IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Army, *Appellee* v. Sergeant (E-5) KENDALL HILLS United States Army, *Appellant*	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20130833 USCA Dkt. No. 15-0767/AR

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United States Army, *Appellee*	) BRIEF ON BEHALF OF APPELLEE
v.	) Crim. App. Dkt. No. 20130833
Sergeant (E-5) KENDALL HILLS United States Army, *Appellant*	) USCA Dkt. No. 15-0767/AR

TO THE JUDGES OF THE
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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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

On 23-25 September 2013, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, UCMJ.[1] Appellant was acquitted of two specifications of aggravated sexual assault.[2] The panel sentenced appellant to reduction to the grade of E-1, confinement for six months, and a bad-conduct discharge. The convening authority approved the findings and sentence as adjudged.[3]

On 25 June 2015, the Army Court affirmed the findings and sentence.[4] On 24 August 2015, appellant petitioned this Court for review. On 19 January 2016, this Honorable Court granted appellant's petition for review.

Statement of Facts

A. Sexual Assaults

On 24 November 2012, Specialist (SPC) PV was invited to go to a pajama party at appellant's house to watch a football game and where alcohol would be served.[5] She had never been to appellant's house before, and had only socialized

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[1] JA 274.
[2] JA 274.
[3] JA 19.
[4] JA 1.
[5] JA 48, 51.

with appellant one time previously.[6] Appellant drove SPC PV, Sergeant (SGT) Davidson, Corporal (CPL) Hamstra, SPC Antonio Cantu, and SPC Althea Johnson[7] from their barracks to his house.[8]

Specialist PV remembered taking shots with SPC Johnson "by the mouthfuls" and estimated she had three or four shots of vodka as well as one beer.[9] Specialist PV took the shots of vodka directly from a "gallon"-sized bottle.[10]

Specialist PV began to feel the effects of alcohol. Specialist Cantu testified that SPC PV "passed out" on the couch.[11] Specialist Jaiman and SGT Davidson saw SPC PV slide or fall off the couch at one point.[12] Corporal Hamstra testified that SPC PV was visibly drunk, looking like she was going to throw-up soon.[13] Specialist Jaiman described SPC PV as very intoxicated, stumbling a lot, and hitting the wall when walking.[14] Specialist Johnson tried to hold SPC PV upright, but SPC PV kept falling over.[15]

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[6] JA 49-50.
[7] At some point after this incident but before trial, SPC Althea Johnson married SPC Antonio Cantu and changed her last name to Cantu. (JA 178). At trial, SPC PV refers to Althea as SPC Johnson. For purpose of clarity, Althea will be referred to as SPC Johnson and Antonio will be referred to as SPC Cantu.
[8] JA 50.
[9] JA 52.
[10] JA 53, 115.
[11] JA 116.
[12] JA 137, 159.
[13] JA 126.
[14] JA 134, 136.
[15] JA 182.

After going to the bathroom to vomit, still feeling nauseous and dizzy, SPC PV remembered being helped to a bedroom and lying down on a mattress without sheets.[16] The other party-goers gave inconsistent testimony as to who helped SPC PV into the bedroom.[17] According to SPC Cantu, SPC PV was taken in the direction of the kids' bedrooms.[18] Appellant's house was originally a duplex, so one of the kids' bedrooms was intended as a master bedroom. That room was locked.[19]

Once SPC PV was in the bedroom, SPC Johnson placed a bucket or bowl beside SPC PV in case she needed to throw-up again.[20] Sergeant Davidson came into the bedroom periodically to check on SPC PV. When SPC PV responded that she was okay, SGT Davidson would return to the party.[21] Specialist Johnson checked on her once, and said it looked as if SPC PV had vomited in the bucket.[22]

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[16] JA 55-56.
[17] JA 116-17, 127, 137, 157. Specialist Cantu testified that SPC Johnson and another person had to two-man carry SPC PV to a bedroom. JA 116-17. Corporal Hamstra remembered SGT Davidson helping her into a room and them coming back out. JA 127. Specialist Jaiman testified that SGT Davidson and CPL Hamstra helped SPC PV to the bedroom. JA 137. Sergeant Davidson testified that he helped SPC PV to the restroom and also to a bedroom. JA 157.
[18] JA 117.
[19] JA 118.
[20] JA 185.
[21] JA 162.
[22] JA 186.

Specialist Cantu, CPL Hamstra, and SPC Jaiman did not see appellant and SPC PV interact that night; however, none of them spent the night at appellant's home.[23] Specialist Cantu, CPL Hamstra, SPC Jaiman, SGT Davidson, and SPC Johnson were friends of appellant, not SPC PV.[24]

During the party, SPC Jaiman overheard a conversation between SGT Davidson and appellant, in which appellant asked why SGT Davidson brought SPC PV to the party when she had not been to any of their previous parties.[25] It seemed to SPC Jaiman that appellant's conversation was about how it took away from the party when people had to take care of SPC PV. [26] Based on this conversation, SPC Jaiman knew that appellant understood that SPC PV was intoxicated.[27] Sergeant Davidson said that appellant told him he was "stupid for inviting SPC PV because she got so wasted."[28]

After an undetermined amount of time asleep, SPC PV went to the bathroom again to vomit.[29] She ended up on the floor and had to be helped back to the

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[23] JA 121-22, 131, 144.
[24] JA 113-14, 124, 132-33, 148, 179.
[25] JA 140.
[26] JA 140.
[27] JA 141.
[28] JA 162.
[29] JA 56.

bedroom.[30]

