IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Army Misc. Dkt. No. 20130833
Sergeant (E-5) KENDALL HILLS, United States Army, Appellant	)	USCA Dkt. No. 15-0767/AR

HEATHER L. TREGLE
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF No. 36329

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Chief, Complex Litigation
Defense Appellate Division
USCAAF No. 26450

CHARLES D. LOZANO
Lieutenant Colonel, Judge Advocate
Deputy Chief, Defense Appellate Division
USCAAF No. 36344

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S MOTION TO USE THE CHARGED SEXUAL MISCONDUCT FOR MILITARY RULE OF EVIDENCE 413 PURPOSES TO PROVE PROPENSITY TO COMMIT THE CHARGED SEXUAL MISCONDUCT.

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, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On July 18 and September 23-25, 2013, at Fort Knox, Kentucky, an enlisted panel sitting as a general court-martial convicted Sergeant (SGT) Kendell Hills of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). SGT Hills was found not guilty of sexual assault (two specifications) in violation of Article 120, UCMJ. The enlisted panel sentenced SGT Hills to confinement for six months, reduction to the grade of E-1, and a bad-conduct discharge. The convening authority approved the findings and sentence as adjudged.

On June 25, 2015, the Army Court affirmed the findings and the sentence. (JA 1). Sergeant Hills was notified of the Army Court's decision and petitioned this Court for review on August 24, 2015. On January 19, 2016, this Honorable Court granted appellant's petition for review.

Statement of Facts

Sergeant Hills was charged with three specifications of Article 120, UCMJ, which arose from one course of conduct on one occasion. (JA 17). Before trial, the government moved to introduce evidence to prove "propensity" under Military Rule of Evidence (Mil. R. Evid.) 413. (JA 281). The evidence the government sought to introduce for propensity purposes was The Charge and its specifications.

(JA 281). The defense objected. (JA 290). The military judge granted the motion (JA 298) and instructed the panel as follows:

> However, evidence that the accused committed a sexual assault offense, and in this case that's the sexual assault offenses alleged in specifications 1 and 2 of The Charge and the sexual contact offense alleged in Specification 3 of The Charge, this may have a bearing on your deliberations in relation to the other charged sexual assault offenses that only under the circumstances I am about to describe:
>
> First, you must determine by a preponderance of evidence that it is more likely than not that the sexual assault offense occurred;
>
> If you determine by a preponderance of the evidence that one or more of the offenses alleged in specifications 1, 2, or 3 of The Charge occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of one or more those offenses [sic], you may nonetheless then consider the evidence of such offenses, for its bearing on any matter to which it is relevant in relation to the other sexual assault offenses;
>
> You may also consider the evidence of such other acts of sexual assault for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault.

(JA 247-48).

The military judge also provided a standard spill-over instruction to the panel. (JA 246-47). The military judge also included in his instructions:

> Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one sexual

> assault creates no inference that the accused is guilty of any other sexual assault. However, it may demonstrate that the accused has a propensity to commit that type of offense.

(JA 249).

Before announcing its findings, the panel informed the military judge that they had "a reconsideration of a finding." (JA 270). After being instructed on reconsideration, the panel returned to deliberate. The panel then found SGT Hills not guilty of specifications 1 and 2, and guilty of Specification 3 and The Charge. (JA 274).

Summary of Argument

The military judge abused his discretion by granting the government motion to use Mil. R. Evid. 413 solely to one event charged under three separate specifications. Such use was improper because it eroded SGT Hills' constitutional presumption of innocence. Neither the plain language nor legislative history indicate Mil. R. Evid. 413 should be used for contested charged conduct that occurred on one occasion with one victim. Even if this Court finds Mil. R. Evid. 413 can be applied under those circumstances, the military judge abused his discretion in allowing the specifications to be used for Mil. R. Evid. 413 propensity purposes because it should have been excluded under Mil. R. Evid. 402 and 403.

Argument

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S MOTION TO USE THE CHARGED SEXUAL MISCONDUCT FOR MILITARY RULE OF EVIDENCE 413 PURPOSES TO PROVE PROPENSITY TO COMMIT THE CHARGED SEXUAL MISCONDUCT.

Standard of Review

Whether a military judge properly admitted evidence under Mil. R. Evid. 413 is reviewed for an abuse of discretion. *United States v. Schroder, 65* M.J. 49, 53 (C.A.A.F. 2007) (citing *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000)).

