31 May 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUES CERTIFIED
v.	)	
	)	Crim. App. No. 38631
Technical Sergeant (E-5) JUSTIN L. FETROW, USAF, *Appellee.*	)	USCA Dkt. No. 16-0500/AF

APPELLANT'S BRIEF IN SUPPORT OF THE ISSUES CERTIFIED

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS COMMITTED LEGAL ERROR WHEN IT FOUND THAT IN ORDER FOR CONDUCT TO CONSTITUTE CHILD MOLESTATION UNDER MIL. R. EVID. 414, THE CONDUCT MUST HAVE BEEN AN OFFENSE UNDER THE UCMJ, OR FEDERAL OR STATE LAW, AT THE TIME IT WAS COMMITTED AND, IF OFFERED UNDER MIL. R. EVID. 414(d)(2)(A)-(C), THAT THE CONDUCT MUST MEET THE DEFINITION OF AN OFFENSE LISTED UNDER THE VERSION OF THE APPLICABLE ENUMERATED STATUTE IN EFFECT ON THE DAY OF TRIAL.

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS COMMITTED LEGAL ERROR WHEN IT FOUND THAT THE ERRONEOUS ADMISSION OF TWO ACTS OF

INDECENT LIBERTIES COMMITTED BY APPELLEE ON HIS CHILD AGE DAUGHTER HAD A SUBSTANTIAL INFLUENCE ON THE MEMBERS' VERDICT REQUIRING SET ASIDE OF THE FINDINGS AND SENTENCE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this issue under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

At Francis E. Warren AFB, Wyoming, on 12 November 2013 and 9-13 February 2014, Appellee was tried by a general court-martial consisting of officer and enlisted members. (J.A. at 88, 91.) Contrary to Appellee's pleas, the members convicted him of one specification of attempted abusive sexual contact with a child, one specification of attempted aggravated sexual abuse of a child, two specifications of aggravated sexual contact with a child, one specification of abusive sexual contact with a child, and two specifications of aggravated sexual abuse of a child, [1] in violation of Articles 80 and 120, UCMJ. (J.A. at 85-88.)

Pursuant to defense R.C.M. 917 motions, Appellee was previously found not

[1] Instead of two specifications of aggravated sexual abuse of a child and two specifications of aggravated sexual contact with a child, AFCCA's opinion erroneously states that Appellee was convicted of four specifications of aggravated sexual contact with a child. *See* (J.A. at 1.)

guilty of two specifications of sexual abuse of a child, one specification of aggravated sexual contact with a child, and one specification of indecent act with a child. (J.A. at 85-88.) The members found Appellee not guilty of two specifications of sexual abuse of a child and one specification of abusive sexual contact with a child. (J.A. at 85-88.)

The members sentenced Appellee to be reduced to E-1, to forfeit all pay and allowances, to be confined for a period of 25 years, and to be dishonorably discharged. (J.A. at 88.) The convening authority approved only so much of the sentence that called for reduction to E-1, confinement for 25 years, and a dishonorable discharge. (J.A. at 88.) The convening authority deferred the adjudged and mandatory forfeitures until action, waived said forfeitures for a period of 6 months, and directed pay and allowances to be paid to Appellee's spouse for the benefit of Appellee's dependents. (J.A. at 88.)

On 20 July 2015, Appellee filed an assignment of error[2] with the lower Court in which he argued that the military judge had erred in allowing Appellee's biological daughter, JLF, to testify to alleged uncharged acts of child molestation pursuant to Mil. R. Evid. 414. (J.A. at 62-80.) On 11 August 2015, the United States submitted an answer to Appellee's assignment of error. (J.A. at 55-61.)

[2] Appellee's other assignments of error included an argument of ambiguous findings, factually and legal insufficiency, sentence appropriateness, and unlawful command influence. (J.A. at 62-63.)

On 21 January 2016, AFCCA issued a published decision in which it found that the military judge had erred in admitting two of the three alleged acts of child molestation under Mil. R. Evid. 414. (J.A. at 1-16.) The Court found that the error was prejudicial, set aside the findings of guilt and the sentence, and authorized a rehearing. (J.A. at 16.)

On 22 February 2016, the United States filed a motion for reconsideration and reconsideration en banc with AFCCA. (J.A. at 17-46.) On 29 February 2016, Appellee responded to the United States' motion. (J.A. at 47-54.) On 1 March 2016, AFCCA denied the United States' motion. (J.A. at 17.) On 29 April 2016, a TJAG Certificate for Review was filed with this Court raising the two issues identified above.

