

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

UNITED STATES
Appellee

v.

Sergeant First Class (E-7)
ALEX M. MCDOWELL
United States Army
Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 20230320

USCA Dkt. No. 26-0277/AR

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Appellee

v.

Specialist (E-4)
ALEX M. MCDOWELL
United States Army
Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 20230320

USCA Dkt. No. 26-0277/AR

Issues Presented¹

- I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING “REVERSE 404(B)” EVIDENCE.**
- II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING DNA EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412.**

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

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant respectfully requests this Court consider the information provided in the Appendix.

Statement of the Case

On June 6, 2023, an enlisted panel sitting as a general court-martial, convicted Appellant, contrary to his pleas, of seven specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice [UCMJ] (10 U.S.C. § 920b). (R. 1670; Charge Sheet; Statement of Trial Results [STR]). The military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be discharged from the service with a dishonorable discharge, and to be confined for thirty-six years. (R. at 1823-24; STR).

On August 3, 2023, the convening authority took no action on the findings and sentence. (Convening Authority Action). On August 10, 2023, the military judge entered Judgment. (Judgment). On December 11, 2025, the Army Court of Criminal Appeals (“Army Court”) summarily affirmed the findings and sentence in Appellant’s case. (Appendix A). On January 8, 2026, Appellant moved the Army Court to reconsider its opinion and suggested the court consider Appellant’s case en banc. On July 7, 2026, the Army Court denied Appellant’s reconsideration motion. (Appendix B).

Reasons to Grant the Petition

This case presents this Court the opportunity to address two questions this Court has not previously answered. First, how does the legal concept of “reverse

404(b)” apply to courts-martial? Does it apply to third parties, as most federal appellate courts have found? And if so, is there a lesser standard for admissibility for reverse 404(b) evidence because prejudice to an accused is not a factor in admission, as federal courts have held?

Second, this case presents this Court the opportunity to address the limits of Military Rule of Evidence (M.R.E.) 412 in precluding evidence in a sexual assault case in which the defense’s claim is that somebody else did it. In Appellant’s case, that somebody else was identified by the defense; that person’s semen was found on the victim’s Linus blanket (a blanket the victim used as a source of comfort); and that person asked for forgiveness and committed suicide before Appellant’s trial. Despite facts pointing to that person being involved with the sexual assaults, the military judge prohibited the defense from admitting the somebody else did it evidence by misapplying M.R.E. 404(b) and 412. Thus, good cause exists to grant the petition for both issues presented pursuant to this Court’s Rule 21(b)(5)(A) and (B).

Individually, each error stripped Appellant of his constitutional right to present a complete defense. Rather than ensuring a level playing field, the military judge actively denied it.

Statement of Facts

The Government alleged that from October 2019 to March 2021, Appellant engaged in multiple sexual acts with his stepdaughter. (Charge Sheet). The Government's case was primarily based on the testimony of the alleged victim [AV]. No eyewitnesses, direct physical evidence, or medical evidence corroborated the AV's allegations or testimony. (R. at 483) (sealed). But other evidence pointed to another possible perpetrator: the purported victim's older brother Caleb, whose semen was discovered on the victim's blanket. (R. at 137-38; 765; App. Ex. V).

The military judge refused to admit the semen covered blanket. (App. Ex. LXVIII) (sealed). The blanket belonged to the AV, and she slept with it every night. (R. at 765). When the government seized the stained blanket and sent it for DNA testing, they believed it would corroborate the AV's story. (R. at 137-38). However, the testing indicated that the semen was not from Appellant, but rather from the AV's half-brother, Caleb. (R. at 94, 105, 107; App. Ex. LXVII (sealed)). The government filed a motion to prevent the defense from utilizing this DNA evidence. (App. Ex. V). The military judge ruled that the DNA was irrelevant to the Appellant's case because the purported victim identified Appellant, not Caleb,

as the perpetrator, and that the well-known “CSI effect” of such evidence would confuse the members. (App. Ex. LXVIII) (sealed).

A. The military judge and the government knew the defense intended to advance a SODDI (some other dude did it) defense.²

Prior to the trial, the defense counsel informed the government and the court of their intention to assert a third-party culpability defense, claiming that Caleb was the true perpetrator. (R. at 112). During trial, the military judge acknowledged the defense had a constitutional right to present a complete defense, and specifically mentioned Caleb being the perpetrator in the Defense’s SODDI theory. (R. at 932). The prosecution contested any association of Caleb with the crimes. (R. at 99-100; 104, 109, 111, 128, 130-131).

B. Caleb Sandidge, the “other guy.”

Caleb died by a self-inflicted gunshot wound to the head in January 2023, shortly before Appellant’s trial was set to begin. (R. at 1028). Caleb and AV have an eight-year age difference and share the same mother but have different fathers. (R. at 586; 947). Caleb was a troubled child. (539, 573, 587, 943, 946, 950).

² The military judge first used the term “SODDI” in the record (“just so I can be clear on the record for the court reporter, S-O-D-D-I, or some other dude did it. Again, I don’t mean to make light of it. That’s just a common term people use for – we think somebody else was the perpetrator.” (R. at 112). The Defense also wanted to call attention to the fact CID prejudged the case and determined Appellant was the perpetrator even before the evidence was collected.

Michael Sandidge, AV's biological father, adopted Caleb, who then took on his surname. (R. at 586). Caleb exhibited signs of distress from a young age and, according to his mother, suffered from Asperger's syndrome. (R. at 943). He displayed aggressive behavior, threatening to harm AV and engaging in physical bullying. (R. at 946). On one occasion, he slaughtered a neighbor's chicken. (R. at 587; 950).

Caleb displayed violent tendencies and also engaged in sexual behavior. (R. at 103, 941). Alicia McDowell, the mother of AV and Caleb, observed Caleb attempting to get AV to touch his penis when she was younger. (R. at 103; 941; App. Ex. LXVIII (sealed)). Ms. McDowell, finding Caleb's behavior unmanageable, arranged for him to live with her ex-husband and Caleb's adoptive father, Michael Sandidge. (R. at 540, 586, 948). After Caleb moved, he and AV primarily resided separately; however, they co-habited during visits, typically in the summer and around Christmas. (R. at 540, 948.).

While residing at the Sandidge residence, Tara Sandidge, the wife of Michael Sandidge, observed concerning behavior by Caleb. (R. at 1041). She specifically observed him via a baby monitor positioned over her child's crib at approximately 0100 hours. (R. at 1041). On another occasion, she awoke around 0200 hours to find him standing in the doorway of her bedroom, observing her in

bed. *Id.* Ultimately, Caleb’s odd behavior resulted in his relocation to live with his grandparents in Colorado. (R. at 1040-041).

After being kicked out of the Sandidge home, Caleb joined the Army, but was separated prior to completing basic training. (R. at 775-76). Prior to killing himself, Caleb left a “farewell message” where he “expressed his regrets that he’d done a lot of bad things.” (R. at 610).

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING “REVERSE 404(B)” EVIDENCE.