Law and Argument

In a court-martial in which an accused is charged with sexual assault, Mil. R. Evid. 413 allows the government to introduce evidence of the accused's commission of one or more offenses of sexual assault "for its bearing on any matter to which it is relevant." Mil. R. Evid. 413(a). This rule has been treated as an exception to Mil. R. Evid. 404(b) by military courts. *See Wright*, 53 M.J. at 480 ("[T]he legislative history shows that Rule 413 . . . creates an exception to Rule 404(b)'s general prohibition against the use of a defendant's propensity to commit crimes . . . .").

Procedural safeguards are required to protect an accused from an unconstitutional application of Mil. R. Evid. 413. *Schroder*, 65 M.J. at 55 (citing *Wright*, 53 M.J. at 483); *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009). These safeguards require the military judge to make "threshold findings" that the evidence is relevant under Mil. R. Evid. 401 and 402, to apply a Mil. R. Evid. 403 balancing test, and to properly instruct the panel. Further, the government is required to give proper notice of its intent to use Mil. R. Evid. 413 evidence. *Schroder*, 65 M.J. at 55. In applying Mil. R. Evid. 403, the military judge should consider strength of proof of the prior act (conviction versus gossip), probative weight of the evidence, potential for less prejudicial evidence, distraction of the factfinder, time needed for proof of the prior conduct, temporal proximity, frequency of the acts, presence or lack of intervening circumstances, and relationship between the parties. *Wright*, 53 M.J. at 482.

Evidence offered under Mil. R. Evid. 413 is constitutionally subjected to a thorough balancing test pursuant to Mil. R. Evid. 403. *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001). "When a military judge abuses his discretion in the [Mil. R. Evid.] 403 balancing analysis, the error is nonconstitutional." *United States v. Solomon*, 72 M.J. 176, 182 (C.A.A.F. 2013). A nonconstitutional error requires the government to demonstrate the error did not have a substantial influence on the findings. *Id.*

An error that infringes upon the presumption of innocence deprives the criminal defendant of a fair trial and therefore violates due process. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). When an error is constitutional, an appellant's claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt. *Schroeder*, 65 M.J. at 56 (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)).

The military judge erred in this case by instructing the panel that it could use evidence of the three specifications of sexual misconduct as evidence of propensity for SGT Hills to commit the same offenses. The specifications arose collectively from a single occurrence with a single victim at a single time and a single place. Applying Mil. R. Evid. 413 in this case corrupted the purpose of the rule and resulted in a due process violation by eroding SGT Hills' constitutional right to be presumed innocent of each specification until proven guilty beyond a reasonable doubt. Even if this court does not find that the use of Mil. R. Evid. 413 in this manner eroded SGT Hills' presumption of innocence, application of the rule was error as SGT Hills' offenses arose out of one course of conduct.

a. Military Rule of Evidence 413, when applied solely to contested charged conduct, erodes the presumption of innocence.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This

standard "provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895) (internal quotations omitted)). The Due Process Clause will invalidate any evidentiary rule that violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency, including the presumption of innocence. *See United States v. Lovasco*, 431 U.S. 783, 790 (1977).

Here, the panel was instructed that once it determined by a preponderance of the evidence, *even if they were not convinced beyond a reasonable doubt*, SGT Hills committed one or more of the offenses alleged, then the panel could consider that SGT Hills had a propensity to commit sexual assault. Allowing a panel to consider an accused's propensity to commit sexual assault, generated strictly from charged conduct for which he is cloaked in the presumption of innocence and before the government has proven guilt beyond a reasonable doubt, erodes the "bedrock axiomatic and elementary principle" to a preponderance of the evidence standard. *See Winship*, 397 U.S. at 363.

The government charged SGT Hills with three different specifications of sexual assault, and SGT Hills had a constitutional right to be presumed innocent of

each specification until his guilt was established beyond a reasonable doubt. Sergeant Hills' constitutional presumption of innocence should have superseded any Mil. R. Evid. 413 considerations. However, SGT Hills only enjoyed his constitutional presumption of innocence until the government proved one or more of the charged offenses by a preponderance of the evidence. If this Court finds no error in a military judge applying Mil. R. Evid. 413 solely to contested charged conduct, then the Court should, at the very least, require the government prove at least one of the contested charges beyond a reasonable doubt before allowing a panel to consider that charge for propensity purposes.

