IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v.	REPLY BRIEF ON BEHALF OF APPELLANT
Specialist (E-4) **NICHOLAS R. ST. JEAN** United States Army Appellant	Crim. App. Dkt. ARMY 20190663 USCA Dkt. No. 22-0129/AR

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

DANIEL CONWAY
Civilian Appellate Defense Counsel
Gary Myers, Daniel Conway and
Associates, Attorneys-at-Law
20079 Stone Oak Parkway,
Suite 1005-506
San Antonio, TX 78258
Tel. 210-934-8265 (UCMJ)
Fax. 603-529-3455
conway@militaryattorney.com
www.mcmilitarylaw.com
USCAAF Bar Number 34771

TUMENTUGS ARMSTRONG
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
Tel. 703-693-0692
tumentugs.d.armstrong.mil@army.mil
USCAAF Bar Number 37591

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Granted Issue

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412 AND BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL ASSAULT.

Argument

Appellant's responses to the government's Mil. R. Evid 412 arguments can be segregated into three general areas: (1) the relevance of the evidence; (2) whether Mil. R. Evid. 403 concerns applied to the evidence; and (3) prejudice. Each will be discussed below, followed by a discussion of the res gestae issue.

Of note, the government abandons the military judge's rationale on both the relevance of the evidence of the proffered Mil. R. Evid. 412 evidence and on the Mil. R. Evid. 403 analysis. While seemingly conceding that the military judge abused his discretion in both of these areas, the government substitutes new arguments, not raised at trial or articulated by the military judge. As analyzed below, the government's new arguments are equally unavailing.

1. The excluded history between the victim and appellant was relevant.

The relevance of the history between MC and appellant lies at the at the heart of the Mil. R. Evid 412 issue. Appellee incorrectly argues throughout their brief that evidence of consent was *irrelevant*, because the charging language alleged assault on a person who was "asleep, unconscious, or otherwise unaware".

(Appellee Br. 7, 12-16, 18- 20, 24). As such, appellee contends that "consent was never at issue in this case." (Appellee Br. 18); *see also* (Appellee Br. 12-16). The government argues that "[b]y solely alleging that MC was legally unable to consent at the time of the offense, the government 'effectively removed from the equation at trial any issue of consent.'" (Appellee Br. 14) (quoting *United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016)).

This was not the rationale employed by the military judge. *See* (JA 327-33). To the contrary, the military judge found that the evidence *was* relevant as to consent. (JA 332) (sealed) ("As to consent, this evidence has some relevance."). However, citing to *United States v. Andreozzi*, 60 M.J. 727 (Army Ct. Crim. App. 2004), the military judge minimized the relevance because of supposed dissimilarity between the prior encounter and the charged encounter. (JA 332). The government now abandons the military judge's rationale regarding dissimilarity and does not even cite to *Andreozzi* in its brief. Appellant's interpretation is that the government is conceding that *Andreozzi* cannot justify the exclusion of this evidence. Instead, the government pivots to a new rationale, neither argued at trial nor cited by the military judge, that the evidence was irrelevant because consent was irrelevant.[1]

[1] In an apparent attempt to reconcile its new argument with the military judge's ruling, appellee attempts to argue that: "The military judge correctly found that the proffered evidence was irrelevant to the factual question of whether or not MC was

Appellee's argument that evidence of consent was irrelevant is misguided and not supported by the record. Throughout the trial, the defense theory was that sexual intercourse had occurred on 5 May 2018 but was consensual. *See, e.g.*, (JA 106-07, 200-01, 206-07, 213-14, 216). The relevance of this defense was obvious; if the named victim consented to the intercourse in question, then, by definition, she was not asleep. The government now argues that the defense of consent was irrelevant, even though it would conclusively disprove guilt.

It is axiomatic that the government has the burden to prove guilt beyond a reasonable doubt. *United States v. Paul*, 73 M.J. 274, 278-79 (C.A.A.F. 2013) (internal citations omitted); Rule for Courts-Martial [R.C.M.] 918(c). To meet this burden: "The proof must exclude every fair and rational hypothesis of the evidence except that of guilt." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 2-5 (10 Sep. 2014) [Benchbook]. As such, the accused, of course, has the right to present hypothesis that would exclude guilt.

