

**IN THE UNITED STATES COURT OF APPEALS
 FOR THE ARMED FORCES**

UNITED STATES)	SUPPLEMENT TO THE PETITION
Appellee)	FOR GRANT OF REVIEW
)	
v.)	Crim. App. Dkt. No. 20230579
)	
SERGEANT (E-5))	USCA Dkt. No. 26-0173/AR
STEPHEN C. CHILLURA¹,)	
United States Army)	
Appellant)	

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

Issues Presented

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING THE FULL-LENGTH VIDEO OF APPELLANT’S STEPCHILD’S INTERVIEW WITHLAW ENFORCEMENT UNDER THE RESIDUAL HEARSAY EXCEPTION.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING EVIDENCE OF APPELLANT’S PROPENSITY TO USE ALCOHOL.

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

¹ Specialist Chillura appeared at trial as a Specialist after being arraigned as a Sergeant. (R. at 737).

U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On November 10, 2023, an enlisted panel sitting as a general court-martial convicted appellant, Specialist Stephen C. Chillura, contrary to his pleas, of one specification of child endangerment, in violation of Article 119b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 919b, and two specifications of domestic violence in violation of Article 128b, UCMJ; 10 U.S.C. § 928b. The panel also found appellant not guilty of one specification of domestic violence, in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. (App. Ex. XXV). On the same day, the military judge sentenced appellant to confinement for eight months, a bad-conduct discharge, and reduction to the lowest enlisted rank. (R. at 841).

On November 22, 2023, the convening authority took no action on the findings and sentence and disapproved appellant's requests for deferment of appellant's reduction in grade and automatic forfeitures and waiver of automatic forfeitures. (Convening Authority Action). The military judge entered judgment on November 27, 2023. (Judgment of the Court).

On February 9, 2026, the Army Court affirmed the findings and sentence. (Appendix A).

Appellant was notified of the Army Court’s decision, and through counsel appellant filed a timely Petition under Rule 20 of this Court’s Rules of Practice and Procedure on April 10, 2026. Appellant hereby files this Supplement to the Petition for Grant of Review under Rule 21.

Statement of Facts

On July 18, 2022, Appellant was watching his five-year old stepchild (“MC”) in the morning while the child’s mother went to work. (R. at 541). The two were out back and had been play fighting near a kiddie pool. During that time, MC left his backyard crying and approached a girl in her nearby backyard. (R. at 189). That girl asked what happened, and MC indicated that Appellant injured him. (R. at 416). The girl then told a third child, who then went inside his home to get ice for MC’s abrasion. (R. at 417). While inside, the third child told his mother, who proceeded to check on MC and then to call the MPs. (R. at 180).

After a few minutes, two MPs arrived and went to retrieve MC from the neighbor’s mother’s residence. (R. at 154-55, 165, 175). One MP took MC to his vehicle where he entertained him for about fifteen minutes, allowing him to play with the sirens and lights, where he acted like “a normal kid.” (R. at 175). The other MP circled Appellant’s residence and entered the backyard where he found Appellant near the kiddie pool. (R. at 156-159). The MP placed Appellant in

handcuffs without advising him of his Article 31b rights, and then walked him around the front of the house to a separate area. (R. at 156-59).

Authorities first took MC to CID as, “the child was willing” to take pictures and sit for a forensic interview; only later did they take the child to two different children’s hospitals for treatment. (R. at 152, 265).

Reasons to Grant Review

While most case law concerning Mil. R. Evid. 807 focuses on the reliability/trustworthiness prong of the residual hearsay exception, this case also significantly implicates the necessity prong. This court has an opportunity to affirm that recent changes² to Mil. R. Evid. 807 have not diluted the necessity prong and to clarify what type of showing is required for a proponent of a residual hearsay statement to establish that there is no other evidence more probative of a particular fact. The court below also decided this case by a divided vote, in part.

Regarding Assignment of Error II, this court can clarify a legal rule that it has not but should. Namely, whether and how the *res gestae* concept applies to Mil. R. Evid. 404(b), including whether notice is required under Mil. R. Evid.

² Federal Rule of Evidence 807 was amended effective 1 December 2019. By operation of law absent a contrary action taken by the President, Military Rule of Evidence (Mil. R. Evid.) 807 was automatically updated 18 months later. This change to the Military Rules of Evidence then would have taken effect on 1 June 2021. *See* Mil. R. Evid. 1102(a).

404(b) in certain situations or concerning acts that may be partly intrinsic and partly other.

Issues Presented

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING THE FULL-LENGTH VIDEO OF APPELLANT'S STEPCHILD'S INTERVIEW WITH LAW ENFORCEMENT UNDER THE RESIDUAL HEARSAY EXCEPTION.

Additional Facts

The interview in question took place at a CID office one or two hours after the MPs responded to then-Sergeant Chillura's home. (R. at 136, 265). Investigator (INV) JO, a military police officer investigating drug offenses, who was also certified to conduct child forensic interviews, conducted the interview at a CID office. (R. at 424).

On September 21, 2023 the government provided notice of its intent to attempt to admit residual hearsay. (App. Ex. V). On October 24, 2023, the government provided notice of its intent to introduce video evidence. (App. Ex. XII). Both notices regarded MC's forensic interview with INV JO. (App. Ex. XII).

On November 9, 2023, the military judge made findings and conclusions in his ruling approving the government's motion. (App. Ex. XXX). INV JO testified to the validity of the video of the interview, which was admitted into evidence and

played for the panel – all over continued defense objections based on Mil. R. Evid. 807 and the Confrontation Clause. (R. at 424, 433; Pros. Ex. 3).

The military judge allowed the government to attempt to rehabilitate a witness after the witness demonstrated on the stand that he did not understand the difference between the truth and a lie, accusing counsel of, “painting this trial into a trick box by not narrowing these issues beforehand, and identifying which issues needed to have pretrial rulings before we could come into this courtroom today. Both parties have done that to me. They have done that to this case.” (R. at 376-77). The military judge’s evident frustration reappeared a short time later, once the Government asked their child-witness a few questions that he was unable to answer. The military judge found a ready solution and a way out of his trick box, by simply excusing the witness and allowing in his entire out-of-court statement without fully analyzing whether its necessity had been demonstrated for all of the purposes for which the Government sought to introduce it. (R. at 415).

