IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	REPLY 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

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

Issue Granted

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 the Case

On January 19, 2016, this Honorable Court granted appellant's petition for review. On February 18, 2016, appellant filed his final brief with this Court. The government responded on March 21, 2016. This is appellant's reply.

Argument

The government claims that "Appellant challenges the constitutionality of Mil. R. Evid. 413—both facially and as-applied." (Gov't Br. 12). But that is not true.

Sergeant (SGT) Hills is not challenging the constitutionality of Military Rule of Evidence (Mil. R. Evid.) 413, as this Court has already held it to be constitutional. *See United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000). Sergeant Hills' challenge is not to the rule but to the military judge's application of the rule in this case and his erroneous panel instructions. The government is conflating an error that infringes upon a constitutional right (as alleged) with a constitutional challenge to the rule itself (not alleged). The government's misunderstanding of SGT Hills' argument renders a large portion of its brief irrelevant to the Issue Presented.

a. The government's assertion that "once threshold inquiries and procedural safeguards are met, application of Mil. R. Evid. 413 is constitutional" overlooks the notion that a military judge can follow the right test but come to the wrong answer and that error infringes on a constitutional right.

The government asserts there is a "presumption in favor of admission" for Mil. R. Evid. 413. (Gov't Br. 14). Sergeant Hills does not dispute that notion. But that presumption in favor of admission buttresses SGT Hills' argument that the rule is one of admission, not use. Looking to this Court's precedent and the legislative history of the rule, it is clear that the presumption applies to the *admission* of the "evidence of prior sexual offenses." *See Wright*, 53 M.J. 482-83. There is no similar discussion in case law or legislative history demonstrating the government can presumptively argue propensity among already admissible evidence.

The government protests that "Appellant repeats the same argument as was made in *Wright*—that Mil. R. Evid. 413 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." (Gov't Br. 16). However, this is not SGT Hills' argument. Sergeant Hills is not claiming that Mil. R. Evid. 413 and its accompanied propensity offends a deeply rooted principle of justice, but that the military judge erred in applying Mil. R. Evid. 413 in SGT Hills' case, and that error undermined SGT Hills' constitutional presumption of innocence, a deeply rooted principle of justice. *See In re Winship*, 397 U.S. 358, 363 (1970).

b. This Court's precedent does not establish that Mil. R. Evid. 413 is constitutional as applied to contested charged conduct.

The government's assertion that *Wright* already decided and rejected this issue is without merit. In *Wright*, while perhaps superficially similar to SGT Hill's case, there is a distinction which the government does not appear to understand, or at least address. As discussed in SGT Hills' original brief, Wright did not contest both charges, thus he was not constitutionally presumed innocent of the charge to which Mil. R. Evid. 413 was applied. Moreover, because it was a mixed plea, the government would not have been able to introduce the evidence of the other offense to which he previously pleaded guilty without Mil. R. Evid. 413. Thus, as this Court found, *Wright* was "the type of case in which this evidence was designed to be admitted." 53 M.J. at 483. *Wright* did not decide whether it is proper to

apply Mil. R. Evid. 413 to already admissible evidence and allow the panel to presume *anything other than innocence* before the government has proven its case beyond a reasonable doubt.

Next, the government relies on *United States v. Schroder*, 65 M.J. 49 (C.A.A.F. 2007). The government asserts, "The military judge also ruled that the charged rape of appellant's daughter was admissible under Mil. R. Evid. 414 in order to prove appellant had committed indecent acts with the neighbor." (Gov't Br. 18). But that is simply not what happened in *Schroder*. The government attaches great import to the background facts of the opinion in which this Court provided a summary of the military judge's ruling. *See Schroder*, 65 M.J. at 52 ("The military judge ruled that the uncharged acts of molestation with SJS and JPR were admissible under M.R.E. 414 to prove that Appellant had raped JPR. He further determined that the uncharged acts with SJS and JPR, as well as the charged rape of JPR, were admissible under M.R.E. 414 in order to prove that Appellant had committed indecent acts with SRS."). However, later in the *Schroder* opinion, this Court provided the instruction the military actually judge gave:

> However, you may consider the similarities in the testimony of [SJS] and [JPR] concerning any alleged offensive touching with regard to the charged offense of rape. And you may consider the similarities in the testimony of [SRS], [SJS], and [JPR] concerning any alleged offensive touching with regard to the offense of indecent acts with a child.

