IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private First Class (E-3) **TRYVON M. JONES** United States Army Appellant	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. 20210503 USCA Dkt. No. 23-0188/AR

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

Granted Issue

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S POST INCIDENT BROWSER HISTORY AS RES GESTAE EVIDENCE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2018).

Statement of the Case

On August 2, 2021, a military judge sitting as a general court-martial, convicted Private First Class Tryvon M. Jones (Appellant), contrary to his pleas, of

two specifications of sex assault of a child, one specification of child abuse, and one specification of aggravated assault by strangulation in violation of Articles 120b and Article 128, UCMJ, 10 U.S.C. §§ 920b and 928 (2018). (JA 003; 009). On September 15, 2021, the military judge sentenced Appellant to reduction to E-1, thirteen years and eight months confinement, and a dishonorable discharge.[1] (JA 010).

On October 6, 2021, the convening authority took no action. (JA 014). On October 14, 2021, the military judge entered judgment. (JA 015).

On April 4, 2023, the Army Court summarily affirmed the findings and sentence. *United States v. Jones*, No. ARMY 20210503, 2023 CCA LEXIS 175 (Army Ct. Crim. App. Apr. 4, 2023) (summ. disp.) (JA 002).

This Court granted Appellant's petition for grant of review on August 16, 2023, on the issue above and ordered briefing under Rule 25. (JA001).

[1] The military judge sentenced appellant as follows:

Charge I, Specification 1	10 years
Charge I, Specification 2	3 years
Charge I, Specification 3	6 months
Charge II, The Specification	2 months

The military judge ordered all sentences to confinement to run consecutively. (JA 010).

Summary of Argument

The military judge erroneously admitted appellant's post-incident browser history as res gestae evidence. This resulted in admission of Mil. R. Evid. 404(b) evidence without proper notice, good cause, and a balancing test. Appellant was prejudiced by the error because the Government unfairly exploited the evidence to paint Appellant as a predator to secure his conviction and a lengthy sentence.

Statement of Facts

Appellant was an abused child who suffered from mental and emotional deficiencies. (JA 130-34; 160). In the three years prior to trial, Appellant received weekly behavioral health treatment. (JA 021-22, 160). At R.C.M. 706 finding, Appellant was diagnosed with variety of personality disorders, including his inability to "consistently exhibit an appropriate emotional response to stimuli." (JA 153).

At trial, the Government sought to admit Appellant's post incident internet browser history claiming, "this goes to the state of mind of the accused. This is browser history immediately after the assault." (JA 108). The trial defense attorney immediately objected for relevancy. (JA 108). The military judge sustained the objection stating, "You haven't laid a foundation for a time frame, when he's doing this, I have no idea when this is occurring." (JA 108). The government attempted to lay the foundation but did not provide information

beyond the search occurred sometime "The 4th and 5th of November" and "They follow basically after the incident." (JA 109). Defense again objected for failure to give Mil. R. Evid. 404(b) notice. (JA 109). The Assistant Trial Counsel countered the objections, arguing:

> …Private Jones' search of the Google history immediately after the assault. [sic] After his confrontation with Shelby Dean, he then searched specific terms that go to his state of mind immediately after the assault. It's the government's position this is res gestae with the charged offenses.

(JA 110).

The browser history showed that, on November 4-5, 2021, Appellant searched the terms: "What is sexual assault?," "types of sexual assault," "choking charge," and "how many years for sexual assault," among others. (JA 150).

The military judge admitted the evidence, without articulating any reasoning, after the Government argued, "it's relevant because he is looking up sex assault, choking charges, how much time for sex assault. He's looking up things of what he just did. And it goes right to *state of mind* that this was an assault, that he knew it was an assault, and that he was looking it up." (JA 111) (emphasis added).

During closing, the government took every opportunity to use this evidence to its advantage. The Government implored the judge to, "look at the Google, history, Your Honor, and you will see [sic] looking up what is choking, sex assault.

He knew what he did was wrong." (JA 118). The government opened their presentencing argument painting Appellant to be an evil monster:

> We lock our doors at night to keep the bad guys out. What do you do when he has a key? From fairy tales to true crime, there has existed this concept of *knowing evil* when you see it. It's the monster in the woods, the man in the mask lurking in the shadows. This evil exists outside, but not in our own home. While tucking in our children at night, we check under the bed for monsters, showing them that they are safe in their house, that the evil is only outside.

(JA 135) (emphasis added).