Standard of Review for All Issues Presented

A military judge’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024). “Military judges abuse 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.” *Id.* When an abuse of discretion deprives “an accused of his right to present a defense,” it is constitutional error, and “the test for prejudice on appellate review is whether the appellate court is ‘able to declare a belief that it was harmless beyond a reasonable doubt.’” *Chapman v. California*, 386 U.S. 18, 24 (1967).

Law and Argument

Rule 404(b) is usually applied to the government's introduction of evidence against a defendant; however, it can also apply in the opposite direction where a defendant wishes to introduce evidence against a third-party to exculpate himself. *United States v. Daniels*, 932 F.3d 1120, 1124 (8th Cir. 2019). "Federal circuit courts often refer to Federal Rule Evidence [Fed. R. Evid.] 404(b) evidence offered about someone *other than* the appellant as reverse 404(b) evidence. (With regard to the permitted uses of crimes, wrongs, or other acts, the language in Fed. R. Evid. 404(b) and Mil. R. Evid. 404(b) is identical.)." *United States v. Cowart*, 2018 CCA LEXIS 288, *10 (N.M. Ct. Crim. App. 2018).

Military Rule of Evidence 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving motive, plan, intent, or the absence of mistake. Mil. R. Evid. 404(b)(2). Military Rule of Evidence 404(b) "is a rule of inclusion rather than exclusion," authorizing admission of the proffered evidence so long as it has a legitimate, non-propensity use at trial. *United States v. Browning*, 54 M.J. 1, 6 (C.A.A.F. 2000).

The defense may rely upon this rule of inclusion just as much as the prosecution under the doctrine known as “reverse 404(b).” *United States v. Stevens*, 935 F.2d 1380, 1402 (3d Cir. 1991); *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999). It is called reverse 404(b) because it is evidence that is used to exonerate a defendant rather than to incriminate. *Stevens*, 935 F.2d at 1402. Evidence of the crimes of a third-party may be used “defensively if in reason it tends, alone or with other evidence, to negate [the defendant’s] guilt of the crime charged against him.” *Id.* at 1403. Here, the military judge erroneously excluded Caleb’s specific acts of violence and how they could instill fear in AV by failing to consider such evidence under a reverse Rule 404(b) analysis. That is, the AV accused appellant because she feared Caleb based on his past act, thus giving her a motive to fabricate.

In the context of reverse 404(b) evidence the standard for admission is more lenient. *See United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989) (“The standard for admission is relaxed when the evidence is offered by a defendant.”); *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984) (the standard of admissibility when a criminal defendant offers similar acts evidence as a shield is not as restrictive as when the prosecution uses such evidence as a sword). The only issue in such cases is whether the evidence is relevant and probative. *Id.* *See*

also *United States v. McClure*, 546 F.2d 670. (5th Cir. 1977); *United States v. Seales*, 419 F.3d 600, 607-09 (7th Cir. 2005). A more lenient standard is justified because with reverse 404(b) there is no risk that a jury will convict based on a third persons bad character. *See Stevens*, 935 F.2d at 1404. The defense made two attempts to present this evidence; however, the military judge did not consider the admissibility of the defense's proffered evidence under reverse 404(b). (R. at 587; 950).

When the defense attempted to explain reverse 404(b) evidence to the military judge, he cut counsel off, stating, "I rule and we move on after I rule." (R. at 593.) The judge added, "I understand that you appear to be bringing up extrinsic evidence to show [Caleb] acted in conformity therein." (R. at 593). The defense counsel stated "that's not true, that's not what I'm doing." (R. at 593). The defense explained "we're talking about the environment. . . the environment in which [AV] was living that [her father] was fully aware of." (R. at 594). The defense was "not trying to prove Caleb committed a violent act... we're trying to show instead why [AV] would have a reason not to point to Caleb for any misconduct, because in that environment, that's what she's witnessing." (R. at 594-95).

The military judge misapprehended the law surrounding the admissibility of this evidence. The evidence was admissible under Mil. R. Evid. 404(b) because it shows AV's motive. *United States v. Wells*, 163 F.3d 889, 896 (4th Cir. 1998). Evidence of extrinsic acts may be particularly critical to establishing the actor's state of mind—something that can generally only be ascertained from drawing inferences from conduct. *Huddleston v. United States*, 485 U.S. 681, 685-86 (1988) (explaining that application of the rule is not limited to prosecutors seeking to introduce evidence against criminal defendants).

Contrary to the military judge's ruling that the evidence was inadmissible under Mil. R. Evid. 401 and 403, "[a] defendant may introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations." *Stevens*, 935 F.2d at 1404. To be relevant, reverse 404(b) evidence needs only have a "tendency to negate" the defendant's guilt. *Id.* at 1405. The standard does not require conclusively disproving guilt. Reverse 404(b) evidence must be relevant to one of the permissible purposes in the rule, such as motive or state of mind. To be relevant, evidence need only have "any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining

the action.” Mil. R. Evid. 401(a)-(b). “The relevance standard is a low threshold.” *United States v. Guihama*, 85 M.J. 48, 55 (C.A.A.F. 2024).

The evidence warranted the panel’s consideration as it served to negate the Appellant’s guilt and was pertinent to matters explicitly allowed by Mil. R. Evid. 404(b). The reverse 404(b) evidence would have likely weakened the government’s theory by illustrating actions that could lead the panel to infer AV’s differing state of mind and her reasons for implicating Appellant instead of her violent half-brother, Caleb. Moreover, the evidence would have indicated a motive for AV to provide false information. The evidence would have provided the panel with adequate grounds to determine that AV possessed a motive to fabricate the allegations against the Appellant.

The evidence would have been simple to understand. Initially, any potential confusion regarding Rule 404(b) evidence could be mitigated by providing the panel with an instruction that outlines the context and limitations for considering the testimony. The succinct evidence indicating that Caleb killed a neighbor’s chicken, coupled with AV’s awareness of this violent tendency, would have been directly linked to clarifying AV’s motive to fabricate and assessing her credibility. The likelihood of confusion is insufficient to surpass the considerable relevance in this instance.

The exclusion of this evidence hindered defense's ability to present its theory to the panel. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Establishing witness bias or motive to lie is a fundamental aspect of defending against the government's evidence. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974). Appellant possessed a due process right to challenge AV's credibility, as the principle witness against him, and demonstrate that she had a motive to deceive. The military judge's decision regarding the reverse 404(b) evidence resulted in the denial of this right to the Appellant.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING DNA EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412.

Law and Argument

Military Rule of Evidence 412 states that evidence offered by the accused to prove the alleged victim's sexual predispositions, or that she engaged in other sexual behavior, is inadmissible except in limited contexts. The rule is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions].

United States v. Erikson, 76 M.J. 231, 235 (C.A.A.F. 2017) (alteration in original) (footnote omitted) (internal quotation marks omitted) (citations omitted).

Essentially, under Mil. R. Evid. 412(a), evidence offered to prove that an alleged victim engaged in other sexual behavior is generally inadmissible.