To accept the government's argument, this Court would have to conclude

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able to consent to sex." (Appellee Br. 13). While appellee does not provide a citation, a review of the military judge's ruling demonstrates that this is an inaccurate statement of the record. *See* (JA 327-33) (sealed). To the contrary, the military judge specifically found that the evidence *was* relevant as to consent. (JA 332) (sealed) ("As to consent, this evidence has some relevance."). However, the military judge minimized the relevance because of supposed dissimilarity between the prior encounter and the charged encounter (a line of argument the government now abandons). (JA 332) (sealed).

that the right to present a defense does not include the right to present an alternate theory. The government cites no authority whatsoever for such a radical proposition and appellant certainly cannot find any.[2]

The Air Force Court recently rejected this line of argument, explicitly holding that Mil. R. Evid. 412 evidence tending to show consent was relevant, despite a charging theory alleging incapacity to consent:

> [A]lthough Appellant was charged with committing a sexual act on SrA JQ while she was incapable of consenting due to impairment by an intoxicant, we acknowledge evidence of statements or acts by SrA JQ prior to the charged incident that tended to indicate either that SrA JQ consented to sexual acts with Appellant, or that Appellant might reasonably believe she consented, could nevertheless be relevant to the Defense's theory of the case. ***In other words, consent (or reasonable mistake thereof) was a relevant issue because if SrA JQ actually consented, then she necessarily had the capacity to consent***, and therefore Appellant could not be guilty on the theory of sexual assault charged by the Government—that SrA JQ was incapable of consenting due to impairment."
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> *United States v. Yates*, No. ACM 39444, 2019 CCA LEXIS 391, at *64 (A.F. Ct. Crim. App. Sept. 30, 2019) (emphasis added) (citation omitted).

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[2] The government cites *Riggins* for the proposition that: "By solely alleging that MC was legally unable to consent at the time of the offense, the government 'effectively removed from the equation at trial any issue of consent.'" (Appellee Br. 14). *Riggins*, however, is wholly inapplicable to the present case. In *Riggins*, this Court held that assault consummated by battery under Article 128, UCMJ, 10 U.S.C. § 928 (2012) was not a lesser included offense of Article 120, UCMJ, 10 U.S.C. § 920 (2012) offenses which alleged the modality of placing the victim in fear of her military career because, *inter alia*, lack of consent was an element of the former offense but not the latter. The holding of *Riggins* simply has no bearing on the present issue and merely quoting half a sentence from it without context lends no weight to the government's argument.

Similarly, in *United States v. Rankin*, the Air Force Court held that exclusion of evidence of "playful" "flirting" during a previous overnight camping trip was error when appellant was charged with nonconsensual digital penetration while victim was asleep. No. AMC 39486, 2019 CCA LEXIS 486 (A.F. Ct. Crim. App. 2019) (unpub. op.).

The government's argument that evidence supporting an alternate theory of consent was irrelevant is directly contrary to these holdings and is untenable. This standard would leave servicemembers charged with sexual misconduct involving a sleeping or incapacitated victim completely unable to present a defense.[3]

[3] Appellee further argues that that the May 3, 2018 encounter may not have actually taken place. (Appellee Br. n.3) ("Appellee does not concede that MC and appellant actually did engage in prior consensual activity given that MC affirmatively denied it when asked.") (citing (JA 324) (sealed)); (Appellee Br. 18) (arguing that MC's denial would confuse and mislead the members and create a "trial within a trial."). As correctly noted by the military judge, in applying Mil. Evid. 412, the military judge is not asked to determine if the proffered evidence is true. (JA 330) (sealed); *see also United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010) (citing *United States v. Banker*, 60 M.J. 216, 224 (C.A.A.F. 2004)). That said, while the government "does not concede" that MC and appellant kissed on May 3, 2018, and obviously does not concede MC's participation during the charged event on May 5, 2018, the government simultaneously does not deny that appellant had marks on his neck and chest in the immediate aftermath of these dates. To the contrary, assistant trial counsel acknowledged that government witness interviews had confirmed that witness(es) would testify to these marks, and to appellant's attempts to cover them with makeup (concealer). (JA 355) (sealed). This begs the question: where does the think these marks on appellant's neck and chest came from? Either option (that MC left them on May 3, 2018 or that she left them on May 5, 2018) would devastate the government's case. In the former case, she had directly lied to government counsel by denying the prior