Furthermore, the Government called Appellant a "the bad guy in plain sight, the wolf in sheep's clothing," "the monster in the house the entire time, hiding in plain sight." (JA 136). Ultimately, the government asked the military judge to sentence Appellant to ten years of confinement. (JA 138). The trial defense attorney, in turn, asked for four years of confinement. (JA 140).

After the government used the erroneously admitted evidence to its full advantage, the military judge sentenced Appellant to thirteen years and eight months confinement—almost four years longer than the government's request. (JA 010; compare at JA 138). Moreover, the military judge characterized Appellant's unsworn statement as "HORRIBLE!" at the bridging the gap session. (JA 016) (emphasis in the original).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019).

Law

A. Res Gestae Evidence

Res gestae or intrinsic evidence is defined as "[t]he events at issue, or other events contemporaneous with them." Res Gestae, Black's Law Dictionary 1565 (11th ed. 2019). The dictionary further defines "contemporaneous" as "[1]iving, occurring, or existing at the same time." Contemporaneous, *Id*. at 397.

Admission of *res gestae* or background evidence "can be justified in terms of preventing a gap in the narrative of occurrences." *United States v. Thomas*, 11 M.J. 388, 392-93 (C.M.A. 1981). However, the courts reject the view that other acts evidence should be admitted under this doctrine. *United States v. Hill*, 936 F.2d 450, n.1 (9th Cir. 1991) (stating the doctrine "should be applied narrowly to avoid the overly-broad, so-called 'res gestae' exception.") (citing 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5329 at 449-50 and 1 WIGMORE, EVIDENCE § 218 at 720-21 (3d ed. 1940) (the "very looseness

and obscurity" of the phrase res gestae "lend too many opportunities for its abuse.").[2]

B. Other crimes, wrongs, or acts

Military Rules of Evidence 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge." *United States v. Tyndale*, 56 M.J. 209, 212 (C.A.A.F. 2001) (quoting *Huddleston v. United States*, 108 S. Ct. 1496 (1988)). "The rule is designed to avoid a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment." *United States v. Brown*, 880 F.2d 1012, 1014 (9th Cir. 1989) (citation omitted).

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[2] Some state and federal courts have stopped relying on res gestae as a theory of admission altogether. *United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000) ("[W]e are confident that there is no general 'complete the story' or 'explain the circumstances' exception to Rule 404(b) . . . ."); *See United States v. Krezdorn*, 639 F.2d 1327, 1332 (5th Cir. 1981) (res gestae is "an appellation that tends merely to obscure the analysis underlying the admissibility of the evidence."); *United States v. Cureton*, 739 F.3d 1032, 1037 (7th Cir. 2014) (noting that res gestae "is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper."); *People v. Jackson*, 869 N.W.2d 253, 264 (Mich. 2015) ("[T]he plain language of MRE 404(b) . . . sets forth no such 'res gestae exception' from its coverage. Nor do we see any basis for reading one into the rule."); *State v. Fetelee*, 175 P.3d 709, 735 (Haw. 2008) (concluding that the Hawaiian Rules of Evidence supersede res gestae); *Rojas v. People*, 2022 CO 8, P41 (Col. 2022) ("We now join those jurisdictions and abolish the res gestae doctrine in Colorado.").

C. Notice and Due Process

To safeguard against unduly prejudicial evidence, the courts must ensure the evidence: (1) be offered for a proper purpose the under Rule 404(b); (2) be relevant; (3) if relevant, survive Rule 403 balancing test; and (4) be properly limited by instructions. *Huddleston*, 485 U.S. at 681.

Addressing the concern for admission of prejudicial evidence without fair process, Congress requires that the Government give proper notice. A condition precedent to admitting 404(b) evidence is notice; without notice, such evidence is inadmissible. *United States v. Vega*, 188 F.3d 1150, 1153 (9th Cir. 1999) (citing Fed. R. Evid. 404(b), advisory committee note, 1991 amendment.). The Government *must*: (1) provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial; and (2) do so before trial — or during trial if the military judge, for good cause, excuses lack of pre-trial notice. Mil. R. Evid. 404(b)(2) (emphasis added). "The drafters clearly intend for these issues to be resolved *in limine*, and not postponed until trial." S. Saltzburg, L. Schinasi, and D. Schleuter, *Military Rules of Evidence Manual*, §8-1, 404.02[c][ii] (8th ed. 2015), (Editorial Comment to Mil. R. Evid. 404(b)).