Standard of Review

This court reviews the admission of evidence under Mil. R. Evid. 807 for an abuse of discretion. *See United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008). A military judge abuses his discretion: “(1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if they use incorrect legal principles; or (3) if their application of the correct

legal principles to the facts is clearly unreasonable.” *United States v. Comisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

Law

In certain circumstances, the residual exception found under Mil. R. Evid 807(a) permits the inclusion in evidence of a hearsay statement that does not fit an enumerated hearsay exception. These out-of-court statements must be: 1) supported by sufficient guarantees of trustworthiness – after considering the totality of the circumstances under which it is made and evidence, if any, corroborating the statement, and 2) more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. *See* Mil R. Evid 807(a).

Without regard to recent changes to the exact language of Mil. R. Evid. 807, historically any evidence admitted under this exception must be “material, necessary, and have indicia of reliability.” *United States v. Johnson*, 49 M.J. 467, 470 (C.A.A.F. 1998) (quoting *United States v. Pollard*, 38 M.J. 41, 49 (1993)). The Army Court’s opinion found portions of the new standard “similar enough” to the prior rule, and noted that it was reasonable for the military judge to rely on past caselaw analyzing the “sufficient guarantees of trustworthiness” clause in the new Mil. R. Evid. 807(a). *United States v. Chillura*, ARMY 20230579, slip op. at note 6 (Army Ct. Crim. App. 9 Feb. 2026).

Necessity of an out of court statement “may be satisfied where a witness cannot remember or refuses to testify about a material fact.” *United States v. Wellington*, 58 M.J. 420, 425-26 (C.A.A.F. 2003). Regarding the reliability prong, the new version of Mil. R. Evid. 807 also requires a military judge to, “consider other corroborating evidence, separate and apart from the circumstances under which the statement was made.” *United States v. Maebane*, 86 M.J. 173, 180 (C.A.A.F. 2025).

Argument

Under the prior version of this rule, this court instructed CCAs to use the following factors for determining whether a statement was sufficiently trustworthy, including: “1) the mental state of the declarant; 2) the spontaneity of the statement; 3) the use of suggestive questioning; and 4) whether the statement can be corroborated.” *United States v. Donaldson*, 58 M.J. 477 (C.A.A.F. 2003). Further, the proponent must “show he could not obtain more probative evidence despite reasonable efforts. Failure to meet that burden renders the evidence inadmissible.” *Czachorowski*, 66 M.J. at 435. As the dissenting opinion below points out, “because the direct testimony of the hearsay declarant ordinarily would be judged the most probative evidence,” *id.* at 436, “the necessity prong essentially creates a best evidence requirement.” *Chillura*, slip op. at 11 (Schlack, J. dissenting) (citing *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996)).

In this case, MC knew the forensic interview was part of a law enforcement investigation because it took place at the CID station and he had already heard others discuss it and seen his stepfather led away by military police. He had just spent time in the police car, accompanied by police, and made initial statements to police about Appellant getting in trouble, including “daddy did it,” as he watched Appellant wearing handcuffs being led away by police. Even the police officer testified that MC “knew that we were there to help him” (R. at 155) and “was very comfortable with coming with police officers.” (R. at 159). This, combined with the child hearing the MPs relate the episode to the EMTs, then hearing it re-told to the doctor and posing for pictures, indicate the child understood he was there to implicate his stepfather, making the spontaneity of the statement completely non-existent. (R. at 155).

To establish that MC’s out of court statement was necessary, the government had to show that his lack of memory inhibited his ability to testify about the material fact(s) which the forensic interview video was offered to prove. Without doing so adequately, the government did not establish that no other evidence – such as the child’s in-court testimony – was more probative of those facts. “Efforts are not reasonable if the proponent aims to satisfy the necessity prong by asking ancillary questions and then throwing his proverbial hands in the air when the response is ‘I don’t know’.” *Chillura*, slip op. at 10 (Schlack, J. dissenting).

While the military judge is entitled to some deference for making findings on the record (App. Ex. XXX; R. at 421), an abuse of discretion nonetheless occurs when those findings misstate key facts. The military judge indicated in written findings that MC did not *remember* why he rode in an ambulance, whether he was hurt, or whether someone did something to him, when in fact the child answered several times, “I don’t know.” (R. at 410; App. Ex. XXX, p. 10). This purported lack of memory was the primary rationale for the military judge’s decision, citing *U.S. v. Owens*, 484 US 554 (1988), when he attributed the child’s unavailability to the fact that, “common knowledge holds that a young child’s memory often fades quickly with the passage of time.” (App. Ex. XXX).

The military judge abused his discretion as a matter of law in admitting the video because “the residual hearsay exception is inapplicable when [such testimony] is not unreasonably difficult to obtain directly from an available declarant.” *Czachorowski*, 66 M.J. at 436. MC had already testified at trial after an attempt at rehabilitation by the trial counsel and the military judge, after MC said he did not know the difference between the truth and a lie. (R. at 355). The child forensic video was central to the government’s case, and they referred to it and quoted it extensively during their closing argument. (R. at 673, 681).

Finally, the government did not ask MC several key questions and failed to establish key context for those questions they did ask. *See Chillura*, slip op. at 11

(Shlack, J. dissenting) (“(1) whether the child-witness knew what ‘that day’ meant, (2) whether the child-witness rode in an ambulance on only one occasion, or (3) whether the child-witness understood how ‘that day’ was connected to the charged conduct”). Instead, the military judge permitted the government to ask a brief series of cursory questions before giving up and admitting the entire video. (R. at 409-10). The military judge’s acceptance of this variety of a performative, highly generalized proffer by the government that a child -witness’ memory was comprehensively deficient, was a violation of this court’s precedent in *Czachorowski* and a clear abuse of discretion.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING EVIDENCE OF APPELLANT’S PROPENSITY TO USE ALCOHOL.

Additional Facts

Despite not alleging a drunk and disorderly offense, the government focused on appellant’s drinking and attempted to portray him as the stereotypically day-drunk, abusive stepfather. The government did not provide notice under Mil. R. Evid. 404(b) regarding appellant’s level of intoxication while minding children, nor did it offer a theory under which such evidence would have been admissible.³

³ The preferral of the charges, and dates of, for example, Specification 1 of Charge I all took place after June 2022 which was the effective date of the change to M.R.E. 404(b). That change requires the government to *sua sponte* provide notice *and* list out all theories of admissibility even without a defense request. Fed. R. Evid. 404(b) was changed to reflect these requirements in December 2020 and was

Early in its opening statement, the prosecution highlighted that, “for whatever reason, this day the accused began drinking that morning and was soon . . .” (R. 114). Appellant objected under Mil. R. Evid. 404(b), but the military judge overruled the objection, finding that drinking was not a “bad act,” and that it was *res gestae*. (R. at 115-19). The trial counsel’s next sentence returned to appellant’s “obvious drinking, but more importantly, [his being] in a foul mood, yelling, angry.” (R. at 119).