Indeed, the relevance of the defense's alternate theory of consent is so self-evident, that it can be demonstrated by reference to *appellee's own brief* before the Army Court. When addressing legal and factual sufficiency, the government argued the evidence was sufficient precisely *because* appellant failed to present a compelling alternate theory of consent: "While there was sufficient evidence supporting MC's testimony, *there was minimal evidence supporting an alternate version of events*. *The only evidence that supported that MC and appellant may have engaged in a consensual sexual encounter* during the charged period came from two close friends of appellant, whose bias in his favor, and against MC, shone throughout their testimony." (Appellee's Army Court Br. 45) (emphasis added). The exculpatory value of evidence of consent (and the inculpatory prejudice of the lack of such evidence) is so obvious that appellee's own brief highlighted this exact issue. The government cannot credibly argue that the evidence was sufficient *because* the defense failed to present an alternate theory of consent, and then turn around and argue that excluded evidence supporting an alternate theory of consent was irrelevant.

A similar dynamic is present in appellee's statement of facts before this

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kissing. (JA 324) (sealed). In the latter case, the charged conduct itself clearly did not happen. This further demonstrates why the panel should not have been artificially deprived of this evidence.

Court. (Appellee Br. 1-3). The government paints a picture of a new soldier arriving at Fort Sill, OK, and almost immediately being taken advantage of by appellant late at night, without warning. In a vacuum this narrative may seem compelling. Consider how this narrative would completely change, however, with the insertion of the excluded evidence: that MC and appellant had engaged in a consensual encounter on May 3, 2018. The narrative crumbles into even smaller fragments when MC's level of aggressiveness and assertiveness in the prior encounter is considered. The fact that the government, even on appeal, is using the artificial exclusion of the sexual history between MC and appellant to spin its narrative of an opportunistic predator praying on a passive new arrival further demonstrates the relevance of the excluded evidence.

The reality is that, both a matter of both common sense and well-settled law, it is obvious that the existence of a sexual history[4] between the accused and accuser is highly relevant in a sexual assault case. This is the whole rationale behind the Mil. R. Evid. 412(b)(2) exception and there is substantial overlap with

[4] Appellee takes issue with appellant's characterization of the May 3, 2018 encounter between appellant and MC as a "sexual encounter." (Appellee Br. 4, n.1). Appellee characterizes it instead as "romantic (though non-sexual) encounter." (Appellee Br. 4). If appellee does not believe the encounter was sexual, then it is hard to understand their position that it should have been excluded under Mil. R. Evid. 412, which, by definition, operates only to exclude *sexual* behavior. The encounter certainly fell within Mil. R. Evid. 412's definition of "sexual behavior," and the physical portion of the encounter met Article 120, UCMJ's definitions of "sexual contact" and, likely, "sexual act."

the Mil. R. Evid. 412(b)(3) analysis. [5]

While the existence of a sexual history between accused and accuser is routinely an important factor in sexual assault cases, the relevance here is further increased by the fact that MC and appellant had only recently met. As such, it was vital to place May 5, 2018, encounter into context of the rapidly developing sexual relationship between them. Generally speaking, consensual sexual encounters do not spontaneously erupt out of nowhere, especially between people who just recently met. Rather, it is common sense that sexual relations generally progress over time, with an initial encounter, often involving a "lower" level of sexual conduct, developing into a higher level of sexual conduct, such as sexual intercourse. This is exactly what happened in the present case, but the panel never knew it, because the history between the participants was artificially hidden from them. Without the context of their previous consensual encounter, the defense was placed in the untenable position of arguing that appellant had entered the barracks room of a female soldier whom he had only met a few days prior, in the middle of the night, and simply spontaneously began having consensual sex with her.

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[5] Appellant specifically articulated this relevance in his motion, arguing, *inter alia*, that one consensual encounter led to another. (JA 306) (sealed). Appellant additionally highlighted that the consensual encounter from directly before the charged date was particularly relevant in light of the fact that MC also voluntarily slept in the same bed as appellant, *the night after* the charged date, creating a pattern both before and after the charged event. (JA 306) (sealed).