Specialist PV's next memory was feeling like she was being carried to a different room.[31] She did not see who was carrying her because it was dark and she was "half asleep."[32] At some point after that, SPC PV remembered being vaginally penetrated from behind. Specialist PV said that she "kind of knew who because he was wearing white pants and I didn't see his face until later on."[33] She did not fully wake up during this time, describing it as being aware that "something was happening . . . but it was like a dream."[34]

During this assault, SPC PV was lying on her stomach with her legs hanging off the bed. Her shirt and bra were still on; her pants and underwear had been pushed down but were not all the way off.[35] She identified her assailant by his clothing, noting that she could see appellant's white pants because "there was light somewhere and white shows up a bit brighter."[36] Specialist PV attributed the white

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[30] JA 56. Specialist PV testified that SPC Hamstra checked on her when she was in the bedroom because she was blinded by the light behind him. JA 57. However, CPL Hamstra testified that he did not check on her that night. JA 129.
[31] JA 58.
[32] JA 58.
[33] JA 58.
[34] JA 59.
[35] JA 59.
[36] JA 59, 61.

pants to appellant because she had seen him wearing white sweat pants prior in the evening and he was the only person wearing white pants during the pajama party.[37]

After a couple minutes of his penis in her vagina, SPC PV "fell back unconscious."[38] She then awoke to his penis penetrating her anus.[39] Again, she "passed out afterwards."[40] Specialist PV did not even know if she tried to get up because she kept falling back asleep.[41] At some point, while appellant was still behind her, she tried to "swipe his [hands] away and pull on [her] pants."[42]

When SPC PV next woke up, appellant was standing beside the bed, using SPC PV's hand to touch his penis.[43] He used her hand to cup his penis and move it up and down.[44] Appellant "mumbled some stuff like it was good or something 'cause it felt good."[45] Feeling sick, SPC PV got up to use the restroom and saw appellant's face.[46] Once SPC PV sat up on the bed, appellant's face was only a few feet from hers.[47]

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[37] JA 61.
[38] JA 60.
[39] JA 60.
[40] JA 60.
[41] JA 79.
[42] JA 80-81.
[43] JA 62.
[44] JA 62.
[45] JA 110.
[46] JA 63. When SPC PV got up, there was enough light for SPC PV to see his face. JA 63.
[47] JA 81-82.

In coming out of the bedroom, SPC PV felt that she had to turn a different direction than before in order to get to the bathroom, so she surmised that appellant had moved her to a different bedroom.[48] She believed the bedroom she came out of at that point was appellant's bedroom.[49]

B. Expert Testimony

Ms. Lisa Hobgood, the government's expert in forensic biology, tested the vaginal and rectal swabs taken from SPC PV during SPC PV's sexual assault forensic exam (SAFE).[50] Ms. Hobgood found male DNA on these swabs but there was not enough DNA for Ms. Hobgood to obtain a DNA profile.[51]

Ms. Hobgood also performed DNA analysis on SPC PV's underwear and found a small amount of male DNA present.[52] With such a large amount of female DNA in SPC PV's underwear, Ms. Hobgood could not perform the type of DNA testing which would result in a full DNA profile.[53] Instead, she performed "Y-

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[48] JA 63-64.
[49] JA 64. Specialist PV used a diagram to explain the layout of appellant's house. JA 66-72, 275-78. Using the overhead projector in the courtroom, SPC PV marked the bedroom her friends assisted her into, the restroom that she used to vomit in throughout the night, and the bedroom that she felt she had been moved to. JA 66-67, 275-78.
[50] JA 208-10.
[51] JA 210.
[52] JA 211-12. However, Ms. Hobgood did not find semen present on any of the items collected from the SAFE examination. JA 204.
[53] JA 212-13.

STR" testing, which is focused on the Y chromosome only.[54] This test is not as discriminating between individuals because the Y chromosome is passed down from the father, so the profile is the same for the father, son, and any of the son's brothers.[55] Ms. Hobgood found the Y-STR profiles of three males.[56] One of the Y-STR profiles was in a much larger amount than the others and Ms. Hobgood was able to quantify this profile as "a major DNA profile."[57] Ms. Hobgood compared this DNA profile with appellant's DNA, and found that the profiles were consistent—meaning that appellant as well as his paternal male relatives could not be excluded.[58] Since the other two Y-STR profiles were in such a small amount, Ms. Hobgood reported that the data was inconclusive and she could not make any determinations based on them.[59] After the Article 32 hearing, Ms. Hobgood performed additional testing to compare the DNA from SPC Cantu, SGT Davidson, and CPL Hamstra to the major profile from SPC PV's underwear.[60] The testing excluded them as potential contributors to the major DNA profile obtained from SPC PV's underwear.[61]

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[54] JA 213.
[55] JA 213.
[56] JA 214.
[57] JA 214.
[58] JA 214.
[59] JA 216.
[60] JA 216-17.
[61] JA 217.