The focus on alcohol continued with the prosecution’s first witness. The government called CID special agent (SA) PL, who arrived after appellant had been detained in an MP vehicle. The first two exhibits that the government asked the CID agent to authenticate and display were not of the general layout of the home or the child’s injuries, but of multiple empty cans of alcohol found inside the home and in trashcans. (R. at 134; Pros Ex. 17-18).

This theme continued with the agent highlighting a “bottle containing an alcoholic beverage” in the “kiddie pool” wherein appellant was arrested. (R. at 135, Pros. Ex. 21). Neither the agent nor any other witness could testify as to when the multiple bottles and cans of alcohol admitted in the three of the first six exhibits were consumed, or by whom.

automatically adopted by military rule eighteen months later (June 2022). *See* Mil. R. Evid 1102(a).

The second witness, Officer CB, also testified about various empty alcohol containers found at appellant's residence, near appellant, and in a tipped over cooler by the kiddie pool. (R. at 156; Pros. Ex. 21). After the officer testified that he detained appellant, the trial counsel had the officer back-up to re-highlight appellant's intoxication level. (R. at 157).

These were not the only references or emphasis on alcohol. (*See e.g.*, R. 209-10, 370, 680) (in closing, the trial counsel asked the panel to fill in the gaps with circumstantial evidence with the next sentence stating “. . . the fact that everyone testified that the accused was intoxicated that day.”); *see also* (R. 681) (asking the panel to relook at photos of “the crime scene” and then transitioning to “who is more credible”); (R. 710) (“‘drunk and angry’ and beyond the accused’s drunken and self-serving statement.”).

Trial defense counsel objected to the presentation of evidence concerning alcohol consumption as an “other act” pursuant to Mil. R. Evid. 404(b) immediately during the government's opening statement. (R. at 116). The military judge overruled the objection, finding that issues relating to alcohol consumption were not “bad acts” in themselves and furthermore were *res gestae* to the events in question, or as the judge put it, “just what happened that day. . . [i]t was just what he was engaged in that day, before the assault occurred. (R. at 117). Subsequent to the military judge's adverse ruling, defense later re-raised and maintained their

objection to the evidence regarding appellant’s use of alcohol. (R. at 209-10, 370). The judge made clear that all the alcohol use had already been ruled on as “*res gestae*” and were not “bad acts” in his opinion. (R. 209-10, 370).

The judge did not instruct the panel on how it could use or consider the evidence of alcohol or the photos of multiple empty containers of alcohol that were potentially consumed on other days or by other people.

Standard of Review

Defense counsel repeatedly objected to the government’s mentions of alcohol. (R. at 116, 209-10, 369). Therefore, this Court reviews the military judge’s decision to admit evidence under an abuse of discretion standard. *See United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024);⁴ *see also United States v. Dollente*, 45 M.J. 234, 240 (C.A.A.F. 1996) (noting there is not a need to object to every piece of evidence if the objection was clearly made and ruled on for the issue).

⁴ 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))

A military judge abuses his discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts. *United States v. Lattin*, 83 M.J. 192, 198 (C.A.A.F. 2023) (citations omitted).

Upon a finding of a military judge erroneously admitting evidence, “the government bears the burden of demonstrating that the admission of that erroneous evidence was harmless.” *United States v. Finch*, 79 M.J. 389, 398–99 (C.A.A.F. 2020).

Law

A. Military Rule of Evidence 404(b)

Mil. R. Evid. 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). The referenced ‘other acts’ do not necessarily need to amount to *bad* acts or crimes in themselves. *See* Mil. R. Evid. 403(b)(1).

The government must provide “reasonable notice” before trial of the general nature of uncharged misconduct and proffer a valid, non-propensity purpose. *See* Mil. R. Evid. 404(b)(2). Furthermore, “[b]efore admitting evidence under Mil. R. Evid. 404(b), a military judge must make findings” on the factors established in *United States v. Reynolds*, 29 M.J.105, 109 (C.M.A. 1989). *United States v. Whigham*, 72 M.J 653, 658 (Army. Ct. Crim. Ap. 2013) (emphasis added); *Huddleston v. United States*, 485 U.S. 681, 686 (1988) (describing the “threshold inquiry a court must make before admitting similar acts evidence under Rule 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), § 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 the importance of notice, the Advisory Committee on Rules of Evidence adopted more stringent notice requirements for other crimes, wrongs, and

acts evidence.⁵ 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.*

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)).⁶

The emphasis on this gatekeeping function stems from the risk of contaminating the court-martial with propensity evidence. *See United States v. Yammine*, 69 M.J. 70, 77–78 (C.A.A.F. 2010) (noting problematic nature of admitting evidence without military judge “separately undertak[ing] the three-part

⁵ This case was decided after the implementation of this new rule in military practice as noted in footnote 2. 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.

⁶ 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 on a litany of cases that “have focused upon the prejudice suffered by the defendant because of the lack of notice”).

Reynolds test before admitting the uncharged misconduct under Mil. R. Evid. 404(b).”).

B. *Res Gestae*

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). Federal courts have characterized *res gestae* evidence as an exception to Rule 404(b) of the Federal Rules of Evidence. *See United States v. Clay*, 667 F.3d 689, 697 (6th Cir. 2012). *Res gestae* evidence may include evidence that is a “prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of the witness's testimony, or completes the story of the charged offense.” *Id.* at 698 (internal quotation marks omitted); *see also United States v. Nerey*, 877 F.3d 956, 974 (11th Cir. 2017) citing *United States v. Baker*, 432 F.3d 1189, 1205 (5th Cir. 2005); *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998) (“[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.” (quoting *United States v. Williford*, 764 F.3d 1493, 1499 (11th Cir. 1985))).

When appropriate, the admissibility of *res gestae* “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’/404(b) 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, *Fed. 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.”)).⁷

Further narrowing the viability of the *res gestae* exception, federal courts mandate that *res gestae* evidence survive a 403 analysis. *See, e.g., United States v. Shirley*, 214 F. Supp. 3d 1124, 115 (D.N.M 2016) (“[t]he United States concedes --

⁷ 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.”).

as it must -- that, although *res gestae* evidence is exempt from rule 404(b), *res gestae* evidence remains subject to rule 403 scrutiny”).