In sum, the relevance of the sexual history between MC and appellant was high and obvious. Appellant was entitled to present this evidence to the panel and confront his accuser about it. As seemingly conceded by the government, the military judge's rationale focusing on supposed dissimilarity was untenable and the government's new argument that "consent was never at issue" is equally unavailing.

2. No Mil. R. Evid. 403 concerns justified the evidence's exclusion.

The Mil. R. Evid. 403 analysis here is also critical, especially given that Mil. R. Evid. 403 was the mechanism by which the military judge ultimately excluded the evidence. At trial, the military judge cited only one Mil. R. Evid. 403 concern: that the evidence was unfairly prejudicial because the factfinder may unfairly interpret the evidence as an invitation for sexual abuse. (JA 332) (sealed). Once again, appellee now abandons the military judge's articulated rationale about unfair prejudice, and instead suggests new Mil. R. Evid. 403 concerns (not cited by the military judge): "the dangers of confusing the issues and misleading the members." (Appellee Br. 18).

The government acknowledges appellant's arguments that (1) the military judge's only articulated Mil. R. Evid. 403 concern related to a statement made by MC in connection with a photograph and (2) this sole articulated Mil. R. Evid. 403 concern could not justify the exclusion of physical kissing between MC and

appellant. (Appellee Br. 17). The government does not attempt to dispute these seemingly indisputable facts. (Appellee Br. 17). Appellant interprets the government's answer as a concession that the sole Mil. R. Evid. 403 concern articulated by the military judge could not justify the exclusion of the gravamen of the proffered Mil. R. Evid. 412 evidence: the physical kissing.

Instead, appellee pivots to new Mil. R. Evid. 403 arguments, not articulated by the military judge, arguing that "unfair prejudice is not the only danger contemplated by the rule." (Appellee Br. 17). Appellee continues that "the relevance [of the prior kissing] was *de minimis* and overwhelmingly outweighed by the dangers of confusing the issues and misleading the members." (Appellee Br. 18). Appellee puts forth two arguments in support of these new conclusions: (1) the relevance was minimal because "consent was never in issue",[6] and (2) because "MC denied that the proffered consensual encounter on May 3 ever took place . . . [l]itigating the issue would have introduced a trial within a trial on a collateral issue, pointlessly diverting the panel members' attention from the actual elements of the charged offenses." (Appellee Br. 18).

[6] It is perhaps telling that appellee builds their Mil. R. Evid 403 analysis, based on Mil. R. Evid. 403 concerns never articulated by the military judge, on a Mil. R. Evid. 401 analysis that also was never articulated by the military judge. It does bode well for the soundless of the military judge's ruling that even the government defending it must abandon both his relevance analysis and his prejudice analysis in order to even articulate a defense of his conclusion.

With respect to the argument that "consent was never in issue," appellant will not repeat the above analysis as to why this theory is fatally flawed. However, it is worth nothing that the government here is tying their Mil. R. Evid. 403 rationale directly to their Mil. R. Evid. 401 rationale. Indeed, this is not a unique Mil. R. Evid. 403 argument at all, but merely the inverse of the government's contention that the evidence was irrelevant (and therefore the lack of probative value would by definition be outweighed by other factors). If this Court accepts the government's Mil. R. Evid. 401 argument, that evidence of consent was irrelevant, then it need not reach Mil. R. Evid. 403 at all. If, however, this Court rejects the government's argument that appellant was not entitled to present evidence of consent, then this Mil. R. Evid. 403 argument, by definition, must also be rejected.

With respect to the argument that the evidence would have confused or mislead the members because MC denied the prior encounter, this is simply an attempt to get around the prohibition on military judge's weighing the credibility of Mil. R. Evid. 412 evidence as a prerequisite to admission, by shifting this otherwise-prohibited analysis into Mil. R. Evid. 403. Again, it is black letter law that the weight of Mil. R. Evid. 412 evidence is for the factfinder to decide. *See Banker*, 60 M.J. at 224 ("[I]t is for the members to weigh the evidence and determine its veracity."); *see also Leonhardt*, 76 M.J. at 828–29 (finding

prejudicial constitutional error in the exclusion of Mil. R. Evid. 412, despite the fact that the victim "presumably have denied the proffered post-offense consensual sexual encounters if she had been cross-examined about them."). The government cites no authority that Mil. R. Evid. 412 evidence can be excluded via Mil. R. Evid. 403 merely because the named victim denies it.[7] Indeed, this would give the victim a de-facto veto over all Mil. R. Evid. 412 evidence. As cited above, the Air Force Court directly addressed a similar issue in *Leonhardt* and pointed out that:

> The Government notes that Ms. MG would presumably have denied the proffered post-offense consensual sexual encounters if she had been cross-examined about them. However, it is possible the members might not have believed her, or might have harbored greater doubts about her testimony and credibility more generally. In addition, if the military judge had not excluded the proffered evidence, Appellant might have testified in findings and the members might have found him credible enough to raise reasonable doubts about Ms. MG's testimony.
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> 76 M.J. at 828–29.

In the present case, MC's denial would likely have rung particularly

[7] Appellee cites to *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) for the proposition that: "the military judge must consider the 'possible distraction of the factfinder that might result from admission of the testimony.'" (Appellee Br. 18). In *Berry*, this Court considered that admission of evidence that the accused, at the age of thirteen, engaged in an act child molestation, when he was charged with similar conduct occurring eight years later under Mil. R. Evid. 413. This Court ultimately found admission of the evidence improper, citing multiple errors and omissions in the military judge's ruling. *Berry* has extremely limited relevance to the present case and certainly does not stand for the proposition that otherwise admissible Mil. R. Evid. 412 evidence can be excluded merely because the victim denies it (in direct contradiction of this Court's on-point case law in *Roberts* and *Banker*).

hollow in that (1) the defense had substantial corroborating evidence that the encounter did, in fact occur, and (2) MC admitted to lying about the charged assault itself in *multiple* prior statements. (JA 123-24, 127, 203) (admitted lie about being pushed and held down); (JA 049, 127) (admitted lie about appellant spending night in room); (JA 046-47, 118) (admitted lie to CID about timeline).[8] This Court should reject this rationale because (1) there is no law to support the idea that Mil. R. Evid. 403 can be used to exclude otherwise admissible Mil. R. Evid. 412 evidence merely because the victim denies it, (2) there is significant case law directly stating that a victim-denial should not result in exclusion of otherwise admissible Mil. R. Evid. 412 evidence, (3) the military judge never cited this rationale in the first place, (4) even if the weight of the evidence were considered it would cut strongly in appellant's favor, and (5) accepting a rule that a mere victim-denial would justify exclusion of Mil. R. Evid. 412 evidence would largely destroy the protections of Mil. R. Evid. 412's delineated exceptions.[9]

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[8] The government omits any mention of these admitted lies from its statement of facts (Appellee Br. 1-6) or its prejudice argument (Appellee Br. 22-24).

[9] As a closing note on the Mil. R. Evid. 403 issue, appellee cites the military judge as saying that "the concerns under Mil. R. Evid. 403 were 'very great.'" (Appellee Br. 18) (citing JA 332) (sealed). For the sake of accuracy, it is worth noting that the military judge's ruling does not contain this quotation, at the cited page or on any other page. Appellate defense counsel raised this issue with appellate government counsel, who conceded that, upon further review, this quotation does not appear in the military judge's ruling.

In sum, the military judge's sole articulated Mil. R. Evid. 403 concern could not justify the exclusion of this evidence and the government's newly raised Mil. R. Evid. 403 arguments are equally unavailing.

3. Appellant was prejudiced by the exclusion.

Appellee argues that "assuming arguendo that the military judge erred by excluding the proffered evidence, such error had no bearing on the outcome of his case." (Appellee Br. 22-24).[10]

Appellee first argues that "[b]y convicting appellant of the charged sexual assault offense, the panel found that MC was asleep at the time of the sexual act. As such, the panel concluded beyond a reasonable doubt that MC was legally unable to provide consent." (Appellee Br. 22). This argument is based on logical fallacy. The fact that appellant was convicted *without the benefit of the excluded evidence* does not support a conclusion that its exclusion was harmless. If anything, this demonstrates, as argued by appellee themselves before the Army Court, that the defense suffered from its inability to present evidence supporting the "alternate version of events . . . that MC and appellant may have engaged in a consensual sexual encounter . . . ." (Appellee's Army Court Br. 45). This argument can be dispensed

[10] Appellee articulates and applies only the test for nonconstitutional evidentiary errors, in apparent reliance on the fact that this Court will not find the excluded evidence was constitutionally required. (Appellee Br. 23).

with dispatch.