A panel member asked if the use of a condom could explain the small size of the sample of male DNA contributors on the swabs and underwear.[62] Ms. Hobgood answered that having a small amount of male DNA could be explained by the use of a condom.[63] Another panel member asked if the DNA from SPC PV's underwear could have come from the bed since she was lying on appellant's son's bed.[64] Ms. Hobgood testified that since she tested the crotch of the underwear, and the crotch does not come into contact with the bed, DNA transference from the bed was not as likely a possibility than if she had tested the back of the underwear.[65] To get transference from the bed to the underwear, the crotch of the underwear would have had to come into physical contact with the bed.[66] Additionally, only the inside of the crotch was tested.[67]

C. Pretrial Motions

Appellant was charged with two specifications of aggravated sexual assault (both penetrative acts) and one specification of abusive sexual contact (putting her hand on his penis).[68] Prior to trial, the government moved to use the evidence of

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[62] JA 239.
[63] JA 239.
[64] JA 239.
[65] JA 239-40. The panel in this case was very active, submitting ten question sheets. App. Ex. XXV-XXXV.
[66] JA 240.
[67] JA 240.
[68] JA 20.

the charged sexual assaults as evidence of appellant's propensity to commit sexual assaults under Military Rules of Evidence [hereinafter Mil. R. Evid.] 413.[69] The defense opposed the motion.[70] On 7 September 2013, the military judge issued a written ruling granting the government's motion to use the charged offenses as propensity evidence under Mil. R. Evid. 413.[71]

In making his determination, the military judge made the three requisite threshold findings that: (1) appellant was charged with an act of sexual assault; (2) the proffered evidence was evidence of his commission of another offense of sexual assault as defined by Mil. R. Evid. 413; and (3) that the evidence was relevant under Mil. R. Evid. 401 and 402.[72] In conducting a Mil. R. Evid. 403 balancing test, the military judge went through the factors laid out in *United States v. Wright*. 53 M.J. 476, 482 (C.A.A.F. 2000).[73]

D. Trial Proceedings

The military judge gave the panel the Mil. R. Evid. 413 instruction as well as a spillover instruction.[74] The military judge properly instructed the panel on the government's burden to prove each and every element of the offenses beyond a

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[69] JA 281.
[70] JA 290.
[71] JA 298.
[72] JA 301-02.
[73] JA 302-03.
[74] JA 247-48.

reasonable doubt in his initial instructions, voir dire, and final instructions.[75] Neither the government's opening statement nor closing argument referenced appellant's propensity to commit these sexual assaults.[76]

Before announcing findings, the panel informed the military judge that they had a "reconsideration of a finding," but provided no information as to which specification reconsideration applied.[77] After being instructed regarding reconsideration, the panel deliberated and returned a finding of not guilty for Specifications 1 and 2 (penetrative acts) and guilty for Specification 3 of The Charge (abusive sexual contact).[78]

Granted Issue

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.

Summary of Argument

Appellant challenges the constitutionality of Mil. R. Evid. 413—both facially and as-applied. The challenge to the constitutionality of Mil. R. Evid. 413

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[75] JA 31, 33-34, 247-49.
[76] JA 39-43, 252-61.
[77] JA 270.
[78] JA 274.

is not a novel argument.[79] Once the threshold inquiries and procedural safeguards are met, propensity evidence admitted under Mil. R. 413 is constitutional and does not erode the presumption of innocence.[80] The plain language of Mil. R. Evid. 413 does not differentiate between charged and uncharged misconduct.[81] In this case, the military judge followed the procedural safeguards before admitting evidence to be used as propensity evidence.[82] Even if the military judge erred, this error did not substantially influence the findings.

Standard of Review

This court reviews a judge's ruling on the admissibility of evidence under an abuse of discretion standard.[83] In the Mil. R. Evid. 413 context, "[w]hen a military judge articulates his properly conducted [Mil. R. Evid.] 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion."[84] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[85]

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[79] *See Wright*, 53 M.J. at 478, 481.
[80] *Wright*, 53 M.J. at 482; *United States v. Schroder*, 65 M.J. 49, 55 (C.A.A.F. 2007).
[81] Mil. R. Evid. 403.
[82] JA 298-303.
[83] *United States v. Dewrell,* 55 M.J. 131, 137 (C.A.A.F. 2001).
[84] *United States v. Solomon*, 72 M.J. 176, 180 (C.A.A.F. 2013) (citation omitted).
[85] *Id.* at 179 (citations and quotations omitted).

Law and Argument

As is now well-established, Mil. R. Evid. 413 "creates an exception to [Mil. R. Evid.] 404(b)'s general prohibition against the use of a defendant's propensity to commit crimes," as reflective of Congress' "decision that there should be a greater range of admissible evidence in criminal . . . actions involving . . . sexual assault crimes."[86] Thus, as recognized by this court, Mil. R. Evid. 413 should be interpreted and applied "in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible" such that there is a "presumption in favor of admission."[87]

A. Once the threshold inquiries and procedural safeguards are met, application of Mil. R. Evid. 413 is constitutional.

Though there is a "presumption in favor of admission" of Mil. R. Evid. 413 evidence, a military judge must nevertheless apply the applicable rules of evidence–Mil. R. Evid. 401 and 402–and, in particular, the Mil. R. Evid. 403 "balancing test" regarding unfair prejudice, confusion and delay.[88] Thus, as has been consistently applied, a military judge must make three threshold findings

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[86] *Wright*, 53 M.J. at 480-81. *See also United States v. Davis*, 65 M.J. 766, 771 (C.A.A.F. 2007) (discussing the similar exception under Mil. R. Evid. 414 regarding propensity evidence of child molestation); *United States v. Dacosta*, 63 M.J. 575, 582 (Army Ct. Crim. App 2006).

[87] *Wright*, 53 M.J. at 482-483 (quoting *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997)); s*ee also Davis*, 65, M.J. at 772.