Mil. R. Evid. 403 states that a military judge, “may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.” Mil. R. Evid. 403.

Argument

The trial counsel was not transparent as to the purpose in introducing the alcohol-related evidence, offered as *res gestae* during its opening statement, nor as to the degree to which the prosecution would focus on appellant’s propensity to consume alcohol generally. This placed the judge in a poor position to rule initially, and when he ruled later on the continuing objection, he had to rely on his earlier ruling even when the government’s case brought in alcohol testimony that was not related “intrinsically” to the charged crime. Trial counsel exacerbated this by neglecting to present evidence as to specifically how much appellant had to drink on the day in question, and by insinuating that the scattered cooler, bottles, and cans were all attributable to appellant’s drinking done that morning – but then walked back that connection to the testimony and exhibits:

ATC: Your Honor, the —I—I don't believe that the government says that because he was drinking, that therefore, that led to the act; but I do think that it was part of what happened.

(R. at 117).

This begs the question as to why the pictures the government counsel led with as its first two exhibits, of copious amounts of alcohol in an indoor trash can, which were not in proximity to the appellant or his stepchild (who were both outside) were relevant or probative for any non-propensity reason.

The government's leading with alcohol suggested to the panel appellant's propensity to commit domestic violence. It was not "just part of what happened" as stated by the trial counsel and the military judge – but an attempt to play on the abusive drunken stepfather stereotype. Even if portions of the alcohol-related evidence were simply part of a story, analysis is required to determine whether each piece of evidence is truly 'intrinsic' or whether it is 'other'. *See United States v. Washington*, __ M.J. __ (C.A.A.F. 13 Apr. 2026) (analogizing Mil. R. Evid. 412 and 404(b) to describe the difference between 'intrinsic' evidence and 'other' evidence). This suggests that the Military Rules of Evidence are not necessarily mutually exclusive with *res gestae*, because this court's predecessor has found evidence intrinsic to the charged conduct to be admissible under Mil. R. Evid. 404. *See United States v. Peel*, 29 M.J. 235, 239 (C.M.A. 1989). So even *res gestae* evidence can and should be evaluated under 404(b) to determine whether evidence

that lacks a sufficient nexus may be inadmissible, rather than simply wholesale admitted as ‘just part of what happened.’ See *United States v. Thomas*, 11 M.J. 388, 392-93 (C.M.A. 1981).

The government did not present evidence regarding how much alcohol appellant consumed – but did admit several pictures of empty containers in trash cans and elsewhere to suggest he is a heavy day-drinker, and therefore, more likely to be abusive and/or neglectful. (See, e.g., Pros. Ex. 17, 18, 21).

The military judge abused his discretion by not addressing the government’s failure to provide Mil. R. Evid. 404(b) notice, not conducting a full (or even partial) *Reynolds* analysis to include linking the evidence or its probative value, and then erroneously believing Mil. R. Evid. 404(b) was only implicated if the act was a “bad act” which the judge explains, in his view, is synonymous with being or accompanying a criminal act. (R. at 209-210).

Likewise, the military judge erred in finding evidence of appellant’s drinking, potentially on separate occasions and in a different locale (inside the residence far away from the alleged crime) to be admissible as *res gestae*.

Moreover, the judge appeared to weigh erroneous and unrelated deadlines against the defense stating, “this is why we litigate motions pretrial; both sides did not file motions. So I’m going to overrule your objection.” (R. at 118). But how would the defense have known by the motions deadline what evidence or theories

the government was attempting to use, especially when there was no 404(b) notice.

As in similar cases, here evidence of alcohol containers around appellant's home did not add anything in terms of probative value and served only to prejudice appellant in the eyes of the panel.⁸ Its emphasis and its continued use were prejudicial especially where the government did not define its 'probative value.'

Lastly, as the military judge failed to identify that an "other act" under Mil. R. Evid. 404(b) does not need to be a "bad act," he failed to instruct the members on their consideration of alcohol evidence.

⁸ See, e.g. *Shirley*, 214 F. Supp. 3d, at 1158 (evidence of an accused holding a knife after a crime had occurred was not *res gestae* and held no probative value even though the underlying crime was committed using a knife); *United States v. Folsie*, 163 F. Supp. 3d 898, 915-16 (D.N.M. 2023) (finding that a letter written to witnesses subsequent to an arrest was not admissible as *res gestae*)

Conclusion

WHEREFORE, appellant respectfully requests this Court grant his petition for review.⁹



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⁹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in Appendix B.

Certificate of Compliance with Rules 24(c) and 37

1. This Supplement to the Petition complies with the type-volume limitation of Rule 24(c) because it contains 5,008 words.
2. This Supplement to the Petition 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.

A handwritten signature in black ink, appearing to read "Pat McHenry". The signature is written in a cursive, somewhat stylized font.

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, COOPER, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist STEPHEN C. CHILLURA
United States Army, Appellant

ARMY 20230579

Headquarters, U.S. Army Fires Center of Excellence and Fort Sill
Jacqueline L. Emanuel, Military Judge (arraignment)
Daniel L. Mazzone, Military Judge (trial)
Colonel John M. McCabe, Staff Judge Advocate

For Appellant: Captain Patrick R. McHenry, JA (argued); Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert D. Luyties, JA; Captain Patrick R. McHenry, JA (on brief).

For Appellee: Captain Andrew T. Bobowski, JA (argued); Colonel Richard E. Gorini, JA; Major Marc B. Sawyer, JA; Captain Andrew T. Bobowski, JA (on brief).

9 February 2026

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Senior Judge:

We hold, under the circumstances of appellant's case, the military judge did not abuse his discretion by admitting either a child forensic interview under the residual hearsay exception or evidence pertaining to appellant's alcohol consumption on the date of a charged offense.

An enlisted panel, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of child endangerment and two specifications of domestic violence in violation of Articles 119b and 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 919b, 928b [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, eight months of confinement, and

reduction to the grade of E-1. On appeal, appellant raises three assignments of error, two of which merit discussion but no relief.¹

BACKGROUND

In July 2022, appellant beat and strangled his five-year-old stepson, MC, in their shared on-post home while MC's mother was at work. Following the assault, MC approached one neighborhood playmate, then another, both of whom observed him crying. After being asked, MC told at least one playmate what happened. Each playmate noted different injuries, one describing scratches and bruising on MC's chest, and the other "big welts on his neck and face." One of the playmates summoned his mother, who found MC in his backyard sobbing. The playmate's mother observed swelling and red marks on MC's neck and on the side of his face. After asking MC what happened, MC told her appellant got mad at MC for crying and shoved his face "down to the ground."