The California Supreme Court addressed this very issue in *People v. Villatoro*, 281 P.3d 390, 399-400 (Cal. 2012). The court in *Villatoro* found the "modified instruction did not provide that the charged offenses used to prove propensity must be proven by a preponderance of the evidence. Instead, the instruction clearly told the jury that all offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity." *Id.* at 400. The court held that because the normal preponderance standard was removed and the jury instruction required the government to prove a charge beyond a reasonable doubt before using it for propensity purposes, the instruction "did not impermissibly lower the standard of proof or otherwise interfere with the defendant's presumption of innocence." *Id.*

Citing to *Burton* and *Wright* the Army Court determined that this Court has affirmed the use of evidence of other charged sexual offenses under Mil. R. Evid. 413 to demonstrate propensity. (JA 11). However, neither *Burton* nor *Wright*, addressed whether applying Mil. R. Evid. 413 to *contested* charged conduct is permissible.

This Court made clear that *Burton* was not a Mil. R. Evid. 413 case. In dicta, this Court stated, "The Government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence such as Military Rule of Evidence 404 or 413." *Burton*, 67 M.J. at 152. The Army Court appeared to place heavy emphasis on the fact this Court contemplated Mil. R. Evid. 413 when it included "charged or uncharged" in the above sentence, and thus determined *Burton* affirmed that notion.

Burton's contemplation of applying Mil. R. Evid. 413 to charged conduct makes sense in light of *Wright*. However, *Wright* cannot be read as a blanket authorization to use Mil. R. Evid. 413 for all charged conduct. In *Wright*, this Court upheld the use of charged sexual assaults to prove propensity under Mil. R. Evid. 413. However, while both sexual assaults in *Wright* were charged, they were not both contested. Wright pled guilty to one indecent assault that was later used as propensity evidence for the assault to which he pled not guilty. *Wright*, 53 M.J.

at 478. Thus, when the charged conduct was used for propensity purposes, Wright was no longer presumed innocent as his guilty plea had already been accepted by the military judge.

Whether an offense is charged or not is irrelevant to this Court's determination. The foremost concern is whether the accused had a constitutional presumption of innocence for the offense. If so, then it is improper to infer the accused has a propensity from that offense until the accused's presumption of innocence is overcome beyond a reasonable doubt.

b. The plain language and legislative history of Military Rule of Evidence 413 demonstrate it was not contemplated to be applied solely to charged conduct.

Military Rule of Evidence 413 is a rule of admission, not use. Evidence concerning charged conduct does not require Mil. R. Evid. 413 for admissibility. As discussed above, it is treated as an exception to Mil. R. Evid. 404(b). *Wright*, 53 M.J. at 480. The rule makes "admissible" evidence of the "accused's commission of one or more offenses of sexual assault." Mil. R. Evid. 413(a). Further, the rule requires the government "disclose the evidence to the accused . . . at least 5 days before the scheduled date of trial . . . ." Mil. R. Evid. 413(b). These sections make little sense when the rule is applied to charged conduct as they are rendered superfluous with Rule for Court-Martial (R.C.M.) 701, and Mil. R. Evid. 401 and 402.

When used with charged conduct, Mil. R. Evid. 413 is no longer an exception to 404(b) (which allows otherwise inadmissible evidence to be admitted as contemplated by the plain language of the rule) but instead becomes an exception to the prohibition on spillover. As discussed in *Wright*, "the effect of the new rules is to put evidence of uncharged offenses in sexual assault . . . cases on the same footing as other types of evidence that are not subject to a special exclusionary rule." 53 M.J. at 483 (quoting David J. Karp, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 Chicago-Kent L. Rev. 15, 19 (1994)). When Mil. R. Evid. 413 is used with charged offenses, the evidence is already on the same footing as other evidence and is not subject to Mil. R. Evid. 404(b) because it is charged. There is no purpose in applying Mil. R. Evid. 413 to charged conduct other than bootstrapping the charges and circumventing the requirement that the government independently prove each charge beyond a reasonable doubt. This Court, and more importantly Congress, has never indicated that Mil. R. Evid. 413 could be a permissible exception to the general prohibition on spillover. Moreover, the Constitution would prohibit such an exception.

As this Court did in *Wright*, looking at the legislative history makes clear Congress did not intend for Mil. R. Evid. 413 to be used with contested charged

conduct. The principal House sponsor of Federal Rules of Evidence 413 and 414, Representative Susan Molinari, in discussing the rule, consistently stated the rule applied to "uncharged offenses." *See* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("[T]he new rules for sex offense cases authorize admission and consideration of evidence of an *uncharged offense* for its bearing 'on any matter to which it is relevant.' . . . The practical effect of the new rules is to put evidence of *uncharged offenses* in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule . . . No time limit is imposed on the *uncharged offenses* for which evidence may be admitted." (emphasis added)).