Recently, the Advisory Committee on Federal Rules of Evidence adopted more stringent notice requirements for other crimes, wrongs, and acts evidence. Fed. R. Evid. 404(b) (2020 Amendments). The committee notes provide that,

since notice is a condition precedent, "the offered evidence is inadmissible if the court decides that the notice requirement has not been met." *Id*. Further, "[n]otice must be provided before trial […] unless the court excuses that requirement upon a showing of a good cause." *Id*. The government counsel's misunderstanding of Mil. R. Evid. 404(b) does not constitute good cause. *United States v. Hilliard*, No. ARMY 20170377, 2019 CCA LEXIS 21, (Army Ct. Crim. App. Jan. 17, 2019) (remanded for other grounds).

D. Military Judge's Ruling

Rule for Courts-Martial 905 requires the military judge to "state the essential findings on the record." In doing so, objections made at trial may not be "evaded or ignored." *United States v. DeYoung*, 29 M.J. 78, 80 (C.M.A. 1989). The military judge has a duty to "affirmatively" rule. *Id*.; *see also United States v. Mullens*, 29 M.J. 398, 399 (C.M.A. 1990) ("We again hold that the military judge is required by Article 51(b) . . . and R.C.M. 801(a)(4) . . . to rule on these objections."). "We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

E. Prejudice

The Eleventh Circuit has developed a three-part test for prejudice for lack of Rule 404(b) notice: "1) when the government could have learned the availability of

the witness [or evidence]; 2) the extent of prejudice to the opponent of the evidence from a lack of time to prepare; and 3) significance of the evidence to the prosecution's case." *United States v. Perez-Tosta,* 36 F.3d 1552, 1562 (11th Cir. 1994). "Since the policy of 404(b)'s notice provision is to protect the defendant by reducing surprise, the possibility of prejudice to the defendant from a lack of opportunity to prepare should weigh heavily in the court's consideration." *Id.*, at 1561 (citing Fed. R. Evid. 404(b) Judiciary Committee note).

"For a nonconstitutional error such as this one, the Government has the burden of demonstrating that "the error did not have a substantial influence on the findings.'" *United States v. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005) (citing *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003) and *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001)). In evaluating whether erroneous admission of government evidence is harmless, this court traditionally uses a four-part test, weighing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id*.

"When a 'fact was already obvious from . . . testimony at trial' and the evidence in question 'would not have provided any new ammunition,' an error is likely to be harmless." *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010) (quoting *United States v. Cano*, 61 M.J. 74, 77-78 (C.A.A.F. 2005)). Conversely,

where the evidence does provide "new ammunition," an error is less likely to be harmless. *Id*. (finding "the government's case against appellant was significantly strengthened by the improperly admitted filename evidence," because it "introduced 'new ammunition' against appellant found nowhere else in the record.).

F. Relief

Once it finds that Appellant was prejudiced by the military judge's error, the Court can assess "if a rehearing on the affected findings is deemed impracticable" and "if reassessment would be appropriate." *Berry*, at 98. If the error had "substantial influence on the findings" the Court dismisses the affected findings. *Yammine*, at 79. Sentencing rehearing is appropriate if the court finds, "it would not be possible to 'reliably determine what sentence would have been imposed at the trial level if the error had not occurred.'" *Id*. at 98 (quoting *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)).

Argument

The military judge admitted evidence without conducting a finding of facts and citing a legal basis. Moreover, her decision was outside the range of choices reasonably arising from the applicable facts and the law. *Frost*, at 109 (citation omitted). Although it is unclear what was the actual basis of her decision, the evidence was not res gestae as the government argued. Therefore, the search

history is "other act" evidence and its erroneous admission without proper notice and good cause impacted the trial's outcome. The military judge's understanding that Appellant's internet search history somehow reflected his "state of mind" added new ammunition to the trial. Moreover, the government used that new ammunition to paint Appellant as a knowing and calculating monster when no other "state of mind" evidence was admitted. Consequently, the military judge sentenced Appellant to a sentence of confinement nearly four years in excess of the government's request. Therefore, the error was not harmless.

A. The military judge abused her discretion because Appellant's browser history was not res gestae evidence.

The government argued the browsing history evidence was a res gestae without any basis. (JA 110). Although the military judge initially stated, "I don't see how it's res gestae," (JA 110), she inexplicably admitted evidence without conducting any legal analysis, (JA 111). Since the government did not offer an alternative theory of admissibility, presumably she admitted the evidence under the res gestae doctrine.

At trial, the Government conceded the alleged incident was complete well before Appellant made his search history. (JA 091, 104, 110-11). As such, Appellant's browser history was not concurrent, intertwined with, or intrinsic to the alleged events. Likewise, the admission of the evidence was not "justified in terms of preventing a gap in the narrative of occurrences." *Thomas*, 11 M.J. at

393. This other act occurred after an intervening event of Ms. Shelby Dean's confrontation. (JA 110). Therefore, the act was not contemporaneous to the charged events. *See* Black's Law Dictionary, at 397 and 1565.