Appellee next argues that: "The government's case was strong." (Appellee Br. 23). The only facts the government articulates in support of the government's case are (1) that MC made an outcry statement to her mother and wrote a poem and (2) that MC articulated all the elements of the offense. (Appellee Br. 23). Starting with the latter contention, articulating the elements of the offense does not make the government case "strong." To the contrary, articulating the elements is the absolute floor in any prosecution. To the former point, the outcry to MC's mother is of some relevance, though the testimony on this point was not entirely clear or favorable to the government. For example, MC also admitted to lying to her mom in this same text conversation. (JA 238) ("Q. So you lied to your mom? A. Yes, sir").[11] More fundamentally, however, one piece or category of evidence in the government's favor hardly makes the case "strong," especially when the government wholesale omits much more significant evidence undermining its case and MC's credibility, to include the uncontested fact that MC admitted to lying about the charged assault itself in

[11] The evidence about the poem, which was largely focused on MC's boyfriend, was complex and somewhat voluminous. A lengthy exploration of the issue is not justified here, but it is fair to say that the poem very much cut both ways, with MC acknowledging it was an artistic expression and contained knowingly untrue elements. *See* (JA 218) (defense closing arguments about poem).

multiple prior statements. (JA 123-24, 127, 203) (admitted lie about being pushed and held down); (JA 049, 127) (admitted lie about appellant spending night in room); (JA 046-47, 118) (admitted lie to CID about timeline). It is disingenuous for the government to argue the evidence was strong while omitting the undisputed fact that the complaining witness admitted to lying directly about the charged conduct multiple times. The government also glosses over the fact that a third-party witness testified that, the day after the charged sexual encounter, MC told him that there *had been a consensual sexual encounter between herself and appellant*, that she regretted it, and that she was concerned about her reputation. (JA 200). Perhaps, based on the government's unique theory about the irrelevance of consent, even the named victim stating the charged offense had been consensual is of limited relevance. Appellant's original brief addressed numerous additional weaknesses in the government case, none of which the government substantively address, in his original brief. (Appellant Br. 28-31). There is no colorable argument on this record that the government's case was strong.

Finally, appellee returns to the argument that "the evidence was immaterial because the issue (or issues) for which the evidence was offered was unimportant with respect to the fundamental question of whether or not

MC was able to consent to sex with appellant on May 5." (Appellee Br. 23). In other words, appellant could not have been prejudiced because "consent was never at issue in this case." (Appellee Br. 18). As articulated twice above, appellant adamantly disagrees with appellee's argument that evidence of consent was irrelevant. With respect to a prejudice analysis, however, this argument is doubly misplaced. The government does not explain how the evidence could have been irrelevant, but its exclusion could still have been erroneous. If the Court agrees the evidence was irrelevant, then its exclusion was not error, and a prejudice analysis need not be reached.

Notwithstanding these arguments by appellee, the record is clear that appellant was prejudiced by the exclusion of this vital evidence. *See* (Appellant Br. 28-33).

4. The exclusion of the res gestae evidence was error.

With respect to the res gestae evidence, there can be no doubt that appellant was constitutionally entitled to present evidence of participation and consent during the res gestae of the charged event. Indeed, appellee seemingly acknowledges as much by stating "the marks allegedly left by the victim would undoubtedly evince MC's participation and would be relevant to the factfinder's determination of whether she was asleep at the time of the sexual encounter." (Appellee Br. n.4).

Nevertheless, appellant was prevented from presenting this evidence because (1) the new military judge at trial erroneously ruled that the prior military judge had excluded all evidence of marks on appellant's body and (2) the military judge erroneously asked for an offer of direct evidence as a prerequisite to the admission this circumstantial evidence of participation and consent during the res gestae of the charged offense.