[88] *Wright*, 53 M.J. at 482 (citations omitted); *United States v. Green*, 50 M.J. 835, 839 (Army Ct. Crim. App. 1999).

before admitting evidence of a different sexual assault: (1) that the accused is charged with an offense of sexual assault as defined by Mil. R. Evid. 413(d); (2) that the evidence offered is that of a commission of another offense of sexual assault; and (3) that the evidence is both logically relevant under Mil. R. Evid. 401 and 402 and legally relevant under the Mil. R. Evid. 403 balancing test.[89]

In *Enjady*, the Tenth Circuit Court of Appeals recognized the due process arguments against Fed. R. Evid. 413:[90] (1) "that it prevents a fair trial, because of 'settled usage'—that the ban against propensity evidence has been honored by the courts for such a long time that it 'must be taken to be due process of law;'"[91] (2) "because it creates a presumption of guilt that undermines the requirement that the prosecution must prove guilt beyond a reasonable doubt;"[92] and (3) "because it tended to demonstrate the defendant's criminal disposition it licenses the jury to punish the defendant for past acts, eroding the presumption of innocence that is fundamental in criminal trials."[93] Nevertheless, the *Enjady* court held that simply because "a practice is ancient does not mean it is embodied in the Constitution.

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[89] *Wright*, 53 M.J. at 482; *United States v. Bailey*, 55 M.J. 38, 40 (C.A.A.F. 2001). *See also Davis*, 65 M.J. at 771.
[90] Military Rule of Evidence 413 "is nearly identical to its Federal Rule counterpart." Mil. R. Evid. 413 analysis A22-42.
[91] *United States v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998).
[92] *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62, 78 (1991) (O'Connor, J., concurring)).
[93] *Id.* at 1432.

Many procedural practices—including evidentiary rules—that have long existed have been changed without being held unconstitutional."[94]

"The presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown."[95] 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.'"[96] This court considered and rejected this argument, stating that Mil. R. Evid. 413 would be "fundamentally unfair *if* it undermines the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt."[97] In analyzing Mil. R. Evid. 413's constitutionality, this court found that the rule did not erode the presumption of innocence, and noted federal courts have uniformly upheld Mil. R. Evid 413 against challenges to its constitutionality.[98]

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[94] *Id.* Additionally, "it is not the State which bears the burden of demonstrating that its rule is 'deeply rooted,' but rather [the defendant]." *United States v. LeMay,* 260 F.3d 1018, 1025 (9th Cir. 2001) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996) (plurality opinion)). The court in *LeMay* held that the traditional ban on propensity evidence did not involve a fundamental concept of justice. *Id.*
[95] *Wright*, 53 M.J. at 481 (citing *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *United States v. Salerno*, 481 U.S. 739, 745 (1987)).
[96] *Wright*, 53 M.J. at 481.
[97] *Id.* (emphasis added).
[98] *Id.* at 482.

While "there is an inherent tension between [Mil. R. Evid. 413/414] and traditional concerns regarding convictions based on 'bad character' evidence,"[99] "the judiciary is not a rulemaking body."[100] Allowing propensity evidence in this subset of cases reflects "a political decision that there should be a greater range of admissible evidence in criminal and civil actions involving specific sexual assault crimes."[101] Any tension resulting from a policy decision to allow propensity evidence is alleviated by application of the procedural safeguards that protect an accused from an unconstitutional application of Mil. R. Evid. 413 or 414.[102]

B. This court's precedent, recent opinions from the service courts, and federal caselaw, have all concluded that Mil. R. Evid. 413 evidence is constitutional as applied to charged misconduct.

In *Wright*, appellant challenged the constitutionality of Mil. R. Evid. 413 evidence when applied to charged misconduct.[103] In that case, appellant was charged with one specification of indecent assault upon Airman P and one specification of rape of Airman D.[104] Appellant pleaded guilty to the indecent assault upon Airman P.[105] The military judge found that "the indecent assault is a charged offense which will be admitted into evidence in order to try and prove the

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[99] *Schroder*, 65 M.J. at 55.
[100] *Wright*, 53 M.J. at 481.
[101] *Id.*
[102] *Schroder*, 65 M.J. at 55.
[103] *Wright*, 53 M.J. at 478.
[104] *Id.* at 479.
[105] *Id.*

Specification of Charge II, that it is sufficiently similar to the alleged rape . . . ." The military judge also found that the "probative value of considering this sexual assault for its bearing on the other offense is not substantially outweighed by the danger of unfair prejudice."[106] The court held that due to the procedural safeguards in place, such as the Mil. R. Evid. 403 balancing test; limiting the misconduct to serious offenses; requiring the evidence to meet the relevance requirements of Mil. R. Evid. 401-402; requiring the military judge to conclude that the jury could find by a preponderance of the evidence that the offenses occurred; and, requiring notice to use Mil. R. Evid. 413; the rule was not unconstitutional when applied to charged misconduct.[107]

In *Schroder*, appellant was charged with raping his twelve-year-old daughter and committing indecent acts with his twelve-year-old neighbor.[108] The military judge ruled that the uncharged acts of molestation against the daughter and neighbor were admissible under Mil. R. Evid. 414 to prove appellant had raped his daughter.[109] 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.[110] The military judge made the

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[106] *Id.* at 480.
[107] *Id.* at 483.
[108] *Schroder*, 65 M.J. at 51.
[109] *Id.* at 52.
[110] *Id.*

required threshold findings that appellant had been charged with commission of another offense of child molestation; that the proffered evidence was evidence of his commission of another offense of child molestation; and the evidence was relevant under Mil. R. Evid. 401 and 402.[111] The military judge also conducted a lengthy balancing test under Mil. R. Evid. 403 where he went through the *Wright* factors.[112] The court held that the procedural safeguards protected appellant from an unconstitutional application of Mil. R. Evid 414.[113]

In addition to this court's holdings in *Wright* and *Schroder*, all the service courts have held that Mil. R. Evid. 413 is constitutional when applied to charged misconduct as long as the threshold inquiries and procedural safeguards are met.[114]

In *Barnes*, the Army court stated: "We find no prohibition against or reason to preclude the use of evidence of similar crimes in sexual assault cases in

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[111] *Id.*

[112] *Id.* at 53.

