IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Staff Sergeant (E-6) **MICHALE L. WILSON** United States Army, Appellant	BRIEF OF BEHALF OF APPELLANT Crim. App. Dkt. No. 20210276 USCA Dkt. No. 23-0225/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 JOURNAL UNDER MILITARY RULE OF EVIDENCE 404(B).

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 [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

In May 2021, an enlisted panel sitting as a general court-martial convicted Staff Sergeant Michael L. Wilson [Appellant], contrary to his pleas, of three specifications of rape of a child, three specifications of sexual abuse of a child, and

one specification of sexual assault upon a child in violation of Article 120b, UCMJ, 10 U.S.C. §920b (2012) (2016) (2019). (JA 008, 015). The military judge sentenced appellant to three life sentences, two of which are consecutive, a dishonorable discharge, and reduction to E-1. (JA 016).

The convening authority approved the findings and adjudged sentence, and the military judge entered Judgment. (JA 021-22). The Army Court summarily affirmed the findings but, in accordance with a concession from the government, excepted "one of six body parts from two specifications, and two of six body parts from the third specification." (JA 007). After reassessment, the Army Court affirmed the adjudged sentence. (JA 006-07). On September 26, 2023, this Court granted Appellant's Petition for Review.

Summary of Argument

The military judge abused his discretion in admitting Military Rule of Evidence [Mil. R. Evid.] 404(b) evidence by: (1) making an untimely ruling dramatically shifting the evidentiary landscape; (2) becoming the 404(b) evidence's de facto proponent; (3) failing to place any limits on the use of the 404(b) evidence (even when requested by the government); and (4) failing to conduct an appropriate *Reynold's* analysis.

The judge's last second ruling, which did not address lack of notice or good cause despite a written and oral objection, broadened the government's original

request. The ruling violated 404(b)'s notice requirements, the pretrial order, and the judge's neutral role by: (1) basing the judge's admission on a theory repeatedly disavowed by the government which only "conceded" after the court's repeated urging, (2) applying the evidence to specifications the government stated it did not apply to, and (3) basing the ruling on a theory the government never offered. This late order, summarily overruling the defense's motion, took place after Appellant had entered pleas days before and just seven minutes before seating the panel.

Importantly, the eleventh-hour ruling lacked a correct analysis for each prong without even considering the often-heightened scrutiny courts provide for First Amendment materials. Likewise, instead of at least reserving his ruling until the judge could determine the contested issues at trial, the trial court created an almost *per se* relevance and probative value rule that makes salacious fictional literature admissible so long as there is a limiting instruction.

This Court should not permit the judge's coaching and evidentiary orders or the judiciary's failure to follow the notice, good-cause, or appropriate detailed analysis' requirements. The Army Court's overlooking the trial court's actions, AWOL rulings on lack of notice or good-cause, or the global admissions without appropriate redactions demonstrate that procedural protections are almost hollow words. "Good cause" means more than just the government was forgetful or ignorant. But the ruling here did not even suggest that; it was silent.

Statement of Facts

Appellant was convicted of sexually assaulting two people: a twelve year old neighbor (Specification 7)[1] and his daughter (all other specifications). Law enforcement seized appellant's personal journal which contained fictional stories he wrote for, and dedicated to, his wife. (JA 249, 316-17).

In October 2020, the government provided notice of intent to use Mil. R. Evid. 404(b) and 414 evidence per the pretrial order deadline. (JA 300-302). The pretrial order mandated that 404(b) evidence "must" be provided "in writing." (JA 252, n.3; JA 254-55). The journal was not included in the government's written notice while other evidence was. (JA 301).

In November 2020, the government moved to pre-admit the journal under Mil. R. Evid. 401, 402, and 403; but not 404(b). (JA 257). The defense filed a motion objecting to the journal under Mil. R. Evid. 404(b) and highlighted the government's failure to provide notice. (JA 283; 288-91). In the government's motion and evidence (both at the 39(a) and later at trial), the Special Victim's Prosecutor (SVP) never put forth when the journal entries were created in relation to the charged offenses, or attempted to provide written notice even after the defense's motions and later objections.

[1] Appellant also is serving a separate term of confinement for a non-military conviction which will remain regardless of this Court's decision here (JA 03, 318).

At an Article 39(a) session on November 30, 2020 (JA 315), the government insisted multiple times that the journal was not 404(b). (JA 038-040). The government's theory of admissibility was that the journal is "a statement of the accused. We do not believe it is 404(b) [evidence]." (JA 038). The judge interrupted government counsel and suggested: "Hold on, isn't that 404(b)? One of the 404(b) purposes specifically listed therein is to prove intent, right?" and "[s]o how is it not 404(b)?" (JA 039). The government again disavowed 404(b). (JA 039-40). The court pushed back: "So how is it not 404(b)" and asked the government to restate its theory of admissibility. (JA 040).

The government reiterated it was not introducing the journal as 404(b) evidence and did not believe the evidence satisfied 404(b)'s requirements. (JA 040). The military judge then read 404(b) aloud, challenging the government. (JA 040). But the government held firm, insisting "that it doesn't fit into any of the categories that are outlined in 404(b)." (JA 040).

The military judge then hinted that the evidence may be "permitted" under that rule: ". . . intent. Isn't that one of the permitted uses in 404(b)(2) . . .?" The trial counsel then conferred with the SVP. (JA 041). Only then did the two "concede that this can be considered 404(b), while that's not initially how we were evaluating it . . ." (JA 041).

After the concession, the judge asked the government if it was nevertheless maintaining its original stance or if it adopted the new 404(b) view. (JA 041). But the government maintained the journal is a "non-hearsay statement of the accused, and that it is appropriate and relevant, given that basis." (JA 041). The military judge redirected the government back to 404(b)'s "other statements, other wrongs, other crimes, wrongs or acts." (JA 041-42). In explaining its theory, trial counsel submitted that the journal had similar "statements" to the charged misconduct making it "direct evidence" of Specification 7. (JA 041-042).[2] The government focused solely on the neighbor's allegations (Specification 7). (JA 042).

The military judge then asked if the government was "prepared to argue why it is 404(b), even though, according to the defense, you haven't noticed it as such?" (JA 042). After conferring with the SVP, the government then argued that because one story in the journal involved a neighbor, it was similar to Specification 7's allegations. (JA 043). Therefore, it claimed the entire journal, which also contained stories regarding consensual adult behavior, could demonstrate intent for Specification 7. (JA 043, 316).

In its written motion and argument, the defense argued the government failed to meet its burden to show the journal entries were similar to the charged

[2] Later at trial, the SVP maintains this position that the journal entries are "direct evidence" (JA 203).

allegations (*Reynolds*' second/third prongs), and also argued the government did not present any foundation for the journal. (JA 044; 283-091). The judge then asked the defense if they have a good-faith basis to believe that the journal's extracts were authentic, to which the defense pointed out that the government had to satisfy that burden. (JA 044-45). The judge then asked the government if there was any evidence for authentication. (JA 045). When the government responded in the negative, the court ordered "Get that." (JA 045).