However, this type of evidence is admissible under Mil. R. Evid. 412(b)(3) if its exclusion “would violate the accused’s constitutional right.”

“Generally, evidence must be admitted within the ambit of Mil. R. Evid. 412(b)[3] . . . when the evidence is relevant and material, and the probative value of the evidence outweighs the danger of unfair prejudice.” *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (alteration in original) (citation omitted). *See also Erikson*, 76 M.J. at 235 (“To establish that the excluded evidence would violate the constitutional rights of the accused, an accused must demonstrate that the evidence is relevant, material, and favorable to his defense.”) (quoting *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010)).

Relevant evidence is that which has “any tendency to make the existence of any fact . . . more or less probable than it would be without the evidence.” Mil. R. Evid. 401. Materiality is a multi-factored test weighing the “importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to the issue.” *Ellerbrock*, 70 M.J. at 319 (internal quotations omitted).

In relation to prejudice, the question is whether there was “prejudice to the integrity of the trial process, not prejudice to a particular party or witness.” *United*

States v. Gaddis, 70 M.J.248, 255 (C.A.A.F. 2011).³ The exclusion of constitutionally required evidence is reviewed for harmlessness beyond a reasonable doubt. *See Ellerbrock*, 70 M.J. at 320. For non-constitutional evidentiary errors, the test for prejudice is “whether the error had a substantial influence on the findings.” *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017)).

A. The military judge erred in excluding Caleb’s semen DNA which was found on the AV’s blanket.

Even though the civilian defense counsel repeatedly argued the Caleb’s semen DNA on AV’s blanket did not fall under Mil. R. Evid. 412, the military judge erroneously disagreed. (App. Ex. LXVIII) (sealed). Simply because the word “semen” is involved with the DNA, it is not automatically within the realm of Mil. R. Evid. 412. The evidence here relates to the sexual behavior of Caleb, not AV. In *United States v. Erikson*, the CAAF rejected the military judge’s overly

³ In *Gaddis*, this Court called into question the continued vitality of *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004). The CAAF, which has not cited *Banker* since it issued *Gaddis*, criticized *Banker* because it implied that Mil. R. Evid. 412 could trump the Constitution, a conclusion that *Gaddis* stated was “simply wrong.” *Gaddis*, 70 M.J. at 256. The test set forth in *Banker* “has the potential to lead military judges to exclude constitutionally required evidence merely because its probative value does not outweigh the danger of prejudice to the alleged victim’s privacy, which would violate the Constitution.” *Id.* Despite the CAAF’s evident abandonment of *Banker*, the military judge cites it in his ruling to exclude this DNA evidence. (*see*, App. Ex. LXVIII) (sealed).

broad position. 76 M.J. at 235 n.2 (“We fail to see how the sexual assault of a victim relates to that victim’s ‘sexual behavior’ or ‘sexual predisposition.’”). Similarly, the military judge’s overly broad position creating an additional burden for the defense is an abuse of discretion.

Caleb’s ejaculation on AV’s blanket is not connected to AV’s sexual behavior or sexual predisposition. The civilian defense counsel notified the military judge of his plan to use this evidence to make a reasonable inference. (R. at 489) (sealed).

B. Even if this Court finds this evidence is covered by Mil. R. Evid. 412, it is constitutionally required under Mil. R. Evid. 412(b)(3).

At the beginning of this trial, the government recognized that this evidence was detrimental to its case. In January 2023, the Government requested a preliminary ruling to exclude evidence of Caleb’s DNA, arguing it was not relevant under Mil. R. Evid. 401, or that its probative value was significantly outweighed by the risk of unfair prejudice according to Mil. R. Evid. 403. (App. Ex. V). The defense opposed the motion, referencing the Appellant’s Sixth Amendment right to confront witnesses regarding evidence, biases, and motives for fabrication. (App. Ex. X). “A possible defense available to [Appellant] is mistaken identity or AV’s motive to fabricate to protect [Caleb].” (App. Ex. X at 6).

The military judge imposed an additional burden on the defense, requiring direct testimony to support any arguments regarding reasonable inferences, finding the evidence inadmissible because the victim identified Appellant as her abuser, and he accepted her version of events as true. (App. Ex. LXVIII) (sealed). He also determined that, because AV had not claimed Caleb was the perpetrator, the panel was not permitted to learn what CID discovered and forensic testing determined. The military judge's job was not to determine whether the proffered evidence was true, but whether it was relevant. *Banker*, 60 M.J. at 222.⁴

He also believed a curative instruction would not cure the misleading nature of the DNA evidence because of the well regarded “CSI effect” of such evidence. (App. Ex. LXVIII) (sealed) (emphasis added). He elaborated, “the fact is [Caleb’s] seminal fluid DNA was found on a blanket used by AV and within the home of AV at the time of the alleged events. Everything after that to reach the fact of consequence – that AV then formed knowledge from that fact – is a series of attenuated suppositions unsupported by evidence. On balance, the greater weight

⁴ Although the continued vitality of *Banker* may be in question, the notion that it is the panel's duty, not the military judge's, to give weight to relevant evidence is not.

of the evidence suggests the unlikelihood of the events possibly occurring.” (App. Ex. LXVIII) (sealed).⁵

The military judge misunderstood the significance of the blanket. He overlooked the fact, that while people may lie, DNA evidence remains reliable. His ruling undermined the Appellant’s ability to defend himself and present a plausible narrative to the panel members.

C. This evidence was relevant and material to the defense.

Contrary to the military judge’s rulings, the DNA evidence was highly relevant and material to the defense. In particular, and exactly as the defense counsel repeatedly explained, CID collected the evidence because AV stated acts happened in her room. Her claims would lead a reasonable person to believe there would be relevant biological material in her bedroom, and indeed there was. When the government seized the stained blanket and sent it for DNA testing, it believed it would corroborate the AV’s story. (R. at 137-38). However, the testing found the semen was not from Appellant, but from Caleb. This is relevant information for the panel members to know and weigh.

D. The government cannot meet its burden to demonstrate harmlessness.

⁵ The military judge used the words “within the home of AV” implying the blanket could have been anywhere in the house. The blanket with Caleb’s semen was found on AV’s bed.

Under the circumstances of this case, the government cannot meet its burden to demonstrate harmlessness. Excluding Caleb's semen DNA was detrimental as it hindered the defense from formulating a plausible SODDI theory. Due to the lack of essential contextual information, the government was able to diminish Caleb's status as a credible assailant. (R. at 1610).

Conclusion

The Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations omitted). That includes challenging the government's case, attacking its assumptions, and testing its evidence. But it means more than that. The Due Process and Confrontations Clauses safeguard the accused's right to put on his or her own witnesses and evidence too. *Id.* This right is "a fundamental element of due process of law." *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (*McAllister II*) (citations omitted).

A complete defense includes the ability to show someone other than the accused committed the crime. *See United States v. Woolheater*, 40 M.J. 170, 173 (C.A.A.F. 1994) ("The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental Constitutional right.").