STATEMENT OF FACTS

As of the date of trial, February of 2014, Appellee and Mrs. JNF had been married for almost nine years. (J.A. at 170.) Appellee brought into the marriage two children from a previous relationship. (J.A. at 171.) Mrs. JNF also brought into the marriage two children, JB and JH, from previous relationships. (J.A. at 171-72.) All of the charged allegations of sexual misconduct in this case related to the two children Mrs. JNF brought into the marriage, JB and JH. (*See* J.A. at 85-88.)

Prior to the court-martial, the government provided notice under Mil. R. Evid. 414, of its intent to present the testimony of Appellee's biological daughter, JLF. (J.A. at 440-41.) Appellee objected to the admission of this evidence through a motion in limine, to which the government responded. (J.A. at 389-425.) A hearing was held on the motion, in which JLF testified. (J.A. at 101-36.)

After the motion hearing, the military judge denied the defense motion in limine. (J.A. at 155, 438-39.) The military judge provided both an oral and a written ruling admitting the evidence under Mil. R. Evid. 414. (J.A. at 145-58, 432-39.) In his findings of fact, which were adopted by AFCCA, the military judge found that JLF described three separate incidents involving Appellee. (J.A. at 3, 433.) The first incident occurred between June 2001 and December 2001, when JLF was 3-4 years old, and lived with Appellee in a home near Charleston, South Carolina. (J.A. at 104-10, 433.) According to JLF, Appellee knowingly placed JLF in a bedroom closet while he had sexual intercourse with a woman in the same room. (J.A. at 104-10, 433.) JLF was able to see Appellee and the woman because Appellee had left the closet door slightly open. (J.A. at 107-08, 433.)

JLF testified that the second incident occurred during the same time period. (J.A. at 111-12, 433.) After Appellee and JLF made a tent out of blankets, Appellee touched JLF's leg. (J.A. at 112-13, 433.) Specifically, Appellee touched

JLF's knee with his hand and moved his hand up her leg. (J.A. at 112-16, 433.) During her testimony, JLF became visibly upset and described this touching as seductive. (J.A. at 114, 433.)

Regarding the third incident, JLF testified that when she was 8-9 years old, she lived with her brother, Appellee, Appellee's wife, JH, and JB. (J.A. at 119, 433.) During this time period, Appellee called JLF into the bathroom of their home. (J.A. at 120.) After JLF entered the bathroom, Appellee pulled down his pants exposing his penis. (J.A. at 119, 121, 433.) As they were standing in the bathroom, someone came into the home, and Appellee told JLF to leave. (J.A. at 122, 433.) Appellee later asked JLF if she laughed when she saw his penis. (J.A. at 119, 122, 433.)

After the hearing and argument by both sides, the military judge denied the defense motion in limine as it related to the above three incidents. (J.A. at 155, 438-39.) In analyzing this issue, the military judge found that Appellee was charged with numerous acts that met the definition of child molestation. (J.A. at 435.) Based on JLF's testimony, the military judge determined that a factfinder could find by a preponderance of the evidence that all three uncharged acts involving JLF occurred. (J.A. at 437.) The military judge also found that all three incidents involving JLF constituted an act of child molestation for the purposes of Mil. R. Evid. 414. (J.A. at 435-36.) Finally, the military judge analyzed the

evidence under Mil. R. Evid. 403, and found that the probative value was not substantially outweighed by the danger of unfair prejudice. (J.A. at 437-38.) Because the military judge found the evidence admissible under Mil. R. Evid. 414 and 403, he did not analyze it under Mil. R. Evid. 404(b). (J.A. at 155, 438-39.)

In opening statement, assistant trial counsel described JLF's allegations. (J.A. at 165-66.) Civilian defense counsel also addressed her allegations. (J.A. at 167-68.) In the its findings case, the government presented only one of the two named victims, JB. (J.A. at 240-86.) The government did not call JH because although she first reported Appellee's sexual abuse to a school counselor in 2013, by the time of trial, JH had recanted her allegations. (*See* J.A. at 2.)

During findings, JB, born in 1996, testified that Appellee had subjected her to numerous incidents of sexual abuse. JB testified that when she lived with Appellee in Summerville, South Carolina in 2007, he would come to her room at night. (J.A. at 243.) Once in her bedroom, Appellee would feel up JB's leg and back, and then he would touch her vagina. (J.A. at 243-48.) This occurred for five nights. (J.A. at 243.) Appellee would touch JB's vagina with both his hand and his tongue. (J.A. at 247-48.) In regards to these incidents, Appellee told JB that he knew she was awake when he came in her room at night. (J.A. at 249.) JB testified that this conduct occurred approximately two months after her grandfather died, which occurred on 9 September 2007. (J.A. at 250, 264-65.) JB also testified

that while she lived with Appellee in South Carolina, Appellee would offer to pay her money to view and touch her breasts. (J.A. at 251.) This occurred approximately a month after Appellee had stopped coming to JB's bedroom at night. (J.A. at 265.)