As the defense continued, it also objected to preadmission and the lack of notice arguing the government had not met the *Reynolds*' first prong, and then

> . . . with regards to 404(b), I don't believe the government has established a sufficient connection between an amorphous intent regarding what's contained on these pages, and any of the named victims in this case. Specifically, that six of the [specifications] aren't the one that the government was referring to, [the neighbor] – she's [Specification] seven. The first six specifications refer to [appellant's daughter] . . ."

(JA 045).

In response to the defense's argument, the military just ordered the government to "get" the CID report pertaining to Specification 7: "So there should be a CID report that has some AIRs [regarding] Specification 7 . . . Get that. I want that, too." (JA 046). He tasked: "I don't want the entire CID report, I want you to be an attorney and to narrow it down to the relevant portions that will help assist me . . ." (JA 046).

The defense further articulated its 404(b) objection to the remaining *Reynolds*' prongs. (JA 047-49). In the event the judge admitted the evidence, the defense asked the judge to provide a limiting instruction that the evidence only be used for Specification 7 as the government argued. (JA 047; 049-50).

The military judge then offered the government a chance to expand the government's argument to apply to Specifications 1-6 despite the court noting that was not in the original request: "[The government's] entire argument was that it shows intent as it related to Specification 7 only [the neighbor]. That's also what I took away from reading your motion." (JA 050). The government accepts the court's offer realizing that "it could also be considered for [the daughter] as well." (JA 050). Ultimately, the military judge denied the government's motion for lack of foundation and did not issue a written ruling on 404(b). (JA 051).

The government never moved for the court to reconsider its ruling. The government also never provided the required written 404(b) notice, which the judge's pretrial order and Mil. R. Evid. 404(b) required be submitted. The court's pretrial order required panel instructions, voir dire questions, and witness lists to be submitted two weeks before trial. (JA 252-56).

As trial approached, one defense counsel was released and replaced, and the lead defense counsel was on terminal leave. (SA 015-18). Six months later, on the Friday before trial, the military judge held another Article 39(a). (JA 315-16).

At this hearing, the judge recapped the November hearing. (JA 054-55). The judge characterized the defense's motion (AE V (JA 283)) as an objection to the journal's preadmission, not as a motion to exclude the journal or as an objection to the lack of notice. (JA 053-55). The defense's motion, both in in writing and oral argument, stated the opposite. (JA 045-49, 283-91). Although the judge noted the defense's objections covered Mil. R. Evid. 402, 403, and 404(b), he stated that he "sustained the defense objection" because of an inadequate foundation. (JA 055).

The judge then referenced an email he sent to the parties earlier that same week which contained several questions. (JA 055-57, 315). The government's answers to these questions were provided the day before the hearing (Thursday) (JA 315). The email shows the court and defense did not know the government intended to utilize the journal at trial. (JA 309, Q1). Further, the court and defense did not know the government's theory of admissibility and if that theory even contained 404(b). (JA 309-10, Q2, Q3, Q4, Q5). The journal extracts the government emailed that Thursday evening were illegible, and the government still had not provided the court foundational evidence. (JA 059-61). Despite the judge's requirement that trial exhibits be marked no later than that morning, the government had not provided the journal entries to the court reporter, and did not have legible copies present for anyone. (JA 061-62, 059).

At the hearing, the government now sought to use the journal to show "motive" even though that had not been a theory posited at the last 39(a) or noticed during the previous six months. (JA 309-10, A2).

Further, the SVP expanded how the journal should be applied in "A4":

> the neighborhood child to specification 7 while the sexual abuse of the young sister by her older brother should apply to specifications 1-6 of the Charge. The foreign child story should apply to all specifications.

(JA 310, A4). Before the hearing ended, not guilty pleas were entered. (JA 064).

Seven minutes before calling the panel on Monday, the court summarily overruled "the defense's 402, 403, and 404(b) objections to the three journal entries . . ." (SA 004 (line 1), 005 (lines 3-4); JA 066 (line 6-7)). The court did not explain to which specifications the journal entries applied despite "A4". (JA 099).

In his undated written ruling, the judge admitted the journal extracts to show motive, intent, and now, absence of mistake; a theory never advanced by the government. (JA 314-26). The court ruled "[s]ome stories included prose involving sexual behavior between adults," but the three newly emailed stories all involved children. (JA 314-326). Finally, the court found an almost per se rule for *Reynolds*' second prong: "evidence of an Accused's sexual attraction to and/or interest in minors may, obviously, be probative of the Accused's alleged intent to engage in the charged child exploitation offenses." (JA 323). The court concluded that an instruction could cure any concern the panel would misuse the journal extracts.

The court's written ruling failed to segregate each story to the applicable specifications as the government requested. (JA 310, 314-26). While the court provided a standard spillover instruction, there was no limit as to which specifications the stories could be applied as requested in "A4." (JA 191-92, 343-44). The entries were also in the same bolded section containing 414 evidence that was allowed "to show the accused's propensity to engage in child sex offenses." (JA 191-92, 343-44). "Bad character" as opposed to propensity, was not explained.

Throughout trial, the government counsel relied on the journal extracts. It was highlighted in the Government's opening (JA 079-080), through law enforcement testimony (SA 006-011), by providing each member a copy of each story (JA 079), and repeatedly in closing (JA 203-04) and rebuttal (SA 012-013).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion.[3] *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019).

[3] There is an emerging Circuit split with several Federal Circuit courts holding: "For Rule 404(b) evidence, we review each prong under a different standard: (1) we use the clear-error standard in reviewing the factual determination of whether the other acts actually took place, (2) we review *de novo* the legal determination of whether the other acts were admissible for a proper purpose, and (3) we use abuse-of-discretion standard in reviewing whether the other-acts evidence is more prejudicial than probative." *United States v. Jaffal*, 79 F.4d 582, 594 (7th Cir. 2023) (citing *United States v. Clay*, 667 F.3d 689, 693 (6th Cir. 2012))

Law

A. Military Rules of Evidence 404(b)

Military Rules of Evidence 404(b) generally prohibits the introduction of other acts that might adversely reflect on the actor's character, "unless that evidence bears upon a relevant issue in the case . . ." *United States v. Tyndale*, 56 M.J. 209, 212 (C.A.A.F. 2001) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)). "One of the most basic precepts of American jurisprudence [is] that an accused must be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition." *United States v. Hogan*, 20 M.J. 71, 75 (C.M.A. 1985)

B. Notice Requirement – Courts treat the notice requirement as a condition precedent and assume error in its absence

Proper 404(b) notice must be provided to avoid the admission of prejudicial evidence and prevent unfair surprise. The government must: (1) provide reasonable notice of the evidence's general nature; and (2) absent good cause, do so before trial. Mil. R. Evid. 404(b). "The drafters clearly intend for these issues to be resolved in limine, and not postponed until trial." S. Saltzburg, et.al., *Military Rules of Evidence Manual*, Rule 404(b), at 4-107 (8th ed. 2015).