[113] *Id.* at 55. In *Schroder*, the issue was not that charged conduct was used to demonstrate propensity; it was the fact that the military judge did not adequately instruct the panel on the proper use of propensity evidence. *Id.* This court found fault with the military judge's instructions because they were "subject to unconstitutional interpretation [when] the members were permitted to conclude that the presence of 'similarities' between the charged and uncharged misconduct were, standing alone, sufficient evidence to convict appellant of the charged offenses. *Id.* In this case, the military judge did not instruct that the presence of similarities, standing alone, would be sufficient to convict appellant. JA 246-49.

[114] *United States v. Barnes*, 74 M.J. 692 (Army Ct. Crim. App. 2015); *United States v. Bass*, 74 M.J. 806 (N.M. Ct. Crim. App. 2015); *United States v. Maliwat*, AF 38579, 2015 CCA LEXIS 443 (A.F. Ct. Crim. App. 19 Oct. 2015).

accordance with Mil. R. Evid. 413 due to the fact that the 'similar crime' is also a charged offense."[115] "The Mil. R. Evid. 403 balancing test is the key to the admission of evidence, its constitutionality, and, as in this case, the use of properly admitted evidence to argue propensity."[116]

In *Bass*, the Air Force Court of Criminal Appeals (Air Force court) exposed the logical fallacy of appellant's argument that Mil. R. Evid. 413 is unconstitutional when applied to charged misconduct but not when applied to uncharged misconduct: "[W]e see nothing more prudent or fair about a rule that would prohibit evidence from being considered under Mil. R. Evid. 413 if it pertains to charged offenses, but allow it if the evidence is too old or too weak to be charged or if the Government presents it twice in two separate courts-martial."[117]

In civilian courts, application of Fed. R. Evid. 413 to charged misconduct rarely presents itself due to the common practice of severance of charges.[118] In *United States v. Rogers*, Fed. R. Evid. 413 was applied within the four corners of the charge sheet because appellant's motion to sever was denied.[119] Appellant

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[115] *Barnes*, 74 M.J. at 697-98.
[116] *Id.* at 699.
[117] *Bass*, 74 M.J. at 815.
[118] *United States v. Rogers*, 474 Fed. Appx. 463, 472 (7th Cir. 2012) (citing Federal Rule of Criminal Procedure 8(a), 14(a); *United States v. Calabrese*, 572 F.3d 362, 367 (7th Cir. 2009)).
[119] *Rogers*, 474 Fed. Appx. at 473.

claimed that he was prejudiced because the jury was "outraged" regarding his conduct with one underage girl[120] and therefore felt he was a "bad person, resulting in his conviction regarding conduct with a different underage girl."[121] The court ruled that: "Perhaps his conversations and email exchanges with Emily buttressed Andrea's account, but, under Federal Rule of Evidence 413, the *jury was allowed to adopt that propensity inference*, and it does not amount to unfair, actual prejudice."[122]

To argue that the government would have to refrain from charging multiple instances of sexual misconduct in order to be able to argue propensity is illogical. Indeed, a prohibition on applying Mil. R. Evid. 413 to charged misconduct has the potential to subject an accused to greater liability in separate courts-martial. In military practice, the preference is to refer all known charges to a single court-martial.[123] However, if propensity evidence is only permitted for uncharged misconduct, there would be no prohibition in having two separate courts-martial against the same accused for different sexual offenses. Uncharged misconduct in the first court-martial would be permissible Mil. R. Evid. 413 evidence and could

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[120] The "Emily" who posed as a thirteen year old girl online was actually an undercover deputy sheriff. *Id.* at 465.
[121] *Id.* at 473.
[122] *Id.* at 474.
[123] R.C.M. 602(e)(2) discussion; *see United States v. Leahr*, 73 M.J. 364, 367-68 (C.A.A.F. 2014).

later be the charged offense for the second court-martial. This could have the effect of subjecting an accused to serving consecutive sentences instead of concurrent sentences.

When there are two incidents of sexual misconduct, both charged, and they meet the threshold inquiries and satisfy the Mil. R. Evid. 403 balancing test using the *Wright* factors, there is no danger that the evidence will be used for an unconstitutional purpose. In a case of charged misconduct serving as propensity evidence, the government has the additional burden of proving both charges beyond a reasonable doubt.

C. Nothing in the legislative history or the plain language of the rule prevents applying Mil. R. Evid. 413 to charged misconduct.

The plain language of Mil. R. Evid. 413 does not differentiate between charged and uncharged misconduct.[124] Military Rule of Evidence 413 states: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant."[125] As one court explained:

> Stated differently, in the case of uncharged misconduct, the focus is on the first part of the sentence (whether the evidence is 'admissible?'). Whereas in the case of charged

[124] Mil. R. Evid. 413. *See United States v. Williams*,__M.J.___, 2016 CCA LEXIS 128, at *13 (Army Ct. Crim. App. 29 Feb. 2016).
[125] Mil. R. Evid. 413(a).