The playmate's mother called the military police (MPs). When the MPs arrived at appellant's home, MC answered the door, "crying profusely." MC's face was swollen and the MPs "observed heavy bruising" and other markings on MC. Through his tears, MC told the MPs that "his daddy did it." The MPs located appellant in his backyard, standing in a kiddie pool, consuming alcohol. Appellant appeared heavily intoxicated, and a strong odor of alcohol emanated from him. When appellant learned the MPs intended to detain him for suspected child abuse, he said he "was only roughhousing" with MC, and "it's not [my] fault [MC is] fair skinned."

As the MPs escorted appellant to a patrol car parked in front of the home, MC pointed at appellant and said to a MP, "he hurt me." When asked who "he" was, MC confirmed he was referencing appellant. Shortly thereafter, emergency medical services (EMS) arrived and evaluated the injuries covering MC's body (including bruising around his neck and down his back, all the way to his buttocks). The EMS personnel also removed a glass shard from MC's ear.

MC was taken to a local hospital where doctors discovered he had additional bruising under his chin, which extended to his shoulders. Due to the nature of these injuries, the attending doctor recommended transferring MC to a pediatric hospital. At the pediatric hospital, a doctor, board-certified in child abuse pediatrics, concluded MC's numerous injuries were consistent with physical abuse.

¹ We have given full and fair consideration to the other matters raised by appellant, including those personally submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they merit neither discussion nor relief.

The same day as the assault, MC completed a child forensic interview with a Special Agent (SA) from the Army Criminal Investigation Division (CID). MC identified appellant as the source of his injuries, telling the SA, who possessed specialized training in conducting child forensic interviews, “[appellant] choke me right here [motioning to neck] and then—and then he hold me on the wall then he dropped me, and that’s when he got me on the neck.” MC also stated appellant attacked him as, “[b]ecause I cried, and then he did it.” Further, MC described the extent of his injuries, “[his throat] burned,” and his mouth felt “bad” and “it hurt[.]” MC also described prior episodes of physical abuse and humiliation at appellant’s hands. Prior to trial, the government provided notice of the intent to introduce MC’s forensic interview at trial pursuant to Military Rule of Evidence [Mil. R. Evid.] 807 if he “fail[ed] to testify to the [charged] events.”

At trial, during opening statements, trial counsel discussed appellant’s use of alcohol the morning of the charged assault. Defense counsel objected to the reference to appellant’s alcohol use as “impermissible propensity” evidence which the government had failed to provide notice under Mil. R. Evid. 404(b). The military judge ruled the evidence of appellant’s alcohol consumption “on the . . . day that the alleged incident occurred” was not propensity evidence, but *res gestae* of the charged offense.²

Following this ruling, the government introduced into evidence photographs of appellant’s home depicting empty alcoholic beverages inside the home and backyard on the day of the assault.³ An eleven-year-old witness also testified appellant appeared “[d]runk and pretty angry,” while another witness described hearing “yelling” from appellant’s backyard. Later, a former investigator for child protective services, who arrived at appellant’s home shortly after the MPs, testified that appellant “seemed intoxicated.”

When called to testify in front of the panel members, after being deemed competent to testify,⁴ MC could not recall basic events surrounding the date of the charged assault (approximately sixteen months prior). The relevant portion of MC’s testimony is as follows:

² “Res gestae” are “[t]he events at issue, or other events contemporaneous with them.” Black’s Law Dictionary (9th ed. 2009).

³ Defense counsel did not object to the admission of these photographs.

⁴ During an initial Article 39(a) hearing, MC was unable to articulate the difference between a truth and a lie. MC also appeared fidgety and “nervously silly.” In a later Article 39(a) hearing, after government counsel asked MC “to be serious,” MC was able to distinguish truths from lies.

Q. And where did you live then?

A. I don't know.

Q. Did you live in Oklahoma?

A. Yeah.

...

Q. Do you remember when you stopped living with your mom and [appellant]?

A. Yeah.

Q. And do you remember riding in an ambulance?

A. Yeah.

Q. Can you tell me about that? Why were you in the ambulance?

A. I don't know.

Q. Okay. Did something hurt that day?

A. I don't know.

Q. Do you remember anybody doing anything to you that day, or did somebody do something to you that day?

A. I don't know.

...

Q. [MC], do you remember a time when you had bruises on your neck?

A. No.

...

ATC: Thank you, [MC]. I don't have any more questions for you, but the defense may have some questions for you. Okay?

After requesting a recess to consult with their expert, defense counsel affirmatively waived cross-examination of MC.

Following MC, the government called the SA who interviewed MC and moved to introduce the video of his forensic interview. Defense objected, arguing MC's statements in the interview were not reliable. After making detailed findings of fact on the record, the military judge admitted the video in its entirety (approximately twenty minutes), pursuant to Mil. R. Evid. 807.⁵

⁵ In his ruling, the military judge cited the correct version of Mil. R. Evid. 807, which went into effect 28 July 2023, approximately one month prior to appellant's arraignment. *See* Executive Order 14,103, 88 Fed. Reg. 50,535, 50,577 (July 28, 2023). In addition, the military judge noted, "[i]n making past assessments, courts could not consider other evidence of independent events or facts not directly linked

(continued . . .)

Later the same day, the military judge issued a written ruling, expanding on his analysis. In his ruling, the military judge noted he considered as “corroborating evidence” that: (1) the statement was made “in the immediate aftermath of [MC’s] initial disclosure,” (2) MC’s manner of speech and demeanor, captured in the interview, was consistent with his in-court appearances and his statements made to other witnesses, and (3) MC did “not appear to present a bias [or animus] towards the [appellant] in any of [MC’s] statements and his story [was] consistent with the injuries documented on his neck, lower back, and buttocks.”

The military judge further determined the interview was “more probative on the point for which it [was] offered” than any other reasonably available evidence, given that MC had been called to testify at trial, but “his memory seemed to fade based upon his youth and ability to easily lose focus.” Lastly, the military judge noted MC’s loss of memory was hardly uncommon, as “the most common reason for finding ‘necessity’ under [Mil. R. Evid.] 807” was in child-victim cases where the child-witness was unable “to remember the events previously disclosed to another” on the witness stand.