> Rule 404(b)(2)(A)'s notice requirements are conditions precedent to admitting government extrinsic offense evidence. As a result, should trial counsel fail to provide adequate or timely notice, they have failed to establish a basis for admission.

Id. Highlighting notice's importance, the Advisory Committee on Rules of Evidence adopted more stringent notice requirements for other crimes, wrongs, and acts evidence.[4] Fed. R. Evid. 404(b) (2020 Amendments). The 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*. These changes highlight the weight placed on the notice requirement.

Lack of notice for 404(b) evidence can create unique prejudice. *See e.g., United States v. Perez-Tosta*, 36 F.3d 1552, 1561 (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.") (citing Fed. R. Evid. 404(b) Judiciary Committee note)).[5]

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[4] This case was decided just prior to the implementation of this new rule in military practice. Both the Military and Federal Rules of Evidence now require the government: (1) provide reasonable notice in writing prior to trial so that the defense has a fair chance to meet it; and (2) articulate the permitted purpose for which it will be offered.

[5] Although this Court has not adopted a specific test for lack of notice in this context, the Eleventh Circuit developed a three-factor test for prejudice from lack of notice for rule 404(b) that it filters the totality of the circumstances through: 1) when the government could have learned the availability of the evidence; 2) the prejudice to the opponent from a lack of time to prepare; and 3) the evidence's significance/use to the prosecution's case. *Perez-Tosta*, 36 F.3d at 1562 (relying

C. The Military Judge's role – the Court should not coach the prosecution and is required to find good cause for the government's lack of notice

Although, R.C.M. 905(f) permits military judge's *sua sponte* reconsideration of any ruling before entry of judgment, R.C.M. 905(d) instructs:

> A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings.

R.C.M. 905(d). Read with Mil. R. Evid. 404(b), these rules require judges to determine motions before entry of pleas unless there is an articulated good cause.

Importantly, the judge should not advance new theories of admissibility or broaden the government's purported theories of admissibility. *See e.g., Greenlaw v. United States*, 554 U. S. 237, 243 (2008) (courts should "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter"). "[C]ourts are essentially passive instruments." *United States v. Samuels*, 808 F. 2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g *en banc*)).

"[Judges] 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.'" *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *Samuels*, 808 F. 2d at

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on a litany of cases that "have focused upon the prejudice suffered by the defendant because of the lack of notice").

1301). In the rare instances a court departs from its neutral role, "the justification has usually been to protect" the accused. *Greenlaw*, 554 U.S. at 243-244 (referencing *Castro v. United States*, 540 U.S. 375, 381-383 (2003).

For example, in *Sineneng-Smith*, the Supreme Court unanimously overturned the Ninth Circuit because that lower appellate court advanced theories that were not raised by the parties. *Id*. In reversing, the Supreme Court chastised the lower court for advancing its own legal theory, then deciding the relevant issue using that theory. *Id*. In doing so, the Court found the Circuit court abandoned its neutral role and effectively became a proponent even when the prevailing party later adopted the court's theory. *Id*. Trial judges should similarly maintain a neutral role.

D. Admissibility – the government must meet every *Reynolds*' prong

After proper notification or a finding of good cause, this Court applies a three part-test before admission:

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

United States v. Reynolds, 29 M.J. 105, 109 (C.M.A 1989). The evidence must satisfy all three prongs. *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010).

For the first prong, the standard of proof is a preponderance of evidence. *See e.g., Reynolds*, 29 M.J. at 109. In determining whether the accused committed the "act", a court needs to pay particular attention to whether the act itself may be protected by the First Amendment as that can heighten the proper analysis.[6] The first prong also includes analysis of "when" the underlying act took place since the relationship between the timing of the "other act" and the underlying charges can affect the other two prongs. *See e.g., United States v. Grimes*, 244 F.3d 375, 384-85 (5th Cir. 2001) (discussing examples of "timing" of "other acts'" evidence).

For the second prong, the court must inquire "whether that evidence is probative of a material issue other than character." *United States v. Diaz*, 59 M.J. 79, 94 (C.A.A.F. 2003) (quoting *Huddleston*, 485 U.S. at 686). This Court has long cautioned that "we do not approve 'of broad talismanic incantations of words'" such as motive to secure admission. *United States v. Ferguson*, 28 M.J. 104, 109 (C.M.A. 1989) (internal citations omitted).

An accused may be able to combat admission of Rule 404(b) evidence by advancing a defense "that makes clear that the object the evidence seeks to

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[6] *See e.g.*, *Dawson v. Delaware*, 503 U.S. 159 (1992); *United States v. Carpenter*, 2022 U.S. App. LEXIS 31605, *8 (2nd. Cir. 2022); *People v. Shymanovitz*, 157 F.3d 1154, 1159-60 (9th Cir. 1998) (holding trial court abused its discretion in admitting magazine articles as prior-bad-acts evidence), overruled in part by *United State v. Curtin*, 489 F.3d 935, 943 n.3 (9th Cir. 2007) (*en banc*); *United States v. Brown*, 374 Fed. Appx. 927, 937 (11th Cir. 2010).

establish, while technically at issue, is not really in dispute." 2 Moore's Federal Rules Pamphlet § 404.9 (2021), *see also United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986) ("materiality of such evidence [may] not arise until … the accused asserts that he is innocent due to lack of criminal intent or other affirmative defense") *cf*, *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007) (noting that evidence of a mental state may be admitted in certain cases involving intent as an element even where a defendant does not argue lack of intent because "every element" of a crime must be proven).

To that end, evidence of other crimes, wrongs, or acts is admissible to prove motive/intent when a person's motive/intent is a consequential fact. *See United States v. Gallagher*, 65 M.J. 601, 610 (N-M.C.C.A., 2007), *aff'd* 66 M.J. 250 (C.A.A.F. 2008) (the judge "must consider whether [the appellant's] state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element."); *United States v. Earls*, 704 F.3d 466, 470–472 (7th Cir. 2012) (the court properly admitted pending state felony charges, where state court penalties were highly probative as to his motive to flee). In *Curtin*, for example, the *en banc* Ninth Circuit concluded "it became clear the only disputed issue in this case would be [appellant]'s subjective intent" since he was charged with travelling with intent to engage in a sexual act and attempting to persuade a minor into sexual acts. 489 F. 3d at 938.

Likewise, in *United States v. Brown*, the Eleventh Circuit found it proper to admit specific writings authored by the accused after the accused presented a defense that he did not own or have knowledge of specific weapons. 374 Fed. Appx. 927, 937 (11th Cir. 2010). This was because the particular lyrics contained references to the *specific* weapons at issue. *Id*. The court noted that the government did not offer other writings that, while generally related to weapons, were not specific enough to the particular weapons at issue. *Id*. In other words, when it came to First Amendment penmanship, the court required a more direct connection for the second and third prongs to admit the evidence. *See id.*

Furthermore, this Court found a military judge did not abuse his discretion when he allowed sexual literature to be admitted *after* the defense raised the issue of intent and the victim's truthfulness. *United States v. Orsburn*, 31 M.J. 182, 185 (C.A.A.F. 1990). This Court distinguished cases holding 404(b) evidence regarding intent was *inadmissible* when intent was not at issue by finding that, in *Orsburn's* particular facts, the defense opened the door to intent evidence. *Id*. at 188; *see also United States v. Varoudakis*, 233 F.3d 113, 124 n. 9 (1st Cir. 2000) (finding that "the determination about whether to admit the evidence to show knowledge or intent 'should await the conclusion of the defendant's case and should be aimed at a specifically identified issue.'" (quoting *United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980) (reversing appellant's conviction for

erroneous admission of 404(b) evidence, because the supposed purpose of the evidence was not in dispute))).