The military judge could have ensured parity for both sides to advance their theory of the case, but he did not. His rulings tipped the scales of justice in favor of the government, and the result was a contest that was not fair in either fact or perception. The limitations placed on Appellant's defense distorted the adversarial process in this courts-martial. This Court should grant Appellant's Petition and set aside Appellant's convictions and sentence.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. McDowell,
Crim App. Dkt. No. 20230320, USCA Dkt. 26-0277/AR was electronically with
the Court and Government Appellate Division on September 23, 2026.

A handwritten signature in black ink, appearing to read "Michelle L.W. Surratt", written in a cursive style.

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APPENDIX

United States v. Cowart

United States Navy-Marine Corps Court of Criminal Appeals

June 12, 2018, Decided

No. 201700026

Reporter

2018 CCA LEXIS 288 *; 2018 WL 2927741

UNITED STATES OF AMERICA, Appellee v. WILLIAM F. COWART, III, Hospitalman (E-3), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Commander Jason L. Jones, JAGC, USN. Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL. Staff Judge Advocate's Recommendation: Commander George W. Lucier, JAGC, USN.

Counsel: For Appellant: Captain Andrew R. House, JAGC, USN.

For Appellee: Lieutenant Commander Justin C. Henderson, JAGC, USN; Captain Brian L. Farrell, USMC.

Judges: Before MARKS, JONES, and WOODARD, Appellate Military Judges.

Opinion by: MARKS

Opinion

MARKS, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of distributing child pornography and one specification of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.¹ The military judge sentenced

the appellant to 48 months' confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant asserts one assignment of error. The military judge abused his discretion when he excluded evidence about a viable alternate suspect for the distribution of child [*2] pornography specifications. We find error, conclude it was not harmless beyond a reasonable doubt, and set aside the findings for Specifications 1 and 2 of the Charge and the sentence. Arts. 59(a) and 66(c), UCMJ.

I. BACKGROUND

The case against the appellant for distribution of child pornography is entirely circumstantial.

On 2 May 2012, the appellant boarded a plane in Japan, where he was stationed aboard USS BONHOMME RICHARD (LHD 6), and flew home to Newport, North Carolina, for about two-and-a-half weeks of leave. He spent most of his leave period at his parents' home, where family and friends came to visit him. On 20 May 2012, the appellant left his parents' home in North Carolina to return to his ship in Japan.

At the same time, an agent with the North Carolina Special Bureau of Investigations (SBI) was monitoring computer file sharing networks² for the electronic exchange of child pornography. On 8 May 2012, the agent discovered that a host computer at a particular internet protocol (IP) address had shared images of suspected child pornography between 3 and 8 May. The agent was able to determine that the host computer was using a particular version of a file sharing software to connect [*3] to a file sharing network under the user

¹ The military judge acquitted the appellant of one specification of possessing child pornography.

² The SBI agent defined "file sharing" networks as computer systems that are connected to each other directly via the Internet and can share files among them. Record at 82.

name "Okisama."³ Between 8 and 9 May 2012, the agent's computer detected and downloaded 40 images of child pornography from the Okisama account. On 19 May 2012, six more files of child pornography came from the same source. The agent traced the IP address associated with the account to the appellant's parents' home. State records identified four individuals associated with the residence: the appellant's parents, the appellant, and the appellant's brother. SBI agents searched the appellant's parents' home in June 2012 and conducted forensic previews of the computers in the house. They found neither child pornography nor file sharing software. The SBI agents then contacted the Naval Criminal Investigative Service (NCIS).

On 26 September 2012, NCIS special agents searched the appellant's berthing and work space aboard USS BONHOMME RICHARD, then pier-side in Guam, and seized all of his personal electronic devices. Forensic analysis yielded images and videos of child pornography on the appellant's cellular phone.⁴ The appellant's laptop computer contained neither child pornography nor the file sharing software used to exchange the child pornography [*4] files in May 2012. An external hard drive contained some evidence of child pornography. Investigators found none of the files distributed in May 2012 on any of the appellant's devices. Finally, forensic analysis revealed the appellant's use of "Okisama"⁵ as the password to his external hard drive⁶ and the username associated with his Nintendo gaming system.⁷

II. DISCUSSION

The appellant alleges that he was deprived of his constitutional right to present a complete defense. His

³ *Id.* at 90.

⁴ Forensic investigators also found child pornography on the appellant's iPod, but the appellant was not charged with possessing child pornography on his iPod. The military judge admitted the child pornography found on the iPod only to rebut the defense's assertion that someone other than the appellant distributed the child pornography from his parents' home in May 2012.

⁵ The meaning of "Okisama" did not appear in the record; however, testimony suggested it was related to the appellant's birthplace, Okinawa, Japan.

⁶ Record at 207.

⁷ *Id.* at 240.

defense relied primarily on evidence that an alternate suspect—his cousin, JC—may have been responsible for distributing the child pornography. The appellant asserts the military judge erroneously excluded testimony suggesting that JC possessed child pornography in 2010 and searched for it at the appellant's family home in 2006 or 2007.

We review a military judge's decision to exclude evidence for an abuse of discretion. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (citing *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000)).

A. Constitutional right to present "legally and logically relevant" evidence in defense

"The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental Constitutional right." *United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)). See also *United States v. Hennis*, 75 M.J. 796, 823 (A. Ct. Crim. App. 2016) (*en banc*) ("The right to [*5] obtain and present such 'third party culpability' evidence is an important component of an accused's right to present a defense."). In *Woolheater*, the defense sought to introduce evidence about Petty Officer Woolheater's shipmate to demonstrate that the shipmate had the opportunity, knowledge, and motive to commit the arson of which Petty Officer Woolheater was accused. *Id.* at 172. The Court of Military Appeals found that the military judge "erred when he ruled that the defense could not present *legally and logically relevant* evidence that someone else had the motive, knowledge, and opportunity to commit the arson." *Id.* at 173 (emphasis added). Later, in *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001), the Court of Appeals for the Armed Forces (CAAF) reiterated that the constitutional right to present a defense is the right to present "evidence which is legally and logically relevant."

B. The appellant's evidence of third-party culpability

The appellant called a single witness—his father—to present his defense. Through his father's testimony, the appellant presented an alternate suspect who may have distributed the child pornography from his parents' IP address in May 2012. While the appellant was visiting his parents in North Carolina, family members [*6] and

high school friends came to the house. Among the visitors was the appellant's cousin, JC. JC and the appellant were close, and JC had lived with the appellant and his family for a time in the past.

According to the appellant's father, JC spent the night at the house six or seven times during the appellant's visit and slept in the same room as the appellant. The father was not certain that JC was in the house during the early morning hours of 9 and 19 May when the child pornography was distributed. He remembered that "when my son first came in [JC] did come and stay with us for several days there[.]" but he testified only that JC "could have been there" at the hour the pornography was distributed on 9 May.⁸ Midway through the leave period, the appellant and his father left the house to visit the appellant's grandfather for about a week. The appellant's father knew JC was in the house right before the appellant left on 20 May. He was certain that JC was in the house during the day on 19 May, but he did not know when he left that night. He did not know whether he was in the house at the hour the child pornography was distributed on 19 May.