LAW AND ANALYSIS

We review a military judge’s decision to admit evidence for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000) (citations omitted). The “abuse of discretion standard is a strict one, calling for more than a mere difference of opinion—[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (alteration in original) (citation omitted) (internal quotation marks omitted). A military judge abuses their discretion: “(1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if they use incorrect legal principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable.” *United States v. Greene-Watson*, 85 M.J. 340, 345 (C.A.A.F. 2025) (internal quotation marks omitted) (citation omitted). If a military judge abuses their discretion, such error warrants reversal only if it “materially prejudiced a substantial right of the accused.” *E.g.*, *United States v. Jones*, 85 M.J. 80, 84 (C.A.A.F. 2024) (citing UCMJ art. 59(a)). In assessing prejudice, we weigh “(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)

(. . . continued)

to the proffered statement” but acknowledged the new EO appeared to lessen the burden on the proponent of the evidence. Given the recency of the change, however, the military judge reasonably concluded that prior caselaw regarding the reliability of the proffered evidence offered valuable “*guidelines* [in the court’s] analysis of the evidence proffered in this case.” (emphasis added).

the quality of the evidence in question.” *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted).

A. The child forensic interview as residual hearsay.

Appellant claims the military judge erred in admitting MC’s forensic interview under Mil. R. Evid. 807. We disagree.

The residual exception under Mil. R. Evid. 807(a) allows a party to introduce a hearsay statement that does not otherwise fall under an enumerated exception found in Mil. R. Evid. 803 and 804, if:

- (1) the statement is supported by sufficient guarantees of trustworthiness – after considering the totality of the circumstances under which it is made and evidence, if any, corroborating the statement; and
- (2) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Under a prior version of the rule, statements admitted pursuant to Mil. R. Evid. 807 were required to have *prima facie* “equivalent circumstantial guarantees of trustworthiness as” the exceptions found in Mil. R. Evid. 803 and 804. *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003) (internal quotation marks omitted) (quoting *United States v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991)). In determining whether a proffered statement was sufficiently trustworthy, courts have historically looked to factors such as: “(1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement [could] be corroborated. Other indicators of reliability may [also] include the declarant’s age or the circumstances under which the statement was made.” *Id.* (citations omitted).

The current iteration of the rule, however, “expressly requires military judges to consider other corroborating evidence, separate and apart from the circumstances under which the statement was made.” *United States v. Maebane*, __ M.J. __, 2025 CAAF LEXIS 772, at *17 (C.A.A.F. 18 Sept. 2025). While there must still be “sufficient guarantees of trustworthiness,” Mil. R. Evid. 807(a)(1), the “evidence admitted under [Mil. R. Evid.] 807 is not required to be completely free from all questions.” *Maebane*, 2025 CAAF LEXIS, at *16 (internal quotation marks omitted) (citations omitted).

We do not find the military judge erred, either in his application of the current version of Mil. R. Evid. 807 or in his consideration of the factors previously used to assess the trustworthiness of the proffered evidence.⁶

The totality of the circumstances surrounding MC's interview bore sufficient guarantees of trustworthiness. The interview occurred within hours of the assault, when the details were still fresh in MC's mind. However, despite the recency of the latest incident of abuse, MC appeared relatively calm and did not appear to harbor any sort of resentment or bias against appellant during the interview. As the military judge noted, MC also demonstrated other behaviors consistent with his age. MC was generally asked open-ended questions, by a SA trained in interviewing children, which allowed MC to provide a descriptive account of the abuse, using language appropriate for his age.

MC's statement was also corroborated by external evidence, including appellant's admission that he was, "only roughhousing" with MC, and it was "not his fault the child's fair skinned." MC's documented injuries and the corresponding testimony from a pediatric abuse expert were also largely consistent with the injuries described by MC in his interview. Lastly, despite MC's tender age, we note his account was largely stable across tellings, first to his neighbors, second, to responding emergency personnel, third, to the medical personnel who treated him at the hospital, and fourth, to the CID SA in his forensic interview.

Appellant further argues MC's testimony was "not unreasonably difficult to obtain directly from an available declarant." *United States v. Czachorowski*, 66 M.J. 432, 436 (C.A.A.F. 2008) (citations omitted). We disagree.

"[C]ourts have found the residual hearsay exception inapplicable when the evidence is not unreasonably difficult to obtain directly from an available

⁶ The current version of Mil. R. Evid. 807(a)(1) identifies two sources of information the military judge should use in assessing the trustworthiness of a proffered statement: (1) "*the totality of the circumstances under which [the statement] was made,*" and (2) "evidence, if any, corroborating the statement[.]" (emphasis added). This first source appears similar enough to the prior Mil. R. Evid. 807(a)(1) standard ("equivalent circumstantial guarantees of trustworthiness"), such that a military judge could reasonably rely on past caselaw analyzing that clause in assessing evidence under the corresponding portion of the new standard. We note a military judge limiting their analysis to such facts and circumstances under which the statement was made would be error under the new standard. See *Maebane*, 2025 CAAF LEXIS 772, at *17. Absent further guidance from our superior court, we find the current version of Mil. R. Evid. 807 merely expanded the scope of evidence available to a military judge when determining the trustworthiness of a proffered statement.

declarant.” *Id.* (citations omitted). “Absent personal observation or a hearing, some specific evidence of reasonable efforts to obtain other probative evidence is still required under [Mil. R. Evid.] 807(B).” *Id.* A mere proffer by the proponent is not sufficient. *Id.* However, other forms of testimony “of what the child abuse victim said [is] more probative than any other reasonably procurable evidence [when] the child was too frightened and uncommunicative to testify meaningfully.” *United States v. Shaw*, 824 F.2d 601, 609-10 (8th Cir. 1987) (internal citations omitted).

Federal courts have long recognized that “when a child is unable or unwilling to testify in a courtroom setting, a child’s out-of-court statements may be the most probative evidence on an issue.” *United States v. W.B.*, 452 F.3d 1002, 1005-06 (8th Cir. 2006); *accord United States v. Sully*, 114 F.4th 677, 685 (8th Cir. 2024). This approach in child abuse cases extends to the “necessity” requirement.