The third *Reynolds*' prong applies Mil. R. Evid. 403's concerns. *Yammine*, 69 M.J. at 77. "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *United States v. Loughry*, 660 F.3d 965, 971 (7th Cir. 2011) (citation omitted). Even if some penmanship may be relevant, the volume and breadth may still substantially prejudice an accused. *See e.g.*, *Brown*, 374 Fed. Appx. at 937.

For example, in *Curtin*, the Ninth Circuit found fictional salacious stories prejudicial because of the unnecessary volume/breath:

> [E]ven the five stories remaining in the case convey in them more to the jury than is necessary for the government adequately to make its point. Unless objected to by the defense, careful editing of the stories would seem to be appropriate. We leave this task to the [trial] court.

Curtin, 489 F.3d at 958;[7] *see also Grimes*, 244 F.3d at 385 (reversing and remanding appellant's conviction because the admitted sexual materials regarding children were "offensive and not similar" when compared to the facts presented even though those also involved sexual abuse of a child).

[7] On remand, the lower court only admitted one of the five stories with the other four that were previously admitted not meeting a detailed analysis. *United States v. Curtin*, 588 F.3d 993 (9th Cir. 2007).

When it comes to First Amendment materials like stories and lyrics, courts caution to use a heightened 404(b) analysis. For example, in *Curtin*, although the court allowed fictional materials as "prior-bad-acts evidence," it noted that trial judges are required to consider the First Amendment implications when dealing with private papers: "The Constitution has long protected our private papers and thoughts, even those entirely lacking in social value." 489 F.3d at 960, (Kleinfeld, joined by Pregerson, Kozinski, Thomas, and Berzon, concurring) (citing *Stanley v. Georgia*, 394 U.S. 557, 565(1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.")).[8]

While materials implicating the First Amendment may still be admissible pursuant to 404(b), these cases stand for the proposition that a heightened analysis, a closer link under the second prong, and an exacting 403 analysis should be required if the evidence implicates the First Amendment. *See e.g., Yammine*, 69 M.J. at 78 (noting that although books and magazines have been admissible when

[8] That line from *Stanley* was quoted approvingly in this Court's recent decision. *United States v. Byunggu Kim*, 83 M.J. 235, 239 (C.A.A.F. 2023) (setting aside appellant's conviction for the military judge's failure to discuss First Amendment implications in a guilty plea).

they concern "a particular partner or sexual act, at or near the scene of an alleged sex crime, around the time of that alleged offense," when the highly descriptive text was more than two years removed and graphic, the evidence did not pass 403). In noting the First Amendment concerns, five judges in *Curtin* stated "the majority errs by confusing fantasy with intent. Mental states that would be criminal if carried out include 'fantasying, wishing, desiring, wanting, intending—a continuum.'" *Id*. at 961 (Kleinfeld, joined by Pregerson, Kozinski, Thomas, and Berzon, concurring) (internal quotations and citations omitted).

E. Prejudice – Whether an enhanced First Amendment analysis or not, "new ammunition" in the form of graphic literature needs a critical eye

To safeguard against undue prejudice, courts must ensure the evidence meets each *Reynolds*' prong and have proper limiting instructions. *Huddleston*, 485 U.S. at 681; *see also United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (emphasizing the importance of implementing procedural safeguard even for Mil. R. Evid. 414, because "there is a risk with propensity evidence that an accused may be convicted and sentenced based on uncharged conduct and not the acts for which he is on trial").

Although erroneous evidence might be harmless if the purpose was fulfilled by other evidence, where the evidence provides "new ammunition," prejudice likely follows. *Yammine*, 69 M.J. at 78. In *Yammine*, graphic descriptions of sexual behavior found on the accused's computer were "new ammunition" that

erroneously strengthened the prosecution's case warranting reversal. *Id*. (internal quotation marks omitted) (citation omitted). Likewise, in *United States v. Steen*, text messages admitted under 404(b) (after the accused testified) discussing a drug deal that members were able to take into the deliberation room provided "new ammunition." 81 M.J. 261 (C.A.A.F. 2021). This was because, when it came down to competing versions of events and the government witnesses had credibility issues, the verbatim exhibit "completely undermined" the appellant's version of events even though it was not directly related to that offense. *Id.* at *7.

Argument

The trial court vacated its neutral role when it repeatedly suggested a theory the government disavowed, ordered the government to provide evidence it never intended to submit, and then tasked the government to "act like lawyers" in preparing last-second exhibits. This all culminated in a lack of notice and a complete shift in the evidentiary landscape for highly prejudicial fictional stories.

Despite the lack of notice, when the court offered the government another chance to admit the evidence six months later (again hinting at the theory), the SVP accepted the court's offer and expanded the "unnoticed" theory to 'motive.' This was *less than* two business days before trial, and despite the parties to the litigation never requesting reconsideration. All the while, the court never analyzed

the truant notice or good cause despite the timing and notice violating rule 404(b), the pretrial order, and a written objection/motion noting both.

When the judge announced his ruling after entry of pleas just seven minutes before seating the panel, it was unclear as to what "theories" the government was permitted to utilize (e.g., motive and/or intent) or for what specifications; the court just summarily overruled the defense objections. (JA 066). At that point, all parties would only have believed the evidence could be used for the limitations the government suggested in "A4" and to motive and/or intent.

However, in his undated written ruling, the judge admitted the journal under a theory the government never pled and applied the journal to every specification despite the government's suggested limitations in "A4." (JA 310, A4; 310-324).

The erroneous admission constituted unfair surprise to Appellant because the defense had been preparing for trial in accordance with the evidentiary landscape derived from the judge's previous ruling. The defense's trial preparation was supported by the judge's Pretrial Order's requirements for "written notice"; the specific deadlines that all had passed; and the government's lack of notice/request for rehearing during the six months. This abrupt change that took place just before the panel was seated changed the evidentiary reality. Furthermore, the military judge did not conduct a proper 404(b) analysis, a proper second/third prong balancing test, and failed to provide detailed findings and instructions.

A. The military judge erroneously admitted evidence without the mandatory notice, under a theory not proposed by the government, and to specifications that were not requested

1. The military judge abused his discretion by sparing the government's lack of notice, ever-changing theories of admissibility, and application to specifications even though the defense prepared for six months under a completely different evidentiary paradigm

Despite failing to ever give notice as mandated by Mil. R. Evid. 404(b)(2) and "in writing" per the Pretrial Order (JA 252), the government originally attempted to pre-admit the journal in November under another theory (before the court's intervention). (JA 257). Given how the events, and the judge's actions, unfolded, the Appellant could not anticipate this evidentiary shift, so the judge's failure to find good cause or require notice was highly prejudicial.