But testimony about JC's presence in the family [*7] home in May 2012 is not the subject of the alleged error. Testimony about two prior incidents involving JC in the family's home is at issue.

1. Report of JC's child pornography possession in 2010

The appellant's father testified that in 2010, the appellant, JC, and a family friend, R, lived together in a trailer on the family's property. He recalled an incident when the appellant and R "came into the house very emotional, high attitude, they came to the back room and were just very upset."⁹ The appellant and R were upset because "[t]hey had found disks of child pornography in [JC's] bedroom."¹⁰ They insisted that JC move out of the trailer. The father explained that he did not report JC to law enforcement because JC is family, has special needs, and "needs someone to support him."¹¹

⁸ *Id.* at 402.

⁹ *Id.* at 384.

¹⁰ *Id.*

¹¹ *Id.* at 386.

Trial counsel objected to the father's testimony, citing relevance, evidence of other crimes, wrongs, or acts, and hearsay. Civilian defense counsel (CDC) responded:

It goes to number one, access for other individuals that had potential access to the IP address that was identified and discussed by Agent [C]. Number two, it goes to the potential motive and opportunity of an alternative suspect other than Hospitalman [*8] Cowart.¹²

When asked to distinguish the evidence from improper character evidence, CDC explained, "it is an alternative, the theory of the defense case as the court has pointed out more than once is that there was potential opportunity, access and availability and potentially motivation for some other individual to access and distribute child pornography in May of 2012."¹³

CDC later reiterated his assertion that the evidence was admissible "under the alternative theory for showing someone else had access, opportunity, potential motivation and was around during the charged time frame."¹⁴ Ruling from the bench, the military judge admitted the evidence that multiple people had access to the wireless network in the home at the time of the appellant's visit. But he excluded the evidence that JC possessed child pornography in 2010:

[A]s to the past history and the stories, I am gonna sustain that part of the objection. It's too far. It's remote in time and it is character evidence brought to show that he acted in one way two years ago and then he acted in conformity therewith in May 2012. I think that's just character evidence in that regard.¹⁵

The military judge then allowed the CDC to proffer his [*9] second line of intended questioning of the appellant's father.

2. Evidence of electronic searches for child pornography in 2006-07

¹² *Id.* at 388.

¹³ *Id.* at 389.

¹⁴ *Id.* at 390.

¹⁵ *Id.* at 391-92.

Before JC lived with the appellant in a trailer on the family's property, he lived with the appellant's parents in their house from 2006 to 2007. The record indicates JC was at least 16 years old at the time and likely older. The appellant's father initially allowed JC to borrow his computer but then withdrew that permission. After JC used the computer, the appellant's father saw "tracks of" child pornography.¹⁶ He defined tracks of child pornography as pop-up advertisements to "[c]lick here for underaged [sic] youth having sex" and images of "kids running down a nude beach and that kind of stuff[.]"¹⁷ As he had taken "on the burden of trying to take care of [JC,]" the appellant's father did not report the suspected child pornography but "did [his] best to clean it up."¹⁸

Trial counsel raised "the same objection" from the first line of questioning, and the military judge responded, "[s]ame ruling. Sustained."¹⁹

C. MIL. R. EVID. 404(b), the *Reynolds* test, and legally and logically relevant evidence

Although CDC did not explicitly invoke MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 404(b), [*10] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.), he sought admission of the testimony about JC's alleged prior acts to demonstrate his motive and opportunity to distribute child pornography. Under MIL. R. EVID. 404(b)(1), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." But evidence of prior bad acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." MIL. R. EVID. 404(b)(2). Typically, the government offers MIL. R. EVID. 404(b) evidence against an accused. In something of a reversal of roles, the appellant, not the government, proffered this MIL. R. EVID. 404(b) evidence. The evidence about JC's alleged prior acts was integral to the appellant's defense that someone else in the house had not only the opportunity but the motive to distribute child pornography in May

2012.²⁰

By well-established precedent, military courts review the admissibility of MIL. R. EVID. 404(b) evidence via the *Reynolds* test:

1. Does the evidence reasonably support a finding by the court members that the appellant committed prior crimes, wrongs or acts? [*11]
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) (internal citations omitted). Step two applies the standard for relevance in MIL. R. EVID. 401. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." MIL. R. EVID. 401. Step three incorporates the balancing test in MIL. R. EVID. 403, accounting for the danger—to the appellant and the process—of "unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."

When an accused introduces MIL. R. EVID. 404(b) evidence about someone else, the danger of unfair prejudice to the accused is minimal, if not non-existent. There is still the potential for danger to the process—threats to "policy considerations such as the interest in

¹⁶ *Id.* at 393.

¹⁷ *Id.*

¹⁸ *Id.* at 394.

¹⁹ *Id.* at 395.

²⁰ Federal circuit courts often refer to FEDERAL RULE EVIDENCE (FED. R. EVID.) 404(b) evidence offered about someone *other than* the appellant as reverse 404(b) evidence. (With regard to the permitted uses of crimes, wrongs, or other acts, the language in FED. R. EVID. 404(b) and MIL. R. EVID. 404(b) is identical.) "'Reverse 404(b)' is a term some courts have used to refer to evidence of prior bad acts by a third party, introduced by the defendant and offered to implicate the third party in the charged crime." *United States v. Battle*, 774 F.3d 504, 512 (8th Cir. 2014) (citing *United States v. Myers*, 589 F.3d 117, 123 (4th Cir. 2009); *United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005); *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005); *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004); *United States v. Hamilton*, 48 F.3d 149, 155 n.8 (5th Cir. 1995); *United States v. Spencer*, 1 F.3d 742, 750 n.5 (9th Cir. 1992) (Reinhardt, J., dissenting); *United States v. Stevens*, 935 F.2d 1380, 1401-02 (3d Cir. 1991)).

the orderly conduct at trials"—that may substantially outweigh the probative value of the evidence. *Woolheater*, 40 M.J. at 173 (citation omitted). Thus the third prong of the *Reynolds* test still applies to MIL. R. EVID. 404(b) evidence about a third party. But it is less likely that [*12] the prospect of unfair prejudice to the process alone will substantially outweigh the probative value of the evidence.

It is important to note that, by incorporating MIL. R. EVID. 401 and 403, the *Reynolds* test incorporates a determination of legal and logical relevance. "[MIL. R. EVID.] 401-404 set forth what is legally and logically relevant." *Dimberio*, 56 M.J. at 24. When conducted on behalf of the defense, *Reynolds* analysis of MIL. R. EVID. 404(b) evidence has constitutional implications. "[I]f the evidence is otherwise legally and logically relevant under Rules 401 through 403 the defendant has a constitutional right to introduce the evidence." *Id.* at 25.

As we review the military judge's exclusion of the defense's evidence about cousin JC, we look for the *Reynolds* analysis or some other application of MIL. R. EVID. 401 and 403.