Lastly, in cases such as SGT Hills', the purpose of the rule is perverted. Here, the offenses the military judge used to support the propensity instruction were alleged by one individual. Use of Mil. R. Evid. 413 in this manner appears to make SPC PV more credible, simply because she alleged two different penetrations and one sexual contact. The rule is intended to bolster claims of sexual assault in "he said, she said" cases by allowing the use of multiple victims to support each other's claims. *See* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("[S]uch cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration . . . Similarly, adult-victim sexual assault cases are distinctive, and

often turn on difficult credibility determinations . . . Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches."). Allowing the bolstering of SPC PV's credibility simply because she alleged two different penetrations and a sexual contact improperly expanded Mil. R. Evid. 413 and further undermined SGT Hills' presumption of innocence.

c. One course of conduct cannot generate a propensity to engage in that very course of conduct.

While SGT Hills was charged with three different specifications of sexual misconduct, they all arose from one course of conduct. Even assuming that applying Mil. R. Evid. 413 solely to contested charged conduct is permissible, this Court should not find it permissible when applied to charges arising from one course of conduct. Applying Mil. R. Evid. 413 solely to charged conduct must be logically limited to charges for crimes that occurred, at the very least, on different occasions. The purpose of the rule is for multiple allegations of sexual assault against one defendant, even if the allegations were never charged as crimes or never reported, to be allowed as evidence of the defendant's propensity to commit such crimes. This purpose is only accomplished if such allegations occurred at different times.

Propensity to commit crimes at one time and place cannot logically be established through the commission of those very same crimes at that same time and place with the same victim. Propensity is defined as "a strong natural tendency to do something," proof of which requires establishing a pattern of behavior over time relevant to the alleged crimes. *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/propensity. A pattern of behavior is not evident for acts occurring at the same time and place.

The Army Court found that "[a]ppellant's commission of three sexual offenses during the course of an approximately two hour window of opportunity against the same victim has *some* tendency to demonstrate that appellant has propensity to commit sexual offenses against SPC PV while she was coming in and out of consciousness." (JA 12). The Army Court based this conclusion on *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006), in which this Court stated "[t]he rules of relevance therefore do not require a temporal limitation on the application of [Mil. R. Evid.] 413 . . . ." However, *James* did not address whether one course of conduct could be relevant to whether an accused had a propensity to commit that very same course of conduct. This Court was examining whether an act which occurred after the charged act could be relevant to whether an accused had a propensity to commit an act prior. This Court stated, "It is the fact of the other act that makes it probative, not whether it happened before or after the act

now charged." *Id.* at 221. Here, while there are three specifications, there is no "other act." Sergeant Hills' misconduct was one event, at one time, at one place, with one victim. The Army Court stretched the applicability of *James* to an illogical extreme.

Sergeant Hills engaged in one course of conduct. Just as this Court would not allow the government to use each blow in a physical altercation for Mil. R. Evid. 404(b) purposes, this Court should not allow the government to essentially do the same under Mil. R. Evid. 413 for an alleged sexual assault that resulted in three different specifications.

d. Even if this Court finds Military Rule of Evidence 413 was applicable to SGT Hills' case, the military judge erred in his Military Rule of Evidence 403 balancing test.

Military Rule of Evidence 403 states that relevant evidence is not admissible if its probative value does not substantially outweigh the danger of unfair prejudice, confusion of the issues, or in misleading the panel. Mil. R. Evid. 403. In applying this balancing test to Mil. R. Evid. 413 cases, a court should generally consider the *Wright* factors, previously discussed. However, the *Wright* factors no longer operate as a procedural safeguard when Mil. R. Evid. 413 is applied to charged conduct. When used with charged conduct, the *Wright* factors become a test with only one answer. Thus, if this Court finds that Mil. R. Evid. 413 can be

applied to charged conduct, this Court should reexamine the factors and craft a test that does not merely act as a rubber stamp.

Even if the Court finds the *Wright* factors are still a sufficient procedural safeguard when Mil. R. Evid. 413 is applied to charged conduct, the military judge conducted a Mil. R. Evid. 403 balancing test and discussed all the *Wright* factors, but did not properly apply the law to the facts of this case.

(1) Strength of Proof of Prior Act.