Even if one considers the military judge's repeated suggestions, pushes, and Manual reading during the November Article 39(a) as 'pseudo-notice' from the trial court, the judge *sustained* the defense's motion leading any reasonable practitioner to believe the evidence was not coming in at trial. Especially since the "sustaining" was in response to the defense's motion challenging both the evidence in its entirety and the lack of notice under 404(b). (JA 283).

The defense's belief was buttressed over the next sixth months since the government never requested reconsideration, provided any written notice/supplement, nor acted as if it would utilize the evidence to even include pre-

marking the exhibit for trial. (JA 059, 061-62). When the government wanted to provide notice, it did so with *other* evidence, but not the journal. (JA 283, 301-04).

The lack of notice and good-cause is highlighted when, only after the court offered another chance less than six days before trial, did the SVP accept presenting a new theory - motive. (JA 309-10). The government applied those two theories to new specifications in more robust ways. (JA 309-10). The judge's own quote from the first Article 39(a) highlighted how difficult it would be for Appellant to follow the government's ever-changing theory: "[the government's] entire argument was that it shows intent as it related to Specification 7 only. That's also what I took away." (JA 050). Despite this new theory and broader application, the court never addresses good-cause or lack of notice despite the defense's motion.

Even during the "Friday-before-trial" hearing, the SVP had not provided the court or pre-marked the journal as required by the Pretrial Order, indicating the government did not intend to offer that evidence. (JA 256). We know that because (1) the only copies provided were in email and illegible (JA 059-061), (2) the government noted that it would have to find legible copies (even though, if they had been pre-marked, they would be available) (JA 061-62), and (3) when asked about additional/supporting evidence, the government "only [had] the charge sheet." (JA 059).

By never giving notice or even preparing the evidence for marking, the court and defense learned of a new theory the Thursday evening before trial, while the defense had only ever had to theoretically consider "intent" for "Specification 7," given the trial counsel's previous argument, motion to preadmit, and the judge's sustaining the defense's challenge.

Thus, the defense prepared for trial as if the journal was inadmissible, only for the judge to intervene and give the government another chance. To be sure, the judge's questions in App. Ex. XX make it clear that no one knew if the government was even still offering the journal (or what extracts thereof) (JA 309, Q1). Even more, the judge (and the defense) did not know the government's theory of admissibility and if that theory contained 404(b). (JA 309-10, Q2-Q4).

Moreover, the judge abused his discretion when he ignored appellant's motion/objection to the lack of notice and failed to analyze "good cause." Despite the defense attaching the government's 404(b) notice to its motion showing that the journal was not included, the only time the judge acknowledges notice is when he asks "Are you prepared to argue why it is 404(b), even though, according to the defense, you haven't noticed it as such?" (R. at 44). The judge ignores the rule and does not ask for the SVP to explain good cause; he just goes straight to allowing them to argue his suggested theory. Thus, the judge's silence on notice or good cause, despite a written motion that was being discussed, is an abuse of discretion.

2. The military judge effectively became the proponent of the government's key evidence by suggesting theories of admissibility, the evidence needed for those theories, and the applicability of those theories

One reasonable explanation for the judge's failure to require notice or good cause is because the court ostensibly acted as the de facto proponent for the theories of admissibility, the foundational evidence for those theories, and the theories' application to specific specifications.[9]

The military judge's improper evidentiary ruling is demonstrated by how the military judge, and not the government, steered the discussion and evidence surrounding the journal. Like *Sineneng-Smith*, initially the government did not offer the evidence under 404(b), and indeed, specifically said it would not. (JA 039). Like *Smith*, the court then pushed them towards 404(b). But unlike *Smith*, trial counsel declined. The court then pushed again using the word "intent." They again declined. The Court then opened and read the Manual. But the government held firm restating its "position is that it doesn't fit into any of the categories that are outlined in 404(b)." (JA 040). The government only "concedes" after the judge suggested that the journal may be acceptable under 404(b) ". . . intent. Isn't that one of the permitted uses in 404(b)(2) . . .?" (JA 041). It became clear where the 404(b) theory originated when, after the concession, the prosecution stated "that's

[9] The trial judge also provided other theories to the SVP during trial. (SA 20).

not initially how we were evaluating it . . .” (JA 041). However, it was still unclear if the government would actually offer the journal under its theory or the court’s.

The court asked if the government was nevertheless still maintaining its original position or the court’s theory. (JA 041). The government attempted to hold firm, stating that the journal is a “non-hearsay statement of the accused, and that it is appropriate and relevant, given that basis.” (JA 041). The judge redirected back to 404(b) stating “other statements, other wrongs, other crimes, wrongs or acts.” (JA 041-42). The trial counsel countered that the journal entries are similar “statements” to the charged misconduct so much so that they are “direct evidence” for Specification 7. (JA 041-042; 203). That was the government’s original and proffered theory of admissibility, not 404(b).

The military judge then suggested the government “argue why it is 404(b), even though, according to the defense, you haven’t noticed it as such?” (JA 042). That sentence in November is the only time where the judge acknowledged the defense’s objection to the lack of notice or mentions notice on the record.

As Justice Ginsburg noted in a similar circumstance, “how could [the trial counsel] do otherwise? Understandably, she rode with an argument suggested by the [court]”? *Sineneng-Smith*, 140 S. Ct. at 1581. And exactly like *Smith*, the government’s original arguments “fell by the wayside, for they did not mesh with the [court]’s theory of the case.” *Id*.

After the government finished its argument, the defense poked holes in the theory of admissibility and the evidence supporting it. In response, the court here did not just instruct the Government on the theory to advance like in *Smith*, it went further and ordered the SVP to produce evidence to overcome the defense's challenges: "Get that" (JA 045); "Get that. I want that, too." (JA 046). To be sure, the government had not provided any documentary evidence or other foundational matters until the trial judge *ordered* the government to provide specific materials.

At the "Friday-before-trial" hearing, like Groundhog Day, the government had no additional evidence or witnesses. (JA 056). The defense then pointed to the lack of evidence connecting the charged acts to the fictional narratives in the journal under 403 and 404(b). (JA 059). After a similar back and forth with the SVP suggesting the type of evidence the court wanted, but still not getting the government to offer any evidence, the court instructs the SVP: "other than what's on the charge sheet, which isn't really helpful, is there anything similar to what I have for [Specification 7]." (JA 059). Like *Smith*, the government rode with the suggestion saying "[t]here is, Your Honor, and the government can provide that. It has not been provided as of yet." (JA 059). "Yet" being the Friday before trial.

Without even mentioning the judge's unprompted email; the suggestions in the email's questions; or the judge's mischaracterization of the defense's motion during the "Friday-before" hearing, the court erred by becoming the de facto

proponent of the evidence. Every time the defense challenged the evidence, the judge countered on behalf of the prosecution by ordering specific evidence. At this point, it seems like the trial judge had stepped in to meet the burden of persuasion and production, so the lack of detailed analysis later is not surprising.