D. Military judge's exclusion of the appellant's 404(b) evidence

"We review a military judge's evidentiary rulings for an abuse of discretion. However, when the judge does not articulate the balancing analysis on the record, we give the evidentiary ruling less deference than we do where . . . the balancing analysis is fully articulated on the record." *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

The military judge ruled to exclude the appellant's MIL. R. EVID. 404(b) evidence about JC from the bench and did not reduce his [*13] ruling to writing. Review of the discourse between the military judge and counsel suggests that the military judge focused on the age of the evidence. The discussion began with trial counsel's objection to the father's testimony about the discovery of a disk containing child pornography in JC's room in the trailer.

TC: He's testifying about hearsay, other crimes, wrongs or acts of another individual not [sic] disparate in time and place, well, not necessarily place, but time.

. . . .

MJ: And so therefore, [the hearsay objection] is overruled, but what's, you know, this is disparate in time with different people. I know the accused is slightly involved in this, but is this tied into what's going on here?

. . . .

CDC: It goes to number one, access for other individuals that had potential access to the IP address that was identified and discussed by [North Carolina SBI] Agent [C]. Number two, it goes to the potential motive and opportunity of an alternative suspect other than Hospitalman Cowart.

MJ: All right. But this doesn't seem to be like in May 2012, this is occurring. This seems to be occurring at a different time. I mean if this was May 2012, and there had been other contraband discovered [*14] there and people have taken steps to destroy it, these people would seem to be really tight close, but in May 2012, this isn't when this event occurs.

CDC: I think that the time that I would argue is that the same individual was involved. I agree we're talking about a two year discrepancy in time, but it's the same individual, in the same location, with the same access who was present during this time in May of 2012, so it's not like I'm saying he was there in May of 2000—or in 2010, and then he never came back. I mean this is the same individual that was in and around the charged premises in May of 2012.²¹

After the appellant's father testified about finding tracks of child pornography on his computer after JC borrowed it, the military judge asked one question: "What year is [he] living under your roof?"²² The appellant's father answered that JC moved in with him around 2006 or 2007. The answer lent support to the military judge's earlier comment that the testimony concerned "past history."²³

Without articulating relevance in terms of MIL. R. EVID. 401 or conducting a MIL. R. EVID. 403 balancing test on the record, the military judge excluded the testimony about JC because (1) it was improper character evidence, and (2) it [*15] was too remote in time.

²¹ Record 387-89.

²² *Id.* at 395.

²³ *Id.* at 391.

1. Improper character evidence

Although the appellant presented and proffered his father's testimony as evidence of motive and opportunity, the military judge characterized it as improper character evidence. "[T]his is a lot of character evidence coming in about this person trying to say they acted in conformity therewith. They did it once. They did it again."²⁴ The military judge explicitly anchored the discussion in MIL. R. EVID. 404(a)(1), which provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character trait[.]" and MIL. R. EVID. 405, which details methods of proving character.

But whether the father's testimony about JC was character evidence under MIL. R. EVID. 404(a) or evidence of prior acts under MIL. R. EVID. 404(b) was not the dispositive question. In *Dimberio*, the CAAF clarified that impermissible character evidence—"such evidence [that] would not fit within the exceptions to MIL. R. EVID. 404(a)"—might still be admissible because it is legally and logically relevant. 56 M.J. at 25. We turn next to legal and logical relevance and the judge's finding of remoteness.

2. Remoteness

It is well within a military judge's discretion to find that evidence [*16] of a third party's possible culpability is too remote to be admissible. The Supreme Court noted in *Holmes v. South Carolina*, 547 U.S. 319, 327, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), that judges may exclude evidence intended to shift suspicion to another suspect if it is too remote to be relevant. (Citing 41 C.J.S. HOMICIDE § 216 at 56-58 (1991) ("but frequently matters offered in evidence [by the accused to show another person's commission of the charged crime] are so *remote* and lack such connection with the crime that they are excluded") (emphasis added); 40A Am. Jur. 2d *Homicide* § 286 at 136-138 (1999) ("[evidence tending to prove that another person may have committed the crime with which the defendant is charged] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or *remote*") (emphasis added)). Remoteness equates to speculation or a lack of

connection with the crime at issue.

Based on his focus on dates, the military judge appears to have found the evidence too remote in terms of time. He did not otherwise articulate why the evidence lacked probative value. The military judge only indicated that too much time had passed since JC was allegedly discovered searching for child pornography. Our superior court has [*17] considered temporal proximity in cases similar to the one before us, where evidence of child pornography has been admitted against an accused because it "could reasonably be viewed as reflecting or tending to reflect his sexual desires during the charged acts." *United States v. Mann*, 26 M.J. 1, 4 (C.M.A. 1988). See also *United States v. Whitner*, 51 M.J. 457, 461 (C.A.A.F. 1999) (affirming admission of evidence of the "appellant's possession of a large number of homosexual materials in his military barracks room on the day of the offense" to show his motive for committing the charged sexual assault of another man); *United States v. Orsburn*, 31 M.J. 182, 187 (C.M.A. 1990) (upholding the admissibility of pornographic materials about children which "were found at the situs of the alleged sexual offenses, around the time of these offenses, and in an area under at least partial control of the appellant"). Cf. *United States v. Rhea*, 33 M.J. 413, 423 (C.M.A. 1991) (upholding the admissibility of pornographic books about children found near where the alleged sexual assaults of a child occurred without mentioning temporal proximity). Temporal proximity can constitute part of the connection between the evidence and the crime at issue.

But the case law does not require temporal proximity, particularly when the evidence demonstrates sexual interest in children. The government sought to introduce four- or five-year-old [*18] evidence against Staff Sergeant Mann to prove a common scheme or plan to sexually assault his children. 26 M.J. at 4. At trial, Staff Sergeant Mann unsuccessfully objected to admission of these acts, arguing they "were not 'close enough in time, place and circumstances to be relevant[.]'" *Id.* The Air Force Court of Military Review found the military judge abused his discretion in admitting the testimony. *United States v. Mann*, 21 M.J. 706, 710 (A.F.C.M.R. 1985). On appeal, the Court of Military Appeals disagreed. 26 M.J. at 5. "The apparent remoteness of some of these acts (5 years) does not undermine their relevance where the youth of the victim is an important component of the averred plan." *Id.* (citing *United States v. Burkett*, 821 F.2d 1306, 1309-10 (8th Cir. 1987) (holding "there is no specific number of years beyond which prior acts are no longer relevant to the issue of

²⁴ *Id.* at 389.

intent"))).

Finally, temporal proximity is but one factor in a MIL. R. EVID. 403 balancing test. See *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000) (listing temporal proximity as one of nine "factors to be examined when conducting a [MIL. R. EVID. 403] balancing test"). See also *United States v. Berry*, 61 M.J. 91, 96 (C.A.A.F. 2005) (noting, in the course of a *Wright* analysis, that "[t]he length of time between the events alone is generally not enough to make a determination as to the admissibility of the testimony"). Instead of considering temporal proximity while conducting a balancing [*19] test, the military judge substituted a test for remoteness. He never identified the potential danger to the fact-finding process that substantially outweighed the probative value of the evidence. As he made a binary determination of temporal proximity in lieu of a *Reynolds* analysis or MIL. R. EVID. 403 balancing test and failed to articulate further how the father's testimony was not legally and logically relevant, we find legal error.