> misconduct, the focus is on the latter half of the sentence (for what purposes and for which offense is evidence—already admitted—relevant, both logically and legally?).[126]

In *Wright*, this court considered the legislative history of Fed. R. Evid. 413.[127] However, appellant misstates this court's conclusion that "the legislative history makes clear Congress did not intend for Mil. R. Evid. 413 to be used with contested conduct."[128] To the contrary, this court stated that "[t]his is the type of case in which this evidence *was designed* to be admitted."[129] Charged evidence was used as propensity evidence and this court held that this application of Mil. R. Evid. 413 was constitutional.[130] 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.[131]

In *Enjady*, the court stated the legislative history of Fed. R. Evid. 413 recognizes that sexual assault cases often turn on a credibility determination of an adult victim.

> Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused

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[126] *Williams*,__M.J.___, 2016 CCA LEXIS 128, at *13.
[127] *Wright*, 53 M.J. at 480.
[128] Appellant's Br. 12-13.
[129] *Wright*, 53 M.J. at 483 (emphasis added).
[130] *Id.*
[131] See the discussion in section B regarding the military's preference for joinder.

> mugger does not claim that the victim freely handed over his wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him.[132]

"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."[133] Although appellant argues the rule was only intended to be used in cases of multiple victims,[134] part of the policy considerations embedded in the legislative history reflect a desire to "continue the movement toward focusing on the perpetrators, rather than the victims, of sexual violence."[135] Thus, the purpose of the rule is to limit "the prejudice to the victim that often results from jurors' tendencies to blame victims in acquaintance rape cases."[136]

D. The military judge properly made threshold findings and conducted a Mil. R. Evid. 403 balancing test on the record.

While detailed factual findings are not necessary, on appeal, more deference is accorded a military judge's evidentiary ruling when the judge "articulates the balancing analysis on the record."[137] Though "neither exclusive nor exhaustive,"

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[132] *Enjady*, 143 F.3d at 1431.
[133] *Id.*
[134] Appellant's Br. 13.
[135] *Enjady*, 143 F.3d at 1432.
[136] *Id.*
[137] *Dewrell*, 55 M.J. at 138; *see also Bailey*, 55 M.J. at 41; *United States v. Mann*, 54 M.J. 164, 166 (C.A.A.F. 2000).

the *Wright* factors used in the military judge's Mil. R. Evid. 403 balancing test include: (i) the strength of proof of the prior act; (ii) probative weight, including similarity to the charged offense; (iii) potential for less prejudicial evidence; (iv) distraction for the fact-finder; (v) time needed for proof of prior act; (vi) temporal proximity; (vii) rate of frequency of the prior acts; (viii) presence or lack of intervening circumstances; and, (ix) relationship between the parties.[138]

In this case, the military judge conducted a Mil. R. Evid. 403 balancing test on the record.[139] The military judge made the threshold findings that: (1) appellant was charged with three specifications that would meet the criteria of sexual assault as defined in Mil. R. Evid. 413; (2) the evidence was admissible under Mil. R. Evid. 401 and 402 as it was logically relevant to show appellant's propensity to sexually assault SPC PV, noting that appellant performed three different sexual acts on the victim while she was in and out of consciousness; and (3) the evidence met the Mil. R. Evid. 403 balancing test under the *Wright* factors.[140]

Of significance, due to SPC PV's extreme intoxication, there is no clear timeline of the events that occurred that evening. She remembered being roused from consciousness on three separate occasions. When she initially woke up, SPC

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[138] *Dewrell*, 55 M.J. at 138; *Davis*, 65 M.J. at 771; *Bailey*, 55 M.J. at 41; *Wright*, 53 M.J. at 482.
[139] JA 298-303.
[140] JA 298-303.

PV testified that appellant's penis was in her vagina.[141] She then passed out for some period of time.[142] She next awoke to appellant's penis penetrating her anus.[143] Again, she "passed out afterwards."[144] Specialist PV testified that she did not even know if she tried to get up because she kept falling back asleep.[145] At some point, while appellant was still behind her, she tried to "swipe his [hands] away and pull on [her] pants."[146] When SPC PV woke up for a third time, appellant was standing beside the bed, using SPC PV's hand to touch his penis.[147] He used her hand to cup his penis and move it up and down.[148]

Although appellant asserts that the specifications arose from a single occurrence,[149] there are no facts to support that assertion because SPC PV faded in and out of consciousness due to her level of intoxication. The military judge did not abuse his discretion by viewing these acts as separate offenses committed at three distinct times and different locations.[150]

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[141] JA 59.
[142] JA 60.
[143] JA 60.
[144] JA 60.
[145] JA 79.
[146] JA 80-81.
[147] JA 62.
[148] JA 62.
[149] Appellant's Br. 7.
[150] The military judge specifically found that the accused performed three different sexual acts on the alleged victim while she was in and out of consciousness due to intoxication. JA 302.

When SPC PV was vaginally and anally penetrated, she was lying on her stomach with her legs hanging off the bed.[151] The third time she woke up, she was lying on her back, facing upward, and appellant was standing next to the bed using her hand to touch his penis.[152] Specialist PV believes she was moved or repositioned at some point between the penetrative acts and when appellant placed her hand on his penis.[153] Once the military judge made this determination that the assaults were separate and distinct acts, he properly proceeded to consider whether the evidence was relevant and conducted an analysis of the *Wright* factors.