Id. at 54.

Thus, the military judge's instruction did not instruct the panel it could consider the rape charge for Mil. R. Evid. 414 purposes in relation to the indecent acts charge.[1] While what "alleged offensive touching" means in the *Schroeder* military judge's instructions may be unclear, the bulk of the discussion in *Schroder* makes clear that the government never sought to use one contested charged offense against another under Mil. R. Evid. 414. *Id.* at 51-52. Moreover, even if "alleged offensive touching" encompassed the charged rape, that was not before the court. Schroder claimed "the military judge erred when he admitted the *uncharged acts* with SJS and JPR to prove the single specification of indecent acts with SRS, without qualification." *Id.* at 52 (emphasis added). This Court held that "the military judge did not err in admitting evidence of *uncharged misconduct* with SJS and JPR." *Id.* at 54 (emphasis added). Thus, *Schroder* did not address the issue before the court now.

Finally, the government asserts that the argument "that the government would have to refrain from charging multiple instances of sexual misconduct in order to be able to argue propensity is illogical." (Gov't Br. 21). However, the government' ignores the purpose of Mil. R. Evid. 413. The stated purpose of Mil.

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[1] The Court noted immediately after the actual instruction, "This was the extent of the military judge's instructions regarding the use of SJS's and JPR's testimony admitted under M.R.E. 414." *Schroder*, 65 M.J. at 54.

R. Evid. 413 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 . . . ." *See* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); *see* also *Wright*, 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)). That stated purpose is fulfilled when the government charges all of the sexual misconduct offenses.

Nothing in the legislative history demonstrates that Mil. R. Evid. 413 was designed to undermine the presumption of innocence, nor does the rule do so when used with uncharged misconduct as contemplated by the drafters. Thus, requiring separate trials if the government wants to argue propensity from a charged offense is not illogical when the panel instruction allows the panel to presume the accused has a propensity to commit sexual misconduct before that conduct is proven beyond a reasonable doubt. In those situations, the accused's constitutional presumption of innocence should control.

c. The plain language and legislative history demonstrate Mil. R. Evid. was not contemplated to be used with contested charged conduct.

The government cites to the plain language of Mil. R. Evid. 413, albeit the outdated version, to claim that the rule is a dual purpose rule. (Gov't Br. 22). To

support this claim, the government relies upon *United States v. Williams*, __M.J.__, 2016 CCA LEXIS 128, at *13 (Army Ct. Crim. App. 2016). In *Williams*, the Army Court construed Mil. R. Evid. 413 as a rule of admission when used with uncharged misconduct; and a rule of use when used with charged conduct, Mil. R. Evid. 413. *Id.* However, the legislative history does not support this contention. *See* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("Mr. Speaker, the revised conference bill contains a critical reform that I have long sought to protect the public from crimes of sexual violence—*general rules of admissibility* in sexual assault and child molestation cases . . . ." (emphasis added)). As discussed previously, the purpose of the rule is to make otherwise inadmissible evidence admissible.

The government also accuses SGT Hills of misstating this Court's conclusion in *Wright*. (Gov't Br. 23). To be clear, SGT Hills is not claiming that this Court concluded in *Wright* that the legislative history makes clear Congress did not intend for Mil. R. Evid. 413 to be used with contested conduct. Instead, SGT Hills' argument is that this Court should look to the legislative history, just as this Court did in *Wright*, in determining the proper parameters for 413's use. And upon examination, the legislative history makes clear that Mil. R. Evid. 413 was not contemplated to be used with contested charged conduct.

Finally, the government claims, "The legislative history's use of the phrase 'uncharged misconduct' is more a recognition of the civilian practice of severance than it is a statement that propensity evidence is only appropriate for offenses not contained within the four corners of the charge sheet." (Gov't Br. 23). Yet this contention is completely contradicted by the legislative history. The phrase "uncharged misconduct" is used over and over again because the explicitly stated purpose of the rule is to put evidence on the same footing as other evidence not subject to exclusion. This purpose is served by charging the misconduct.

d. The government mischaracterizes the military judge's findings and the evidence as presented at trial .