E. Admissibility of the appellant's 404(b) evidence under *Reynolds*

Before we determine whether the military judge's legal error amounted to an abuse of discretion, we will determine whether the excluded evidence was admissible. Thus we apply the *Reynolds* test to the father's testimony about JC.

1. Report of JC's child pornography possession in 2010

The appellant sought to admit evidence that JC possessed child pornography in 2010, but it was hearsay. The appellant's father never saw the disk which allegedly contained child pornography. He testified only to what the appellant and R reported to him. The military judge did not abuse his discretion by admitting the testimony only for its "effect on the listener."²⁵ If we are unable to consider the father's

testimony as substantive [*20] evidence that JC possessed disks of child pornography in the trailer in 2010, we end our *Reynolds* analysis of this evidence at step one. We cannot find that "the evidence reasonably support[s] a finding . . . that [JC] committed [the] prior crimes, wrongs, or acts." 29 M.J. at 109. The military judge did not abuse his discretion in excluding this evidence.

2. Evidence of electronic searches for child pornography in 2006-07

The appellant's father proffered that he personally observed evidence of child pornography on his computer after JC used it in his home in 2006 or 2007.

First, the evidence reasonably supports a finding that JC committed the prior crime, wrong, or act. *Id.* "[T]he standard for meeting this factor is quite low." *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993). The appellant's father described with particularity pop-up advertisements for "underaged youth having sex" and images of children on a nude beach.²⁶ We can reasonably infer that they resulted from recent electronic searches related to children, nudity, and sex on the same computer. He did not explain with particularity why he attributed the searches to JC as opposed to anyone else with access to his computer. The evidence is circumstantial. But given the low standard, we [*21] find the evidence meets the first prong of the test.

Next, we determine "what 'fact . . . of consequence' is made 'more' or 'less probable' by the existence of this evidence." *Reynolds*, 29 M.J. at 109. We consider this question in the context of the government's entirely circumstantial case against the appellant for distribution of child pornography. The direct evidence established only that someone distributed child pornography via the IP address registered to the appellant's father in May 2012.

Investigators began their search for the distributor by

²⁵ *Id.* at 388. However, the evidence suggests that an exception to the hearsay rule may have applied, and the statements may have been admissible under MIL. R. EVID. 803(2) as excited utterances. Had the statements been admitted, they would have reasonably supported a finding that JC possessed child pornography in 2010 while living with the appellant on his parents' property. JC's possession of child pornography would make it more probable that he had a motive to distribute child pornography in May 2012. Even with

the testimony necessary to determine whether the statements met the hearsay exception for excited utterances, danger to the court-martial process in terms of confusing the issues, misleading the military judge, undue delay, wasting time, or needlessly presenting cumulative evidence would not have substantially outweighed the probative value of the evidence. The evidence would have been admissible. *Reynolds*, 29 M.J. at 109; MIL. R. EVID. 403.

²⁶ Record at 393.

forensically examining all of the computers in the home. When they found no evidence of child pornography or the file sharing software they moved to their next possible suspect. As the appellant was the only person associated with the residence not home at the time of the search, the North Carolina investigators contacted NCIS. There is no evidence the North Carolina SBI continued their investigation or that anyone searched JC's computer or electronic devices. NCIS found child pornography on the appellant's cell phone and iPod and discovered that he used the profile name "Okisama." Aside from the Okisama connection, the only evidence against the appellant was [*22] his interest in child pornography. He possessed none of the distributed images. There was no evidence of child pornography or the file sharing software on his laptop computer. Evidence that, on at least one prior occasion, JC had borrowed his uncle's computer and may have used it to search for child pornography on his wireless network is evidence that JC had the same motive and opportunity to distribute child pornography when he returned to the home in May 2012.

Admittedly, the passage of five or six years from the time JC allegedly searched for child pornography to the distribution at issue weakens the probative value of the evidence. But we do not find that temporal attenuation fatal to the admissibility of this evidence in this case. *See Berry*, 61 M.J. at 96; *Wright*, 53 M.J. at 482; *Mann*, 26 M.J. at 5. There is a sufficient nexus between JC's willingness to search for child pornography while a guest of the appellant's family five or six years earlier and his return to the house as a guest in May 2012. This evidence has some probative value as to the matter at issue in this case—the identity of the distributor of child pornography.

Finally, "is the 'probative value . . . substantially outweighed by the danger of unfair prejudice?'" *Reynolds*, 29 M.J. at 109. In short, [*23] no. There is no risk of unfair prejudice to the appellant. Evidence that someone other than the appellant may have searched for and viewed child pornography is not likely to confuse the issues, particularly when the fact finder is the military judge. Nor was there any danger that the fact-finder would be misled. There was no undue delay, because the appellant's father had already succinctly testified to the evidence at issue. There were no other witnesses, no evidentiary exhibits, and no expert witnesses needed to interpret exhibits. There was also no prospect of needlessly cumulative evidence, as this was the only evidence that JC, or anyone else in the home, had shown an interest in child pornography.

Finding no danger of unfair prejudice, we conclude that it did not substantially outweigh the probative value of the evidence.

Thus we find that the testimony that JC may have searched for child pornography on the same home network five or six years earlier was admissible under MIL. R. EVID. 404(b). It was legally and logically relevant. The military judge's legal error in failing to analyze the evidence in accordance with MIL. R. EVID. 401 and 403 and the *Reynolds* test and in excluding the evidence as improper character evidence [*24] and too remote in time constituted an abuse of discretion.

F. Prejudice

As previously stated, "[t]he right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental Constitutional right." *Woolheater*, 40 M.J. at 173 (citations omitted). As long as "the evidence is otherwise legally and logically relevant under [MIL. R. EVID.] 401 through 403 the defendant has a constitutional right to introduce the evidence." *Dimberio*, 56 M.J. at 25. An appellant has the burden of establishing that an erroneous exclusion deprived him or her of evidence "material and favorable to his defense" and thus amounted to constitutional error. *United States v. Toohey*, 63 M.J. 353, 357 (C.A.A.F. 2006) (quoting *United States v. Robaina*, 39 F.3d 858, 862 (8th Cir. 1994)) (additional citations omitted).

The appellant's sole defense to the distribution charge was evidence that JC also had the opportunity and motive to distribute child pornography in May 2012. Exclusion of that evidence left the appellant with nothing more than a house full of people with the opportunity to distribute child pornography but no apparent motive to do so. The military judge's abuse of discretion improperly deprived the appellant of evidence "material and favorable to his defense[.]" *Id.*

As there was a constitutional dimension to the military [*25] judge's error, the government must prove that it was harmless beyond a reasonable doubt. *United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002) ("For constitutional errors, the government must persuade this court that the error was harmless beyond a reasonable doubt.") Declining to acknowledge the possibility of constitutional error in this case, the government has failed to do so. Contrary to the government's characterizations, the circumstantial case against the

appellant for distribution of child pornography was not overwhelming. Although the appellant possessed child pornography, he possessed none of the distributed child pornography or the file sharing software. The only direct link between the appellant and the distribution detected by the North Carolina SBI was the moniker "Okisama."