The military judge was well within the bounds of reasonable judicial discretion in finding MC’s testimony not reasonably procurable by the government. Although MC was deemed competent, he was unable to answer basic questions or remember ancillary details related to the abuse. Given the military judge had the ability to personally observe MC’s testimony, appellant’s case is a far cry from others like *Czachorowski*, where the determination of unavailability hung solely on a proffer by the proponent of the hearsay statement. *See* 66 M.J. at 436.

We disagree with our dissenting colleague’s opinion that the government failed to ask MC specific enough questions to satisfy the necessity prong. The series of questions the trial counsel went through with MC during his testimony establish it was unreasonably difficult to obtain evidence of the abuse directly from MC. After the then six-year-old MC testified that he remembered riding in an ambulance, the trial counsel asked him: (1) “why” he was in the ambulance, (2) if “something hurt” that day, and (3) if “somebody [did] something” to him that day. Each time, MC responded, “I don’t know.” Finally, the trial counsel asked MC “do you remember a time when you had bruises on your neck?” to which MC responded, “No.” Taken together, this exchange sufficiently demonstrates that further direct questioning of MC was unlikely to yield meaningful evidence, thereby satisfying the necessity prong.

Given MC’s inability to remember details related to the abuse when he testified, his forensic interview was “more probative on the point . . . offered than any other evidence that the proponent [could have] obtain[ed] through reasonable efforts.” Mil. R. Evid. 807(a)(2). Furthermore, given the sufficient guarantees of trustworthiness surrounding MC’s statement, including corroborating evidence, the military judge did not abuse his discretion in admitting MC’s forensic interview with CID.

B. Evidence of appellant's alcohol consumption.

Appellant also claims the military judge abused his discretion in allowing the government to introduce evidence of appellant's alcohol use on the day of the charged misconduct without first providing notice of its intent to do so under Mil. R. Evid. 404(b). Appellant further alleges the military judge compounded this error by "create[ing] a scenario where the defense could not ask for [a Mil. R. Evid.] 404(b) instruction since it was not implicated."⁷

Evidence is *res gestae* of the charged offense when it is "inexorably intertwined with the alleged offense" and is "part of the same transaction." *United States v. Gaddy*, ARMY 20150227, 2017 CCA LEXIS 179, at *5 (Army Ct. Crim. App. 20 Mar. 2017) (mem. op), pet. denied, 76 M.J. 430 (C.A.A.F. 2017). If conduct is *res gestae*, no Mil. R. Evid. 404(b) notice is necessary, even if the conduct may also be offered for a Mil. R. Evid. 404(b) non-propensity purpose. *United States v. Metz*, 34 M.J. 349, 351 n.* (C.M.A. 1992).

The military judge did not abuse his discretion. "Appellant's alcohol consumption was part of the facts and circumstances explaining the *res gestae* of the offense." *United States v. Hernandezaviles*, ARMY 20170131, 2019 CCA LEXIS 76, at *8 (Army Ct. Crim. App. 26 Feb. 2019) (mem. op.) (citing *Metz*, 34 M.J. at 351), pet. denied, 79 M.J. 206 (C.A.A.F. 2019). Accordingly, the military judge imposed reasonable limitations on the government's discussion of appellant's alcohol use—namely that it be limited to the day of the charged offense. The government complied with the military judge's order, presenting witness testimony concerning appellant's intoxication immediately following the outcry and admitting pictures taken the day of the offense showing empty alcohol containers in appellant's residence and backyard.

Even assuming error, appellant was not prejudiced. In this case, the government's case was strong and appellant's weak. Appellant made incriminating comments to MPs and investigators at the scene, indicating he was the source of at least some of MC's injuries. Furthermore, MC's demeanor and outcries were largely corroborated by the medical testimony and photographs introduced by the government, discussed *supra*. Given appellant's alcohol use was not emphasized by

⁷ We note defense counsel *did* request an instruction on "[o]ther crimes, wrongs, or acts," a request honored by the military judge. The panel was instructed, "You have heard evidence throughout this trial that the accused may have consumed alcohol on [the day MC was assaulted], you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged."

trial counsel in argument,⁸ and the panel was properly instructed on how they could consider said evidence, any risk of harm was nullified.

CONCLUSION

The findings and sentence are AFFIRMED.⁹

Judge COOPER concurs.

SCHLACK, Judge, concurring in part and dissenting in part:

An out of court statement admitted into evidence pursuant to Military Rule of Evidence [Mil. R. Evid.] 807 must be three things: material, reliable, and *necessary*. *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996). In deciding the military judge did not abuse his discretion, the majority finds the forensic interview at issue was “more probative on the point for which it [was] offered than any other evidence that the proponent [could] obtain through reasonable efforts” and therefore, necessary. *Manual for Courts-Martial, United States* (2024 ed.), Military Rule of Evidence [Mil. R. Evid.] 807(a)(2). I disagree, and therefore, dissent.

Military Rule of Evidence 807 is routinely invoked in cases involving child witnesses. The litigation involving the admissibility of evidence offered pursuant to this rule is often focused on the reliability prong of Mil. R. Evid. 807. In 2023, Mil. R. Evid. 807 was amended to align with Federal Rule of Evidence 807. *See* Exec. Order 14,103, 88 Fed. Reg. 50,535, 50,577 (July 28, 2023). The change broadened the scope of evidence available to the military judge assessing reliability of the proffered statement (i.e., a change to Mil. R. Evid. 807(a)(1)). Importantly, it did not modify the necessity prong of the rule. *Compare Manual for Courts-Martial, United States* (2019 ed.), Military Rule of Evidence 807(a)(3), *with* Mil. R. Evid. 807(a)(2). The proponent must still demonstrate that “he could not obtain more probative evidence despite ‘reasonable efforts.’” *United States v. Czachorowski*, 66 M.J. 432, 435 (C.A.A.F. 2008). Efforts are not reasonable if the proponent aims to satisfy the necessity prong by asking ancillary questions and then throwing his proverbial hands in the air when the response is “I don’t know.” That is functionally what happened in this case.

⁸ To the contrary, it was only mentioned once in opening argument, once in closing argument and once in rebuttal.

⁹ The first findings entry of the “Statement of Trial Results Findings Worksheet” is corrected to reflect “Specification 1.”