When the judge summarily overruled the defense's objections seven minutes before seating the panel, it put the Appellant in an untenable position. This eleventh hour ruling provided Appellant a Hobson's choice: choosing to proceed to trial with the only counsel familiar with his case who was already on terminal leave or seeking yet another continuance and losing his lead attorney. (SA 015-018). The Hobson's choice left Appellant at a tactical disadvantage and denied him a fair process with such a large evidentiary shift. This outcome is why the rules require notice, rulings prior to entry of pleas, or at the very least, some form of articulable finding of good cause. This evidentiary shift led the appellant to claim, in part, his counsel were ineffective at the lower court as they attempted to adjust and their attention was pulled away. (JA 002-06).

Even without the judge's disregard of the notice mandates, ruling before entry of pleas, or articulating good cause, the admission itself was an abuse because the panel never had a clear instruction/guidance of the evidence's use, especially for Specifications 1-6 that were offered in "A4." (JA 310, A4). The

defense would not have been prepared for that broad of an application since even the government counsel did not apply the specifications that broadly in the email.

3. The military judge never explained where the "good cause" was for court's late admission

Where was the good cause? The military judge never asked or required the government show good cause for the late notice. Standing alone, that is an abuse of discretion.

B. Regardless of both the lack notice or good-cause, Appellant's journal was inadmissible under all three *Reynolds*' prongs

Even if the government had provided notice, the journal (or significant portions of thereof) was not admissible under 404(b). While the judge found the appellant wrote the stories under *Reynolds*' first prong, there was zero evidence about when those stories were authored (i.e., before or after the offenses, and if so, how long in either direction from the charged offenses). If the evidence was to show "intent" (as only Specification 4 and 6 involved an "intent" element), but the stories were penned months/years after the acts, the connection becomes strained under the second and third prongs. By never discussing or requiring the government to prove the "when," the court's ruling skipped over the detailed analysis necessary for admission pursuant to 404(b) without even considering that this was a First Amendment "other act." *See e.g., Grimes*, 244 F.3d at 384-85.

1. The military judge abused his discretion by concluding that a controverted fact was made more or less likely by the three stories

When uncharged acts are offered as proof of intent, the judge "must consider whether [the accused's] state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element." *Gallagher*, 65 M.J. at 610.

For example, buying condoms before traveling over state lines to meet a minor helps demonstrate the purpose of why an accused is traveling. On the other hand, writing *Fifty Shades of Grey* for one's spouse or possessing a copy of *Lolita* as the Supreme Court referenced this year, does not show an "intent" to sexually assault one's biological daughter or daughter's friend. *See Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1306 (2023) (Kagan, J. with Roberts, C.J. dissenting) ("the plotline—an adult man [who] embarks on an obsessive sexual relationship with the preteen daughter of the [lodger's] house"). In the first example, intent is squarely at issue; it is an element of the crime and explains 'why' the suspect crossed State lines. In the second, there is a general intent crime and the question of 'why' someone engages in intercourse is not really a secret *unless* some facts presented during trial make this controverted.

This is why a trial court must understand the context to determine a "fact of consequence"; something the trial court here did not (and could not) do given the government failure to provide foundational evidence, theories of admissibility, or

appropriate context. *See Diaz*, 59 M.J. at 94. Motive and intent were not logically relevant here because, unlike the solicitation or enticement cases, they were not contested like if there had been a defense that there was a medical/valid reason for the touching(s). Likewise, the motive the government pitched was logically strained compared to the cases the judge relied on. (JA 323).

The military judge improperly relied on two cases (*Lieu* and *Hays*) for this prong, both of which involved contraband (not at issue here). (JA 323). In *Lieu*, child pornography was admitted under Rules 404(b) *and* 414 to prove the intent element in the prosecution of "travel with intent to engage in illicit sexual conduct." *United States v. Lieu*, 298 F Supp 3d 32, 52 (D.C. Cir. 2018). Here, unlike *Lieu*, the journal is not Rule 414, and unlike cases where there could be a potential mixed motivation in traveling over state lines, the intent here was unambiguous; the crime either happened or it did not. *Id.* Intent was not at issue.

Likewise, this Court in *Hays* allowed the possession of child pornography contraband to prove intent and motive for the accused's prosecution of solicitation to rape a child. *United States v. Hays*, 62 MJ 158, 162 (C.A.A.F. 2005). Solicitation requires proving that the request was with the intent for the minor to commit a crime. In this case, the intent in touching the sexual organs in and around intercourse has only one logical conclusion given how the case was presented during trial. It either happened or the victims were untruthful.

The military judge also relied on cases involving inchoate offenses or intent/knowledge-element offenses such as attempt, solicitation, traveling with an intent to engage in, and knowing transmission of child pornography. (JA 310, A5; JA 323-24). So, the military judge's reliance on these cases and his analysis were not detailed enough for a First Amendment type of "other act," and he was led astray by trying to transform cases that covered a different type of charge to the more uncontroverted issues and general intent crimes in this case. That is why his almost *per se* rule is so broad when even compared to the cases he referenced.

The judge had other options that this Court should reinforce; he could have listened to the evidence, seen the defense case/cross-examinations, and then ruled. *See e.g., United States v. Trimper*, 28 M.J. 460, 461 (C.M.A. 1989); *Orsburn*, 31 M.J. at 185; *Steen*, 81 M.J. at 262. Like all three of the cases just cited, the military judge should have stayed his ruling, and then tailored the ruling after seeing the defense's case and the victim's actual testimony (which varied in multiple ways from the "summaries" he reviewed at the eleventh hour and caused multiple rounds of charge sheet amendments). That timing to narrowly tailor and properly instruct is a text-book example of when "good-cause" is present for a delayed ruling.

Unlike *Orsburn*, *Trimper*, and *Steen*, the court here never attempted to determine whether intent was truly at issue before admitting the statements without any redactions. In fact, given that the ruling came at the last minute and the rush

was initiated by the trial judge, it seems like the judge never considered that he had that option. *See Id.* As other federal circuits emphasize, "when the defendant makes his intent a disputed issue," the evidence becomes more relevant. *Curtin*, 489 F. 3d at 952. Thus, the trial court should have waited to see the issues develop.

Here, the wholesale admission of the three stories was without redactions or a detailed "nexus" analysis of the "time" regarding when the journal was written. *Orsburn*, 31 M.J. at 185. In *Orsburn*, the military judge gave a lengthy and detailed instruction, admonishing the panel to only consider the stories for the limited purpose of considering specific intent for a very particular offense. *Id*. Here, no detailed limiting instructions were provided for either a clear non-propensity use or anything even remotely in line with "A4." This was an abuse of discretion.[10]

Here, only Specifications 4 and 6 raised the issue of "intent to gratify his own sexual desire." (JA 338; SA 019). However, the military judge, in his written ruling, indicated that Specifications 4 – 6 all had intent elements, but then did not instruct the panel of an intent element for Specification 5. (JA 338, SA 019).[11] But, even if the judge's ruling regarding the intent element was correct, that does not

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[10] If this court considered the updated standard of review being adopted by federal circuits, this prong would be reviewed *de novo*. *Jaffal*, 79 F.4th at 594 (7th Cir. 2023) (citing *Clay*, 667 F.3d at 693 (6th Cir. 2012)).

