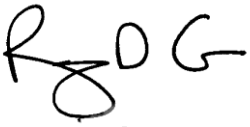

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