The military judge found the government "presented solid evidence of the alleged sexual acts" in the form of a sworn statement from SPC PV and forty pages of transcribed testimony of SPC PV from the Article 32 hearing. (JA 302). This analysis is wrong in light of how Mil. R. Evid. 413 is designed to be used, and, even if engaging in such an analysis was proper, the military judge ignored key facts and improperly applied the law in coming to his conclusion.

The strength of the proof of the prior act presumes that the evidence at issue is either an uncharged or prior act, as is evidenced in the wording of the factor itself. *See Wright*, 53 M.J. at 482 (stating the first factor as "strength of proof of the prior act – conviction versus gossip," indicating that the acts contemplated by the rule are uncharged, or at the very least occurred on a different occasion.); *see also United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (stating the first factor asks "how clearly the prior act has been proved" and "how seriously

disputed the material fact is."). Case law provides no guidance on how to consider the strength of the proof in a circumstance such as SGT Hills' case where the "prior act" is the contested charged conduct that occurred on the only occasion of misconduct that SGT Hills stood trial for. It is not possible for a military judge to consider the degree to which an allegation of sexual assault "has been proved" during a preliminary hearing of a court-martial convened for the purpose of proving the allegation. The material fact of whether SGT Hills committed any form of sexual assault against SPC PV was disputed to the greatest extent possible through SGT Hill's plea of "not guilty."

Assuming the military judge could perform such mental gymnastics, the judge failed to consider that the Article 32 Investigating Officer recommended the charges against SGT Hills not be referred to court-martial based largely on SPC PV's lack of credibility while testifying at the Article 32. (JA 296). Aside from SPC PV's allegations, the military judge relied upon no other evidence to support his conclusion the strength of proof was sufficient to warrant the evidence probative under Mil. R. Evid. 403.

(2) Probative Weight.

The military judge stated, "The probative weight is high, demonstrating the accused's propensity to sexually assault SPC [PV] while she [was] in and out of consciousness due to intoxication." (JA 302). The military judge erred in applying

this factor for the same reasons he erred in failing to find the evidence irrelevant under Mil. R. Evid. 402--One course of conduct cannot logically be relevant to whether the accused had a propensity to engage in that very course of conduct--and the argument from section c. above applies here as well.

(3) Less Prejudicial Evidence.

The military judge found that neither party presented the court with less prejudicial evidence, and the evidence would be part of the government's case-in-chief. (JA 302). But the military judge failed to consider the *use* of the evidence for propensity purposes, not just the admission of the evidence in general. The less prejudicial alternative to using the evidence for propensity was to simply use the evidence as direct proof of the charged offenses. The military judge consistently relied on the fact the evidence in question was directly related to the charges as support for the notion it was relevant under Mil. R. Evid. 403, but failed to conduct his analysis in light of the purpose of Mil. R. Evid. 413. *See Wright*, 53 M.J. at 482 (citing *United States v. Guardia*, 135 F.3d 1326, 1328 & 1331); *see also Guardia*, 135 F.3d at 1331 ("We hold that a court must perform the same 403 analysis that it does in any other context, but with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413.").

(4) Distraction.

The distraction Mil. R. Evid. 413 introduced into this court-martial highlights that the *Wright* test did not contemplate application of Mil. R. Evid. 413 solely to contested charged conduct. *See Wright*, 53 M.J. at 482 (citing *Enjady*, 134 F.3d at 1433); *see also Enjady*, 134 F.3d at 1433 (including as a factor "the extent to which such evidence will distract the jury from the central issues of the trial."). The military judge found there would be no distraction to the fact-finder because "the [Mil. R. Evid.] 413 evidence *is* the evidence of the alleged sexual offenses." (JA 302). This only makes sense if the evidence in question is not evidence pertaining directly to the charged offenses and is, instead, evidence of other similar crimes that are not the subject of the court-martial.

Here, the *use* of the evidence as propensity, and not the evidence itself, distracts the factfinder from appropriately determining if the government independently proved each element of each offense beyond a reasonable doubt. The military judge was "confident that the detailed instruction the panel [would] receive concerning the use of the evidence [would] decrease any likelihood that the members would be unfairly prejudiced to convict the accused on the bases of such propensity evidence . . . ." (JA 302). While the instruction for Mil. R. Evid. 413 is indeed long, it does not clearly indicate how to resolve the conflict between the use of propensity evidence within the four corners of the charge sheet and the

constitutionally required spillover instruction. The two concepts are logically inapposite. Thus the issue of distraction to the factfinder is not resolved by the instruction.