[11] The panel instructions for Specification 5 did not include an intent element despite the language on the Charge Sheet. (SA 019). Regardless, the military judge erred in believing the government had to prove specific intent for that specification in his ruling, but then instructing on it. (JA 324, para. 6).

end the analysis. The government needed to establish the relevancy of the stories to the facts involving Specifications 1-6, but it did not. And the military judge made no such distinctions in his instructions.

The government argued the fictional story about the neighbor and Specification 7's allegation involving a neighbor were similar. There is no mention as to when the story was written, or the foundation presented at the hearing. Additionally, this Specification did not require specific intent nor was specific intent contested; the victim's credibility was. This shows how the military judge did not conduct the type of detailed analysis for legal/logical relevance that was needed with the First Amendment, but instead, blanketly indicated an almost per se rule: "evidence of an Accused's sexual attraction to and/or interest in minors may, obviously, be probative of the Accused's alleged intent to engage in the charged child exploitation offenses." (JA 323). With that type of rule for the *Reynolds*' second/third prong, the 403 analysis is crucial especially in the First Amendment context. Unfortunately, the court did not turn a critical eye to that analysis.

2. The military judge abused his discretion by concluding the probative value of the fictional stories substantially outweighed the unfair prejudice

The military judge's Mil. R. Evid. 403 balancing test was neither correct nor adequate. Even if this Court disagrees the stories were otherwise inadmissible, the military judge still abused his discretion in not redacting the hyper-sexualized and graphic parts that were not relevant to the factual allegations here.

Like in *Curtin* where the wholesale admission of five stories without redactions was erroneous, here the judge never considered partial redactions. *See* 489 F. 3d at 938. So like *Curtin*, this Court should require the trial court to "assiduously reevaluate [its] *unedited* admissibility in the light of Rule 403's concerns." *Id*. at 952 (emphasis added). The danger of unfair prejudice substantially outweighed the probative value of the admission of appellant's journal because the evidence was admitted in its entirety and used for every specification despite the government not requesting that broad use.

The trial court should have redacted disturbing portions that were not similar to the allegations against Appellant. For example, one entry involving a fictional foreign girl had no similarity to any of the offenses because of cultural differences, a doctor treating the girl's father, deployed war-time scenario, and payments/financial assistance. (R. at 220-228). The fictional foreign girl watching her parents have sex had no factual relationship to the charges. How is watching parents engage in intercourse probative to the appellant sexually assaulting his neighbor and text messaging her versus being extremely taboo, eye-catching, and disturbing? Especially given the unique facts of this case where the neighbor approached the Appellant to tell him that she liked him and they made plans to meet up near a construction site. (JA 370-74).

Likewise, how is it different from Nabokov's *Lolita*, which two members of the Supreme Court noted "though hard to read today, is usually thought one of the greatest novels of the 20th century" despite "the plotline – an adult man . . . embarks on an obsessive sexual relationship with the preteen daughter of the house." *Andy Warhol*, 143 S. Ct. 1258, 1306 (Kagan, J. with Roberts, C.J. dissenting). Similarly, like *Grimes*, the stories' references to blood and semen, when no blood was present in the testimony against the Appellant, were graphic and disturbing. This is the exact graphic nature that the Fifth Circuit found too prejudicial in *Grimes* where texts referenced blood with underage girls, but the underlying allegations were more neutral and did not contain it. *See Grimes*, 244 F.3d at 385. In short, even if the doctor's intercourse with the foreign girl was probative, the rest of the story is unrelated. However, given the dissimilar facts, the entire story had virtually no probative value and had a high likelihood of being misused. The panel's convicting Appellant of touchings that the Army Court had to except out indicates that the panel misused the journal extracts.

Likewise, the fictional story about a brother and sister had no logical and legal relevance given the disparity in age and relationships between the appellant and the victims (one a non-familial relationship). (JA 229-237). In this fictional writing, the sister is the one who initiates all aspects of the relationship, and the brother attempts to avoid it. (JA 231-34). That is the opposite to the allegations

here; it is not alleged the accused daughter seduced Appellant, and this is not the case where the Appellant showed the fictional stories to his daughter to "groom" her. *See Yammine*, 69 M.J. at 78. These stories probative value decreased given they were dedicated to appellant's spouse, but the military judge did not even address the circumstances, time, or reason the stories were created during the 403 analysis. And by excerpting out only three stories from the full journal, it painted an incorrect picture of the penmanship and produced a portrait of a man obsessed with young girls. This made the entries even more prejudicial.

While the neighbor girl's story had higher probative value for Specification 7 (relatively speaking as compared to the sibling and foreign stories), it had less legal/logical relevance because intent was not at issue in that specification. Like *Curtin*, the judge never explained how, for example, the first three pages about the neighbor showering (alone and away from the male protagonist) had any similarity with Specification 7's allegations. (JA 237-40). It is not alleged that Appellant showed the neighbor his stories to introduce these ideas to her. *See Yammine*, 69 M.J. at 78. Therefore, there was no to low probative value to that portion. (JA 240-42). And even if there was, there was no specific intent element.

On the other hand, the stories had very vivid details including sensations, blood, and descriptions which all were lacking from either victim's testimony. Simply put, these stories should not have been admitted under a 403 analysis, and

even if they could contain that much probative value, there should have been redactions because of the highly prejudicial nature of the stories given their dissimilarity to the underlying allegations and their vivid details.

Despite noting "[a] possible danger of unfair prejudice is that the members will use the evidence for an improper character purpose," the judge noted the standard instruction "negates the danger of any unfair prejudice." (JA 325). He did not explain why and included the instruction directly next to the 414 instruction (under the same bolded header) that specifically allowed for propensity. (JA 191-92, 343-44). The instruction also did not explain the difference between propensity and bad character like the detailed instruction in *Orsburn* did.

The military judge's instructional error even ignored the government's eleventh-hour limitations in "A4." (JA 310). A detailed instruction like in *Orsburn* was imperative because these kinds of fictional writings are highly prejudicial as they are taboo and it allows one to jump immediately to propensity: the stories must mean Appellant has a sexual fetish or is a pervert. *See Grimes*, 244 F.3d at 385 (the improperly admitted evidence was vile because it involved "young girl in handcuffs, and references to blood . . . Perhaps on retrial the government can redact a different portion of the narratives" to avoid the graphic portions that are unrelated to the charged offenses). This was even more so since the only remaining entries were all regarding children, indicating a man-obsessed with only one thing.