We must also assess the possible prejudice of this exclusion in light of the military judge's subsequent admission of similar MIL. R. EVID. 404(b) evidence *against* the appellant on rebuttal. As part of the government's case in rebuttal, trial counsel asked the military judge to re-examine admission of the appellant's iPod under MIL. R. EVID. 404(b). The appellant's iPod, seized among his belongings on the ship, contained three uncharged files of child pornography.²⁷ The military judge had initially [*26] excluded it from evidence based on insufficient notice to the appellant under MIL. R. EVID. 404(b) and a lack of connection to the distribution of child pornography. Ironically, the military judge later ruled the evidence was admissible to rebut the appellant's theory of an alternate suspect.

In this ruling, the military judge correctly noted that "MIL. R. EVID. 404(b) is an evidentiary rule of inclusion [and] the applicable test is derived under *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989)."²⁸ The military judge found the MIL. R. EVID. 404(b) bases of motive and identity to be "inexorably intertwined" and "interconnected with the idea that the accused is the source of distribution."²⁹ The military judge noted that "[s]everal military cases deal with sexual preference of an accused and sexually related items possessed by an accused."³⁰ He relied on *Whitner* and *Mann*. Finding that the appellant brought his iPod home on leave with him in May 2012, the military judge held that "[t]he possession of the iPod [sic] images of child pornography by the accused provides a motive to be involved in the distribution and possession of images that were distributed in [this case]."³¹

The military judge's ruling admitting the evidence to

rebut the appellant's defense best captures the significance of the defense [*27] evidence he excluded:

This motive to be involved in child pornography internet activity goes toward rebutting the defense evidence of a third party being responsible for the distribution. All persons are considered innocent and all possible persons of interest in the Cowart home began the case on an equal evidentiary plane. The defense argument is that a third party distributed the evidence and the accused's possession of the iPod images provides the fact-finder with a marker that differentiates him from all others. This is fact of consequence that is made more or less probable by the existence of this evidence and it goes to attempting to limit the identities of a possible distributor.³²

Evidence that JC also had the "marker"—the same sexual interest—upends the equal evidentiary plane. It negates the differentiation the government relied on to prove its case.

The military judge's erroneous and asymmetrical application of MIL. R. EVID. 404(b) improperly excluded evidence of an alternate perpetrator that was material and favorable to the appellant's defense. The prejudicial impact of that error was exacerbated by the military judge's subsequent ruling allowing the government to introduce similar evidence to [*28] rebut the defense. Thus, exclusion of evidence implicating JC was not harmless beyond a reasonable doubt in this case and constituted an error materially prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ.

III. CONCLUSION

The findings of guilty to Specifications 1 and 2 of the Charge and the sentence are set aside. The findings as to the Charge and Specification 4 thereunder are affirmed. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with a rehearing authorized.

²⁷ Charges against the appellant for possession of child pornography stemmed from files found on a mobile phone and external hard drive.

²⁸ Record at 449; Appellate Exhibit (AE) XXIII at 3.

²⁹ AE XXIII at 4, 5.

³⁰ *Id.* at 4.

³¹ *Id.* at 6.

³² AE XXIII at 7.

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, WILLIAMS, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist ALEX M. MCDOWELL
United States Army, Appellant

ARMY 20230320

Headquarters, 7th Infantry Division
Matthew S. Fitzgerald, Military Judge
Lieutenant Colonel Aaron L Lykling, Staff Judge Advocate

For Appellant: Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Jonathan F. Potter, Esquire; Captain Andrew W. Moore, JA (on brief and supplemental brief); Jonathan F. Potter, Esquire; Captain Andrew W. Moore, JA (on reply brief and supplemental reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA; Captain Nicholas A. Schaffer, JA (on brief and supplemental brief).

11 December 2025

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.^{1 2 3}

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

¹The Judgment of the Court is corrected to reflect the correct "Date Judgment Entered", "2023 08 10".

(continued . . .)

(. . . continued)

² The government dismissed Specification 2 of the Charge prior to referral but did not renumber the remaining specifications. *See* Rules for Courts-Martial 604 discussion. As a result, the Statement of Trial Results does not display a Specification 2 of The Charge.

³ The military judge did not provide the unit of time for each sentence in the Sentencing, Confinement portion of the Statement of Trial Results Segmented Sentencing Worksheet. All periods of confinement should reflect that they are for number of “years.”

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOPER, WILLIAMS, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist ALEX M. MCDOWELL
United States Army, Appellant

ARMY 20230320

ORDER

WHEREAS:

On 8 January 2026, appellant requested reconsideration of this court's decision, issued 11 December 2025, and suggested reconsideration en banc. The request for reconsideration is DENIED. The suggestion for reconsideration en banc is not adopted.

DATE: 7 July 2026

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CR2

APPENDIX C

Appendix C: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982),

Appellant, through appellate defense counsel, personally requests that this court consider the following matters:

- I. WHETHER THE MILITARY JUDGE ERRED FOR REFUSING TO GIVE AN INSTRUCTION CONCERNING AV'S CHARACTER FOR UNTRUTHFULNESS.**
- II. WHETHER APPELLANT IS ENTITLED TO SENTENCING RELIEF FOR POST-TRAIL DELAY.**
- III. WHETHER THE MILITARY JUDGE ERRED IN EXCLUDING CALEB'S STATEMENT "I'M SORRY FOR ALL THE BAD THING'S I'VE DONE" UNDER MIL R. EVID. 803.**
- IV. WHETHER THE MILITARY JUDGE ERRED IN DENYING DEFENSE ITS REQUEST FOR A DIGITAL FORENSIC EXPERT.**
- V. WHETHER THE MILITARY JUDGE'S DEPARTURE FROM IMPARTIALITY DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND UNDERMINED PUBLIC CONFIDENCE IN MILITARY JUSTICE.**
- VI. WHETHER THE TRIAL COUNSEL COMMITTED UNDUE COMMAND INFLUENCE WITH HER EMAIL PERSUADING APPELLANT'S COMMAND TO EXTEND HIS EXPIRATION TERM OF SERVICE.**
- VII. WHETHER THIS COURT HAD JURISDICTION AFTER EXTENDING APPELLANT'S EXPIRATION TERM OF SERVICE.**
- VIII. WHETHER DEFENSE COUNSEL WERE INNEFFECTIVE FOR FAILING TO PROVIDE MIL R. EVID. 412 NOTICE.**

IX. WHETHER THE COURT MARTIAL HAD JURISDICTION OVER APPELLANT BECAUSE THE OFFICER WHO PRESIDED OVER MOST OF THE TRIAL WAS NOT SERVING “FOR A TERM OF NOT LESS THAN THREE YEARS” AS REQUIRED BY R.C.M 502(C)(3)

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 4,158 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.



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