The standard for relevance is low. Mil. R. Evid. 401 states that relevant evidence is evidence having *any* tendency to make the existence of *any* fact more or less probable than it would be without the evidence.[154] Under this low standard, the Army Court properly found that "Appellant's commission of three sexual offenses during the course of an approximately two hour window of opportunity 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."[155]

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[151] JA 59, 61.
[152] JA 62.
[153] JA 62.
[154] Mil. R. Evid. 401 (emphasis added).
[155] *United States v. Hills*, ARMY 20130833, 2015 CCA LEXIS 268, at *21 (Army. Ct. Crim. App. 25 Jun. 2015); JA 12.

Therefore, the military judge did not abuse his discretion in finding the three offenses were logically relevant in order to demonstrate propensity.

In *Barnes*, the Army court stated that the *Wright* factors used in the Mil. R. Evid. 403 balancing test are instructive but non-exhaustive.[156] Specifically, three *Wright* factors—the potential for less prejudicial evidence, the possible distraction of the fact finder, and the time needed for proof of the prior conduct—will likely be inapplicable when conducting the balancing test for only charged misconduct.[157] In this case, after finding that the evidence was relevant, the military judge conducted a Mil. R. Evid. 403 balancing test and made a finding that each *Wright* factor supported a propensity determination.[158]

For the strength of proof for the prior act, the military judge found that the government would already be offering testimony for each of the three acts since they were charged misconduct and were the subject of SPC PV's statement to CID and the subsequent hearing under Article 32, UCMJ.[159] This was an important consideration in the Air Force court's decision in *Maliwat*.[160] In *Maliwat*, "[b]oth acts were vetted through the military justice process. These were not rumors,

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[156] *Barnes*, 74 M.J. at 700; *see also Bass*, 74 M.J. at 816 ("The application of Mil. R. Evid. 413 to misconduct—charged or uncharged— is subject to the same procedural safeguards in place to protect the rights of the accused.").
[157] *Barnes*, 74 M.J. at 700.
[158] JA 302.
[159] JA 302.
[160] *Maliwat*, AF 38579, 2015 CCA LEXIS 443, at *15-16.

unfounded allegations, or hearsay statements reported by a law enforcement agent. The witnesses testified under oath about [a]pellant's actions and were subject to the crucible of cross-examination."[161] Likewise in *Bass*, the Navy-Marine Court of Criminal Appeals held that "the military judge was entitled to consider that the evidence was already coming in as evidence of charged misconduct and would be further subject to the crucible of trial. That properly was a factor in assessing the danger of unfair prejudice . . . ."[162]

After considering the *Wright* factors, the military judge found that "the probative value of the charged sexual assaults are not substantially outweighed by the danger of unfair prejudice to the accused, confusion of the issues, misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[163] Thus, the military judge did not abuse his discretion in determining that the the facts of this case met the threshold inquiries and did not abuse his discretion in applying the procedural safeguards.[164]

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[161] *Id.*
[162] *Bass*, 74 M.J. at 817.
[163] JA 303.
[164] *See Solomon*, 72 M.J. at 180.

E. Any error committed by the military judge was nonconstitutional and did not have a substantial influence on the findings.

The Army Court assumed error and then found no prejudice.[165] Therefore, even if this court finds that the military judge erred when he provided the Mil. R. Evid. 413 instruction, this court would align itself with the analytical posture of the lower court, which properly concluded that the "possible abuse of discretion . . . did not have a substantial influence on the findings."[166]

As far as the instruction given for Mil. R. Evid. 413 evidence, the law "does not mandate a formulaic instruction," but when the members are instructed regarding propensity evidence, the members "must also be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged."[167] Additionally, the factfinder must be instructed that it cannot convict on propensity alone.[168]

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[165] *Hills*, ARMY 20130833, 2015 CCA LEXIS 268, at *25; JA 14.
[166] *Id.* at *25; JA 15.
[167] *Schroder*, 65 M.J. at 56; *see also Williams*, __M.J.____, 2016 CCA LEXIS 128, at *24. The Army court held that "as the instructions required by *Dacosta* remain problematic in numerous respects, we overturn the requirement for the specific instructions required in that decision." *Id.* However, the Army court did not prescribe specific instructions and instead pointed to this court's ruling in *Schroder* and the Tenth Circuit Court of Appeals' instruction in *United States v. McHorse*, 179 F.3d 889, 903 (10th Cir. 1999), for examples of what an instruction could entail. *Id.*
[168] *Schroder*, 65 M.J. at 56.

Even if this court finds the military judge abused his discretion in conducting the Mil. R. Evid. 413 balancing test, and therefore gave an unwarranted instruction, instructions are not viewed in isolation but within the context of the other instructions given as whole.[169] Although a spillover instruction is contained in the standard instruction for Mil. R. Evid 413 evidence,[170] in this case, the military judge also gave the panel the standard spillover instruction.[171] The military judge emphasized the government's burden to prove the elements of each offense beyond a reasonable doubt at least three times.[172]

In this case, any purported error was not in the language of the instruction itself, but in the military judge's Mil. R. Evid. 403 balancing test.[173] In *Schroder*, the military judge's flawed instruction was an error of constitutional magnitude because it instructed the panel that they could convict appellant based on the