There was no indication this post-incident act could prove a fact or controversy relating to the charges. The Government only referred to a vague "state of mind" inference as indicative of knowledge and res gestae. However, the evidence is more indicative of Appellant's confusion after Ms. Dean's confrontation. Therefore, the military judge abused her discretion because the facts of the case and the applicable law does not support her decision.

B. The military judge abused her discretion admitting Mil. R. Evid. 404(b) evidence without proper notice and good cause.

The military judge erroneously concluded that the evidence was not covered under Mil. R. Evid. 404(b) evidence. Absent good cause, unnoticed evidence should be excluded where the Government possessed the evidence from the beginning of the investigation. The military judge did not address Appellant's objection for lack of notice or good cause for "state of mind" evidence. (JA 109-10). Therefore, her ruling warrants little or no deference.

C. The military judge's erroneous admission prejudiced appellant.

Based on the complete lack of notice and the military judge's analysis for Rule 404(b) evidence, this Court should adopt the Eleventh Circuit's test: "1) when the government could have learned the availability of the witness [or evidence]; 2)

the extent of prejudice to the opponent of the evidence from a lack of time to prepare; and 3) significance of the evidence to the prosecution's case." *Perez-Tosta.*, 36 F.3d at 1562.

The Government had the evidence from the investigation's outset. The government provided timely notice of intent to use other Mil. R. Evid. 404(b) evidence. (App. Ex. VII). Trial Defense Counsel filed a Motion to Exclude Evidence under Mil. R. Evid. 404(b), thereafter. (App. Ex. VI). However, the government never provided a notice of their intent to use the search history evidence until the middle of the trial. (JA 109;159). The Government argued the browser history showed Appellant's "state of mind when he did it." (JA 111). But "state of mind" is a vague phrase that could encompass any of the permissible purposes for admitting 404(b) evidence, such as motive, intent, or knowledge. Furthermore, the military judge did not conduct a Mil. R. Evid. 403 prejudice analysis. The surprise admission at trial was prejudicial because appellant was not prepared to defend against the evidence. Therefore, the erroneous admission of this evidence affected Appellant's substantial right to fair notice and present defense.

Due to the military judge's erroneous conclusion that the evidence was not subject to Mil. R. Evid. 404(b), the Government was able to freely use the evidence for propensity purposes. The Government argued that internet searches

were admissible to prove his state of mind and knowledge. (JA 111) ("And it goes right to state of mind that this was an assault, that he knew it was an assault, and that he was looking it up."). The search phrases placed in this context were inflammatory and affected all aspects of the government's allegations. (JA 150) ("What is sexual assault?," "types of sexual assault," "choking charge," and "how many years for sexual assault."). Despite the temporal inconsistencies, the government relied on this evidence to argue that the Appellant knowingly committed these offenses. Therefore, the Government cannot prove that their plea to the military judge to look at the Google history, "looking up choking, sex assault," did not influence the judge's ultimate findings on the merits of the case.

At the close of the presentencing hearing, the Government called Appellant a "knowing evil," "a bad guy in plain sight," and "the wolf in sheep's clothing." (JA 135). No other evidence of knowledge was offered or admitted. Therefore, this evidence became "new ammunition" for the Government's arguments both at the merits and sentencing portion of the trial. *See Yammine* at 78. This propensity use compounds the erroneous admission's prejudice. This error was magnified by the military judge's denial of Appellant's forensic psychologist to rebut how his personality disorders may have led him to conduct these internet searches.

The military judge erroneously admitted this extrinsic evidence and the government thoroughly and improperly used this evidence throughout the trial.

Because the military judge gave Appellant almost four years more than the government's proposed sentence, the government cannot demonstrate that their effort to paint Appellant as "knowing evil" did not have a substantial influence on sentencing.

Conclusion

WHEREFORE, Appellant respectfully requests this Court vacate the findings and sentence.

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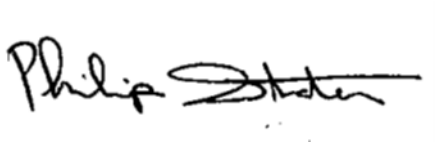

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4,167 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Jones, Crim App. Dkt. No. 20210503, USCA Dkt. No. 23-0188/AR was electronically filed with the Court and Government Appellate Division on September 14, 2023.

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