At the heart of the military judge's error here was his erroneous ruling that the prior military judge had excluded all evidence of marks on appellant's body. At the outset of the mid-trial Article 39a session, the new military judge directly ruled, twice, that the prior military judge had excluded all evidence of marks on appellant's body. (JA 355-56) (sealed).

This ruling was erroneous because the original military judge unambiguously *did not* exclude all evidence of marks on appellant's body. The prior military judge's ruling stated: "Defense has not established an exception(s) for the proffered M.R.E. 412 evidence." (JA 333) (sealed). However, the military judge also unambiguously stated on the record that marks left during the charged offense were "not 412 evidence." (JA 347) (sealed) ("If it's during the incident in question, it's res gestae. *It's not 412 evidence*.") (emphasis added). This non-412 evidence clearly fell outside his ruling, which addressed only "the proffered M.R.E. 412 evidence."

As such, the new military judge's ruling that the prior military judge had excluded all evidence of marks on appellant's body was unambiguously erroneous. When defense counsel attempted to explain this to the new military judge, the military judge ordered him to stop speaking. (JA 392) (sealed).

While is not necessary for this Court to determine *why* the military judge errored in this way, it is not difficult to imagine how and why this error likely occurred. The replacement military judge likely read his predecessor's written ruling but did not read the transcript of the prior Article 39a session, where the original military judge specifically said that marks left during the charged offense were "not 412 evidence", but rather res gestae evidence.

Appellee nonetheless argues that "[t]he evidence was properly excluded" because appellant was "[u]nable to even connect his marks to the May 5 sexual assault". (Appellee Br. 22). Appellant cites to Mil. R. Evid. 104(b), presumably for the proposition that: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." (Appellee's Br. 22). While not citing to Mil. R. Evid. 104(b), the military judge went down a similar path, repeatedly asking defense counsel what evidence was before

the court that the marks were caused during the charged act. (JA 357-58) (sealed). This was error, and the government's new citation to Mil. R. Evid. 104(b) in no way justifies it. In *United States v. Acton*, the CMA explained the proper application of Mil. R. Evid. 104(b):

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence.
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> 38 M.J. 330, 333 (C.M.A. 1993) (quoting *Huddleston v. United States,* 485 U.S. 681, 690, (1988) (ellipses in original).

The CMA further observed that, when considering Mil. R. Evid. 104(b): "The threshold for this prong of admissibility is low." *Id.* (citing *United States v. Dorsey,* 38 MJ 244, 246 (C.M.A. 1993)).

Appellant attempted to offer two witnesses' testimonies of their observation of physical marks on appellant's body in the immediate aftermath of the charged assault. *See* (JA 356) (sealed). To use the framework of Mil. R. Evid. 104(b), the panel could reasonably have found that the presence of these marks (distinctive physical marks such as one may receive from consensual sexual activity) resulted from consensual sexual activity the night before. As such, the low threshold of Mil. R. Evid. 104(b) was clearly met. There was no need for the defense to present evidence

directly connecting the marks on appellant's body to the charged assault as a prerequisite to the admission. That is not how Mil. R. Evid. 104(b) works.

Put another way, the marks were *circumstantial evidence* of participation and consent during the charged encounter. Indeed, this is the very definition of circumstantial evidence. As the adage goes, "if there was evidence the street was wet in the morning, that would be circumstantial evidence . . . it rained during the night." Benchbook, para 7-3. If, as in this case, appellant had marks on his neck and chest in the morning, that would be circumstantial evidence that someone had aggressively kissed him the night before. Appellant should have been allowed to introduce this textbook circumstantial evidence, and then be allowed to argue reasonable inferences therefrom, to include that MC had participated in the May 5, 2018 sexual encounter. *See* R.C.M. 919(b).