“[B]ecause the direct testimony of the hearsay declarant ordinarily would be judged the most probative evidence,” *id.* at 436 (citation omitted), “[t]he necessity prong essentially creates a best evidence requirement.” *Kelley*, 45 M.J. at 280 (internal quotation marks omitted) (citation omitted). Necessity of an out of court statement “may be satisfied where a witness cannot remember or refuses to testify about a material fact.” *United States v. Wellington*, 58 M.J. 420, 425-26 (C.A.A.F. 2003) (citation omitted) (no abuse of discretion when military judge admitted recorded interview of declarant, who was unable to recall statement made while under “massive medication,” which was needed to corroborate the accused’s confession). However, to establish necessity the proponent must show the witness’ lack of memory, for example, is about the material fact for which the out of court statement is offered to prove. Otherwise, the proponent fails to establish that “there is no other more probative evidence of that fact.” *Id.* at 425

Here, counsel asked a young child about a ride in an ambulance on “that day” without establishing any of the following: (1) whether the child-witness knew what “that day” meant, (2) whether the child-witness rode in an ambulance on only one occasion, or (3) whether the child-witness understood how “that day” was connected to the charged conduct at issue. In effect, the government held MC out as being unable to remember the alleged assaults without proving it was so. *See Czachorowski*, 66 M.J. at 436 (non-permissive for the military judge to accept a general government proffer that a witness could not remember without observing the witness themselves or “some specific evidence or reasonable efforts to obtain probative evidence”).

The scant foundation necessarily required the military judge to make far too many assumptions about what the child-witness could not remember without a factual basis to do so. The findings of fact supporting the military judge’s ruling on the necessity prong underscores these assumptions. The discussion was limited to: (1) that MC could not remember living in Oklahoma without prompting from counsel; (2) he could recall riding in an ambulance *while living with his mother and accused*, but not why he was in the ambulance, or if he was hurt when he was in it “that day.” First, the finding of fact that MC testified that the ambulance ride happened while living with his mother and the accused was clearly erroneous.¹⁰ Second, MC’s testimony, captured nearly to its full extent in the majority opinion, is an inadequate factual basis for the military judge to determine other evidence was not available via reasonable efforts. Simply stated, the military judge did not

¹⁰ In response to a compound question—“did something happen, where you stopped living with your mom and [appellant]? Do you remember when you stopped living with your mom and [appellant]?”—MC responded: “Yeah.” He further acknowledged remembering riding in an ambulance, however, trial counsel failed to ask whether that ambulance ride occurred while living in Oklahoma or connect the ambulance ride to the charged offense.

observe whether MC could answer the most basic, yet material, questions relevant to determining necessity: i.e., whether MC remembered appellant assaulting him *at all* and if so, whether MC remembered *how* appellant assaulted him. Nonetheless, the military judge ruled the entire forensic interview was necessary. In my view, this was a clear abuse of discretion.

Despite finding legal error, this court will not “reverse a conviction for an error of law unless that error materially prejudiced an accused’s substantial rights.” *United States v. Pope*, 69 M.J. 328, 331 (C.A.A.F. 2011) (citing Uniform Code of Military Justice art. 59(a), 10 U.S.C. § 859(a) [UCMJ]; other citation omitted). “We review *de novo* whether the Government has met its burden of establishing that the error did not have a substantial influence on the findings in the context of the entire case.” *Id.* at 331-32 (citation omitted). Here, I would find the government unable to meet that burden as the *only* evidence that a strangulation occurred came from the child forensic interview of MC.¹¹ As such, appellant was clearly prejudiced as, without the interview, there was insufficient evidence to find him guilty of domestic violence via strangulation.

Finding appellant’s domestic violence strangulation conviction legally insufficient does not end my analysis. When setting aside a conviction, this court may affirm a conviction for a lesser included offense. UCMJ art. 66(f)(1)(A)(i). Assault consummated by battery is a lesser included offense of strangulation. *See United States v. Jones*, 68 M.J. 465, 470 (“Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an [lesser included offense] of Y.”), and *compare* UCMJ art. 128(b)(3) (aggravated assault by strangulation), *with* UCMJ art. 128(a)(3) (assault consummated by a battery). In my view, the government put on sufficient evidence appellant committed a battery upon MC’s neck; there was eyewitness and medical testimony of discoloration and marks on MC’s neck in the immediate aftermath of the assault. The evidence of injury coupled with appellant’s inculpatory statement that he was only “roughhousing” with MC and that it was not his fault that MC was “light-skinned” are sufficient to prove appellant did bodily harm to MC’s neck beyond a reasonable doubt.

I recognize that changing the offense from domestic violence via strangulation to domestic violence via assault consummated by battery upon a child under sixteen

¹¹ “Strangulation” is broadly defined as: “[i]ntentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury” *Manual for Courts-Martial, United States* (2024 ed.), pt. IV, ¶ 77.c.(5)(c)(iii). Though there was ample, direct evidence of an injury to MC’s neck and sufficient evidence that appellant was the perpetrator, there was no other evidence of an impediment to MC’s breathing or blood circulation.

CHILLURA — ARMY 20230579

lessens the punitive exposure to appellant. That said, I believe eight months of confinement is appropriate for the domestic violence via assault consummated by battery upon a child under sixteen in this case and would make no adjustment to the length of confinement and affirm the sentence.

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

APPENDIX B

Appendix B: *Grosteffon* Matters

Pursuant to *United States v. Grosteffon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

1. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING MC'S STATEMENTS UNDER THE EXCITED UTTERANCE EXCEPTION.
2. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING IMPROPER CLOSING ARGUMENT BY TRIAL COUNSEL WHO SUGGESTED THAT THE DEFENSE HAD AN "INCENTIVE TO LIE" (R. at 681).
3. WHETHER THE MILITARY JUDGE'S REQUEST TO BE ASSIGNED TO APPELLANT'S COURT MARTIAL AS HIS FIRST CONTESTED TRIAL, HELD UNDER THE DIRECT SUPERVISION OF THE CHIEF TRIAL JUDGE, IN CONJUNCTION WITH OTHER EVIDENCE OF BIAS AGAINST THE DEFENSE AND OF COACHING TRIAL COUNSEL, DEMONSTRATES AN APPEARANCE OF IMPARTIALITY UNDER *LILJEBERG v. HEALTH SERVS. ACQUISITION CORP.*, 486 U.S. 847 (1988). (R. at 14, 18, 118, 170-71, 183, 303, 370, 375, 377-78, 497).
4. WHETHER APPELLANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Chillura, Crim App. Dkt. No. 20230579, USCA Dkt. 26-0173/AR was electronically with the Court and Government Appellate Division on May 28, 2026.

A handwritten signature in black ink, appearing to read "Pat Mchenry".

PATRICK MCHENRY
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