C. The government cannot prove the military judge's abuse of discretion was harmless error

The evidence was indiscriminately used for issues not in dispute, and allowed to be used improperly. Moreover, despite recognizing the highly prejudicial nature of the evidence, the military judge simply viewed that an instruction would obviate the panel's overreliance on the 404(b) evidence, but then failed to put the required safeguards and provide particularized instructions for each story and corresponding specifications like in *Orsburn*. Therefore, the government cannot show harmless error.

1. The government's case was not particularly strong with the lack of corroboration and multiple rounds of amendments to the Specifications

Courts examine the possible effect of improper admission when weighing the strengths of each parties' cases. *Yammine*, 69 M.J. at 78. This evidence erroneously strengthened the government's case. Despite a search of appellant's house and all his electronic devices, the government offered no child pornography or other similar contraband. There was no allegation the journal was used to groom the victims either. Despite alleging years of abuse, occurring near family members in multiple locations, no other witnesses corroborated the allegations.

The government impermissibly used the journal to fill the gaps in the government's case. In *Yammine*, graphic descriptions of sexual behavior were "new ammunition" that improperly strengthened the prosecution's case. *Id*. Here,

appellant's writings became the magic bullet that weaved through the holes in the government's case by presenting Appellant as salacious and perverted. To the panel, with only three stories admitted out of context, they would be under the impression the Appellant (and his wife) only fantasized about children.

The daughter's testimony was the result of leading questions and contained scant details. She failed to testify consistently to her previous allegations. (JA 006-07). While some inconsistency can be expected (*see generally United States v. Cano*, 61 M.J. 74, 77 (C.A.A.F 2005)), here the daughter's inconsistencies are highlighted by the amendments to the charge sheet before trial (JA 067) and the Army Court's additional modifications. (JA 006-07).

2. The defense had just minutes' notice to change strategies

Because the defense was not given proper notice and a fair chance to prepare for this evidence or even craft voir dire questions, it would be hollow gesture to weigh the strength of its case at trial. Instead, the court should look to possible strategies appellant could have taken if he received proper notice. *See Perez-Tosta*, 36 F.3d at 1561. As such, the court must examine "the extent of prejudice to the opponent of the evidence from a lack of time to prepare." *Id*.

Nearly a half-year after the defense first objected, not even the judge knew if the government was seeking to admit the evidence or under what theory. (JA 309-10, Q1, Q2, Q3). Appellant also did not have reason to believe this evidence would

be admitted especially when all deadlines had passed and the government had not even pre-marked that evidence. (JA 059-62, 252-54).

Given the prejudicial nature of that evidence, a completely different trial strategy is predictable. Assuming arguendo the evidence was admitted and redacted in November, with sufficient time to prepare, it is possible that appellant or his spouse may have testified regarding the allegations or placing the journal in context. The defense could have sought different types of expert assistance to help put the journal in context. Given that appellant's wife had pled guilty to non-military charges (JA 247-48), seven minutes is not enough time to contact her attorney and change a strategy to explain this striking piece of evidence. (JA 247). It is entirely plausible that these stories were authored because the spouse liked this form of erotica, which is a reasonably inference in the dedication. (JA 249-250). Moreover, potentially admitting other portions to make it look like the Appellant did not only write about children was a real option, but one that carried other risks that need to be calculated and 'war-gamed' during trial preparation.

Unfortunately, the court issued its ruling after pleas, in violation of R.C.M 905. The defense had not prepared to voir dire regarding the journal, or otherwise 'draw the sting' during their opening statement; they did not mention the journal. Although the defense attempted to put it in context through the FBI agent with Def Ex. D's "dedication" to his wife, there was no context from the spouse or other

adult stories admitted. All of that could have been planned over that six-month window. Simply put, the judge's failure to enforce notice or good cause prejudiced the Appellant.

3. The evidence was material and central to the government's case

The government made the fictional stories central to its case. The government used them in its opening statement (JA 079-080), through law enforcement testimony (SA 006-11), by handing each member their own copy of each story (JA 079), and repeatedly in closing (JA 203-04) and rebuttal (SA 012-013). In closing, the government characterized the evidence as an admission and argued Appellant "told you" he had the wanted "to have sex with children." (JA 203). It also asserted the writings were "direct evidence" of appellant's intent. Like *Steen*, this was some of the only documentary evidence that the panel was able to take back with them their deliberations, and the only one the government provided individual copies for each member.

4. The last-minute evidence's quality was strained under the caselaw

The quality of the journal extracts was not as logically connected as the government asserted. The reason for the graphic stories' existence were not apparent, since appellant has dedicated these stories to his wife, the journal

contained adult sexual activity as well, and there was no temporal link.[12] (JA 131-132, 249, 316). However, with the late change in the evidence, the defense was not in a position to authenticate/offer the evidence even if they could overcome a hearsay objection. As noted *supra* (Argument (B)(2)), there are significant differences in the stories and the charged acts from the relationships to even the locations, ages, and surrounding circumstances.

In addition to failing to limit the fictional stories' applicability to the corresponding allegations as suggested in "A4", the 404(b) evidence spilled over to the other specifications. The government asked the panel to consider the stories as general evidence of appellant's "intent to have sex with children." (JA 203). This was essentially propensity: because appellant fantasized about diminutive figures or less experienced sexual partners, it meant he intended and did assault his daughter and a neighbor: "he told you what he wanted to do." (JA 203). Moreover, the government argued the stories were direct evidence of appellant's intentions:

> In the judge's instructions, it specifically says, *direct evidence* as to an accused's intent is not always available. Members of the panel, *it is today*. You have his journal. *You have to read it*. It was awkward. But the bottom line is, *he told you what he wanted to do*. The *accused told you he had the intent to have sex with children, that he had a motivation to have sex with children*.

[12] In contrast, the characters in the *Curtin* and *Orsburn* stories were labeled as children. *Orsburn*, 31 M.J. at 185; *Curtin*, 489 F. 3rd at 954.

JA 203) (emphasis added). That is not the intent/motive to have sex with the charged victims, but *any and all* children (including those of the panel). Whether this court applies *Perez-Tosta* or just looks at the totality of the circumstances, all signs point to an evidentiary landscape that now was the prosecution's focal point.

This court should not sanction the military judge's failure to follow the notice or good-cause, nor should it excuse his failure to conduct an appropriate Mil. R. Evid 403 analysis (whether a standard or heightened First Amendment analysis). The fact that the Court of Criminal Appeals summarily affirmed the trial court's coaching, the AWOL rulings for lack of notice or good-cause, or the global admissions without redactions demonstrates that the procedural protections and deadlines were hollow words. "Good cause" must mean more than just the government was ignorant or forgot. However, the ruling here did not even provide that; it was simply silent.

Conclusion

Based on the foregoing, this Court should set aside appellant's convictions and multiple life sentences and remand the case for a new trial where the judge can conduct an "assiduous" analysis and appropriate redactions.

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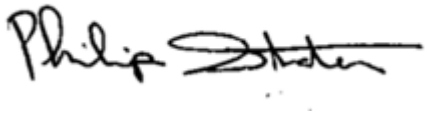

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Defense Appellate Division and the Government Appellate Division on November 20, 2023.

CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 11,226 words.

2. This brief 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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