The military judge erred by asking for an offer of direct evidence as a prerequisite to the admission of this textbook circumstantial evidence. Indeed, it begs the question: what direct evidence did the military judge expect the defense to put on? It is unclear either in the military judge's confusing record statements or in appellee's brief exactly what evidence appellant supposedly should have been required to present as a prerequisite to admission. The only potential sources of such direct evidence would have

been testimony from either appellant or MC. MC, obviously, would not supply the information and appellant, as was his right, elected not to testify. As such, the military judge was asking the defense to do the impossible. No rule of evidence requires the presentation of direct evidence as a prerequisite to the admission of circumstantial evidence and the military judge erred by imposing such a requirement.[12]

Although the military judge never cited to Mil. R. Evid. 403 in excluding the res gestae evidence, appellee goes on to argue that its exclusion was proper under that rule:

> To the limited extent that the marks, without context, may have been relevant, the danger of undue prejudice substantially outweighed any probative value. *See* Mil. R. Evid. 403. Providing the members with

[12] Appellee argues in a footnote that appellant waived the res gestae issue. (Appellee Br. n.5). Trial defense counsel raised the issue of the res gestae evidence at a pretrial Article 39a session (even though he was not obligated to) (JA 40-41) (sealed), secured a direct statement by the first military judge that it was res gestae evidence and would not fall under Mil. R. Evid. 412 (JA 347) (sealed), and vigorously argued for its omission when the government nonetheless objected under Mil. R. Evid. 412 at trial (JA 390-94) (sealed). This is certainly not waiver. While it is true that trial defense counsel eventually abandoned his effort to admit the evidence, it was only after he was repeatedly asked to do the impossible and unnecessary by presenting direct evidence linking the marks to the charged assault as a prerequisite to admission. Trial defense counsel's record statements must also be viewed in light of the military judge's harsh criticism, to include cutting him off multiple times and ordering him to stop speaking as he attempted to create a record. *See, e.g.*, (JA 357). Finally, trial defense counsel did not abandon his effort to admit the evidence until long *after* the military judge's erroneous ruling that the prior military judge had excluded all evidence of marks on appellant's body. *See* (JA 356-57) (sealed). Waiver, of course, cannot occur after a ruling has already been made over defense objection.

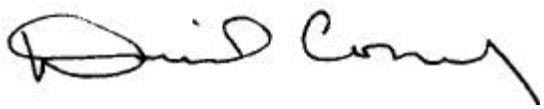
> evidence of marks on appellant, without context, would leave them confused.
>
> (Appellee Br. 22)

It is highly unlike that a panel of senior military members would be left befuddled about how marks got on a man's neck and chest the day after a sexual encounter.

Regarding "context," if the government wanted to argue a possible alternative source of the marks, they were free to do so. The only limitation on the parties' exploration of the context/origin of the marks was the limitation artificially emplaced by the court's Mil. R. Evid. 412 ruling, excluding evidence of the May 3, 2018 encounter. It is true that this ruling would prohibit the panel from considering whether the marks might have been exclusively caused by the May 3, 2018 encounter (because they were kept ignorant of this encounter's occurrence). That said, to the extent this limitation created an artificial barrier to evidence and arguments about the source of the marks, appellant certainly cannot be held responsible for it. The court made a choice, over appellant's motion to the contrary, to artificially limit the panel's access to this evidence. The government (or the military judge) cannot later complain that this artificial limitation might result in the panel receiving less than a full contextual picture.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilt for the Specification of Charge I, Charge I, and the sentence.



DANIEL CONWAY
Civilian Appellate Defense Counsel
Gary Myers, Daniel Conway and
Associates, Attorneys-at-Law
20079 Stone Oak Parkway,
Suite 1005-506
San Antonio, TX 78258
Tel. 210-934-8265 (UCMJ)
Fax. 603-529-3455
conway@militaryattorney.com
www.mcmilitarylaw.com
USCAAF Bar Number 34771

TUMENTUGS ARMSTRONG
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
Tel. 703-693-0692
tumentugs.d.armstrong.mil@army.mil
USCAAF Bar Number 37591

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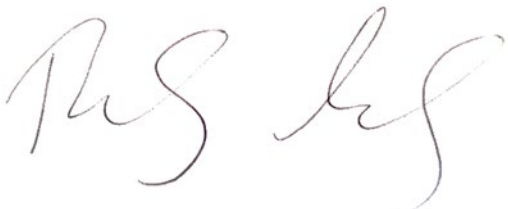

TUMENTUGS ARMSTRONG
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
Tel. 703-693-0692
tumentugs.d.armstrong.mil@army.mil
USCAAF Bar Number 37591

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. St. Jean, Crim. App. Dkt. No. 20190663, USCA Dkt. No. 22-0129/AR was electronically filed with the Court and Government Appellate Division on July 8, 2022

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736