The government claims, "The military judge did not abuse his discretion by viewing these acts as separate offenses committed at three distinct times and different locations." (Gov't Br. 26). At no point did the military judge make any finding regarding "three distinct times and different locations." The military judge simply found that, if the government's evidence is to be believed, three different sexual acts occurred in SGT Hills' home on the same evening. (JA 302).

Further, the government argues that there are no facts to support SGT Hills' contention that the three specifications arose from a single occurrence. (Gov't Br. 26). However, that was the gist of Specialist (SPC) PV's testimony and also the government's theory at trial. Even the Army Court found "the three alleged sexual offenses occurred within a two-hour window with the same person and in the same

location." (JA 13). Specialist PV testified she felt like she was moved rooms, but she testified the movement occurred before she was sexually assaulted. (JA 210). She testified, "But I was assaulted by his penis in my vagina and then in the anus and then I fell back to sleep again." (JA 210). She continued, "I felt him assaulting me after his penis in my vagina to his penis in my anus and it felt a little painful." (JA 212). For both assaults, she testified that she was lying face down on the bed. (JA 213). She testified the sexual contact occurred when she was still on the bed and now lying face up. (JA 214). At no point did SPC PV testify that the assaults occurred at different locations or at different times. Further, the government did not argue either of those theories at trial. The government's evidence was of one course of events, punctuated by two penetrations and a sexual contact, while SPC PV was in and out of consciousness.

e. The government has not even attempted to demonstrate that any error committed was harmless beyond a reasonable doubt, but it has also not demonstrated that any error did not have a substantial influence on the findings.

The government asserts that the Army Court assumed error and found no prejudice, thus this court should "align itself with the analytical posture of the lower court." (Gov't Br. 30). This Court should not do so for three reasons. First, the Army Court did not find any error to be constitutional, thus that court did not apply a harmless beyond a reasonable doubt test. Second, in assessing the strength of the government's case, the Army Court relied on DNA evidence which was only

relevant to the charges for the penetrative acts which SGT Hills' was found not guilty. (JA 15). Thus, even in determining that the propensity evidence did not have a substantial influence on the findings, the Army Court used propensity evidence to make that determination. Lastly, the Army Court, like the government, in assessing the strength of the government's case completely ignored the panel's reconsideration.

The government agrees that "the standard Mil. R. Evid. 413 instruction along with the spillover instruction *may* have caused some confusion . . . ." (Gov't Br. 32). The government maintains that the military judge's repeated instructions would have cleared up any confusion. (Gov't Br. 32). However, this argument overlooks the notion that "[e]ven if we, as lawyers, can sift through the instructions and deduce what the judge must have meant, the factfinders were not lawyers and cannot be presumed to correctly resurrect the law." *United States v. Curry*, 38 M.J. 77, 81 (C.A.A.F. 1993). The military judge instructed the panel that it could presume SGT Hills had a propensity to engage in sexual assault offenses if the panel determined by a preponderance of the evidence that at least one offense occurred. (JA 248). This instruction directly contradicts the presumption of innocence, which is maintained until the government proves the crime beyond a reasonable doubt. Thus this Court cannot know how the panel resolved the inconsistent and confusing instructions.

Finally, the government claims "the evidence of the charged misconduct was going to be presented with or without the Mil. R. Evid. 413 instruction. Even if it was error to be admitted for propensity purposes, it was relevant "as intrinsic evidence of appellant's pattern of lustful intent during his commission of the three sexual assaults against SPC PV." (Gov't Br. 35). The government is following in the footsteps of the Army Court, which also determined the evidence would have been admissible under Mil. R. Evid. 404(b). However, this was not a Mil. R. Evid. 404(b) case, nor did the government present it as such or give notice of its intent to use the evidence in this manner. Much like in *United States v. Burton*, the government here did not offer the evidence under Mil. R. Evid. 404(b), it did not follow the requirements of that rule, thus it may not after the fact justify its relevance under Mil. R. Evid. 404(b) based upon a "what the government could have done" theory. 67 M.J. 150, 153 (C.A.A.F. 2009).

Conclusion

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hills,* Army Dkt. No. 20130833, USCA Dkt. No. 15-0767/AR, was electronically filed with the Court and Government Appellate Division on March 24, 2016.

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