(5) Time to Prove.

This factor reiterates that Mil. R. Evid. 413 was not contemplated to be used with contested charged conduct. There would be no need to evaluate the "time needed for proof of prior conduct" if the conduct in question was the same conduct that was the subject of the court-martial. *See Wright*, 53 M.J. at 482.

(6) Temporal Proximity, Frequency, and Intervening Circumstances.

These final three factors logically look for acts that are close in time and frequency to establish a likelihood of propensity for an accused to commit sexual misconduct. *See Wright*, 53 M.J. at 482 (citing *Guardia*, 135 F.3d at 1331); *see also Guardia*, 135 F.3d at 1331 (finding the probative value of propensity evidence will depend on "the closeness in time of the prior acts to the acts charged, . . . the frequency of the prior acts, . . . and the presence or lack of intervening circumstances."). The military judge concluded all three factors weighed in favor of admission, specifically the acts happened at the same time and place, to the same victim, there were three sexual assaults, and no evidence of intervening circumstances.

These three factors assume there are multiple occurrences to compare. *Id.* While there are three specifications of sexual misconduct on the charge sheet, there were not three separate instances of sexual assault. The alleged assault occurred, as recognized by the military judge, at a single time and place during an unbroken sequence of events. (JA 302). One alleged continuous transaction gave rise to one charge and three specifications, and a temporal proximity between transactions cannot be established with only one transaction. According to SPC PV, she was going in and out of consciousness and thus had a segmented memory; however, there was no indication there were three separate sexual assaults.

The military judge erred in determining the frequency of the sexual assaults was three when in fact it was one. Frequency, as it relates to establishing propensity to commit sexual misconduct, must logically be established by multiple acts separated by more than mere moments. Similarly, there were no intervening circumstances as this was allegedly one continuous sexual act punctuated that form the bases for three specifications of one charge under the UCMJ. The military judge's rationale in analyzing these last three factors was inconsistent from the intended purpose and function of Mil. R. Evid. 413. Thus he abused his discretion in determining they weighed in favor of admission.

e. Not only can the government not demonstrate any error was harmless beyond a reasonable doubt, but it also cannot show the error did not have a substantial influence on the findings.

The government's case against SGT Hills was not overwhelming. Nor could it even be classified as strong. While the government did not argue propensity in its closing argument, the military judge did instruct the panel that they could consider the specifications for propensity purposes. In cases where a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory, "it is possible that the guilty verdict may have had a proper basis, [but] it is equally likely that the verdict rested on an unconstitutional ground, and we have declined to choose between two such likely possibilities." *Boyde v. California*, 494 U.S. 370, 380 (1990) (quoting *Bachellar v. Maryland*, 397 U.S. 564, 571 (1970)(internal quotations omitted)).

Here, this Court cannot be confident that SGT Hills' conviction did not at least partly rest on the panel's improper consideration of Mil. R. Evid. 413 propensity evidence. While the panel did acquit SGT Hills on two of the three specifications, the acquittals can be more correctly attributed to the overwhelmingly weak government case for the two specifications and any propensity could not have overcome the deficiencies. The same could not be said for Specification 3.

Again, the evidence for Specification 3 was not overwhelming, but the propensity could have potentially pushed the evidence over the reasonable doubt threshold. In fact, the panel announced that it had "a reconsideration of a finding." (JA 270). Considering the evidence for Specification 1 and 2 was identical, it is not likely they reconsidered the finding for one of those specifications. While this Court cannot know what the panel did during reconsideration, it does demonstrate to this Court the government's case was not strong, that this was a close case, and the panel was on the fence in reaching its decision. Something pushed them over the beyond a reasonable doubt threshold and it was likely the impermissible propensity instruction.

Conclusion

Wherefore, SGT Hills requests that this Honorable Court dismiss Specification 3 of The Charge and The Charge.

HEATHER L. TREGLE
Captain, Judge Advocate Appellate
Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703)693-0668
USCAAF No. 36329

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Chief, Complex Litigation
Defense Appellate Division
USCAAF Bar Number 26450

CHARLES D. LOZANO
Lieutenant Colonel, Judge Advocate
Deputy Chief,
Defense Appellate Division
USCAAF Bar Number 36344

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Hills, Crim. App. Dkt. No. 20130833, Dkt. No. 15-0767/AR, was delivered to the Court and Government Appellate Division on February 18, 2016.

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