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[169] *Dacosta*, 63 M.J. at 579 (citations omitted).
[170] Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 7-13-1, note 4.2 (1 Sep. 2014).
[171] JA 247-48.
[172] JA 247-48.
[173] As the Army court noted, "this case is not one of error in the instruction itself." *Hills*, ARMY 20130833, 2015 CCA LEXIS 268, at *25 n.8; JA 14. The military judge provided the standard instruction found in the Army's Military Judges' Benchbook. JA 247-48; Benchbook, para. 7-13-1, note 4.2. In *Barnes*, the Army court found that the standard instruction was internally inconsistent, in that it "instructed the panel members that any propensity evidence cannot be used to support an inference of guilty [which] defeats the purpose behind Mil. R. Evid. 413." However, this error was to the benefit of the accused. *Barnes*, 74 M.J. at 701; *see Williams*, __M.J.___, 2016 CCA LEXIS 128, at *24. Similarly, the military judge's instruction enured to appellant's benefit in this case.

similarities of appellant's misconduct.[174] Here, although the standard Mil. R. Evid 413 instruction along with the spillover instruction *may* have caused some confusion,[175] the military judge clearly and repeatedly—from initial instructions, to voir dire, to final instructions[176]—instructed the panel members that they must be convinced beyond a reasonable doubt to convict appellant and propensity evidence could not overcome a failure of proof in the government's case.[177]

Even in *Schroder*, after finding instructional error of constitutional magnitude, the court held that the "finding of guilty only of the lesser included offense of indecent acts with another, which lacks the element of specific intent which appellant disputed at trial, suggests that the *members were not swayed* to convict on this count *by the instructional error* regarding the use of propensity evidence."[178] The court stated that "[b]ased on the members' finding of guilty only on the lesser included offense of indecent acts, the totality of the instructions provided by the military judge, and the detailed and credible nature of [the neighbor's] testimony, we are convinced beyond reasonable doubt that the error did not contribute to appellant's conviction."[179] In this case, the panel did not

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[174] *Schroder*, 65 M.J. at 55.
[175] *Hills*, ARMY 20130833, 2015 CCA LEXIS 268, at *n.8; JA 14.
[176] JA 31, 33-34, 247-49.
[177] JA 247-49
[178] *Schroder*, 65 M.J. at 57 (emphasis added).
[179] *Id.* (citing *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)).

convict appellant for the greater offenses of sexual assault, and therefore did not use the Mil. R. Evid. 413 instruction in a way that overcame a failure of proof in the government's case.

Thus, even if this court finds that the military judge's Mil. R. Evid. 403 balancing was in error, this error is nonconstitutional.[180] With nonconstitutional error, courts evaluate whether the error had a substantial influence on the findings.[181] This court evaluates "prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."[182]

In *Dacosta*, the court found the error harmless because "[t]he government's case was strong even absent evidence of the prior sexual assault."[183] As the Army court noted, the evidence of the abusive sexual contact was stronger than evidence of the penetrative sexual assaults.[184] For the penetrative sexual assaults, SPC PV did not see appellant's face, identifying him only by his while pants, and never fully woke up, describing it as being aware "something was happening . . . but it

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[180] *Solomon*, 72 M.J. at 182 (citing *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005)). Even if this court determines this error was of a constitutional dimension, the error was harmless beyond a reasonable doubt.
[181] *Id*; *see also Dacosta*, 63 M.J. at 580.
[182] *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).
[183] *Dacosta*, 63 M.J. at 583.
[184] *Hills*, ARMY 20130833, 2015 CCA LEXIS 268, at *27-28; JA 15.

was like a dream."[185] By contrast, for the abusive sexual contact, it was uncontested that SPC PV became very intoxicated at the party, which in turn, influenced her recollection of events. Moreover, for the specification of abusive sexual contact, SPC PV was better able to identify appellant as the assailant. She testified that she woke up when appellant placed her hand upon his penis.[186] She remembered appellant "mumbled some stuff like it was good or something 'cause it felt good."[187] At that point, SPC PV got up from the bed and saw appellant's face for the first time.[188]

The defense case focused on cross examination and attempted to discredit SPC PV with any inconsistency during testimony.[189] The Army court found the defense's case to be "not particularly strong."[190] Likewise, the propensity evidence was not the lynchpin of the government's case. The government did not argue that appellant had a propensity to commit sexual assault in either its opening statement or closing argument.[191] It was not the theme of its case. Finally, 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,

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[185] JA 59.
[186] JA 62.
[187] JA 110.
[188] JA 62, 81-82.
[189] JA 90-108.
[190] *Hills*, ARMY 20130833, 2015 CCA LEXIS 268, at *27-28; JA 15.
[191] JA 39-43, 252-61.

it was relevant "as intrinsic evidence of appellant's pattern of lustful intent during his commission of the three sexual assaults against SPC PV."[192]

In conclusion, Mil. R. Evid. 413 is constitutional when applied to charged misconduct when the threshold inquiries and procedural safeguards are met. Nothing in the plain language of Mil. R. Evid. 413 differentiates between charged and uncharged misconduct. The military judge did not err when he found that the three incidents of sexual assault were both logically and legally relevant to show that appellant had a propensity to sexually assault PV. However, even if the military judge did err, the instruction did not substantially influence the findings.

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[192] *Hills*, ARMY 20130833, 2015 CCA LEXIS 268, at *28 (citing *United States v. Rude*, ARMY 20120139, 2015 CCA 72, at *21 (Army Ct. Crim. App. 26 Feb. 2015)); JA 15.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm decision of the Army Court.

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I certify that the foregoing brief on behalf of appellee, United States v. Hills, Crim. App. Dkt. No. 20130833, USCA Dkt. No. 15-0767/AR was electronically filed with the Court to (efiling@armfor.uscourts.gov) on 21 March 2016 and contemporaneously served electronically on military appellate defense counsel, Captain Heather Tregle.

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