JB testified that after the family moved to Cheyenne, Wyoming, between the end of 2010 and beginning of 2011, Appellee would continue to offer her money in exchange for sexual favors, such as watching Appellee masturbate. (J.A. at 251, 265-68.) Although she would reject his offers routinely, JB eventually acquiesced to Appellee's pressure. (J.A. at 253-54.) JB also testified that on one occasion Appellee offered her and JB 50 dollars to masturbate him. (J.A. at 255.) Appellee went into JB's room, shut the door, turned the lights off, laid on JB's bedroom floor, and pulled down his underwear. (J.A. at 255.) Appellee then grabbed JB's hand and placed it on his penis. (J.A. at 255.) JB also testified that as she removed her hand from Appellee's penis, she felt JH's hand. (J.A. at 255.) During this timeframe, Appellee's wife and JB's birth mother, Mrs. JNF, was deployed. (J.A. at 253.)

JB also testified that one day Appellee came into her room, pulled his underwear down, and told JB to play with his penis and put it in her mouth as he was calling her derogatory names. (J.A. at 256.) Appellee would also ask JH and JB for "massages." (J.A. at 256-57.) During these "massages," Appellee would

coax the girls into touching his penis. (J.A. at 257-58.) On one occasion, Appellee wrote sexual acts in a composition book and had his step-daughters pick an act to be performed on them in exchange for money. (J.A. at 258-59.) That night Appellee licked JB's vagina. (J.A. at 258.) In total, JB testified that Appellee persuaded her into touching his penis three times. (J.A. at 261.) Finally, JB testified that Appellee had offered her an iPhone in exchange for her masturbating him. (J.A. at 262-63.) Although she did not submit to his request, JB observed that JH received a new iPhone around the same time period. (J.A. at 262-63.)

JB testified on cross-examination that she moved to California permanently on 1 June 2012 to be with her biological father. (J.A. at 269.) OSI first interviewed JB after her sister JH reported Appellee's abuse to a counselor in the winter of 2013. (J.A. at 277.) JB's interview was not recorded, but JB did provide a written statement. (J.A. at 277-78, 426-31.)

In addition to JB, JLF testified to the three uncharged incidents of alleged child molestation she experienced. (J.A. at 198-239.) As she did in motions practice, JLF testified that when she was three or four years old, Appellee placed her in a bedroom closet in their home, where she watched Appellee have sexual intercourse with another woman. (J.A. at 201-06.) JLF also testified that when she was older and living with Appellee and her family in Charleston, South Carolina, Appellee exposed his penis to her in the bathroom. (J.A. at 207-10.) Finally, JLF

testified that when she was three or four years old, Appellee slid his hand from her knee up her thigh in a seductive manner while they were building tents out of blankets. (J.A. at 210-11, 215.)

As part of its case in chief, the government also introduced text messages between Appellee and JH. (J.A. at 156-57, 382-88.) These text messages were introduced into evidence in the form of an extraction report. (J.A. at 382-88.) In those text messages, Appellee asks JH, his young step-daughter, for "massages." (J.A. at 382-88.)

The government also presented the testimony of Dr. FL. (J.A. at 287-314.) Dr. FL, an expert in the field of psychology and child sexual abuse, explained that children under the age of 16 regularly delay reporting of sexual assault. (J.A. at 311-12.) Dr. FL also testified that children disclosing and testifying about sexual assault will often show little to no emotions. (J.A. at 312-13.)

To support an alibi defense in its case, the defense entered select personnel documents of Appellee and called Appellee's wife, Mrs. JNF. *See* (J.A. at 334.) The defense also presented the testimony of a family friend who, in 2012, began interacting with Appellee and his family. (J.A. at 316-17.) This family friend testified that she had not noticed any abnormal behavior from JH or JB. (J.A. at 318.) The defense also presented evidence that Appellee had a genital piercing.

(J.A. at 324-26, 335-36.) Appellee's wife testified that when the piercing was removed, Appellee's penis felt normal to the touch. (J.A. at 341.)

The military judge instructed the members that they were not to consider the evidence relating to JLF unless they first found by a preponderance of the evidence that the alleged acts occurred. (J.A. at 354.) Only if the members made such a determination, could they then consider the evidence relating to JLF "for its bearing on any matter to which it is relevant in relation to the charges and specifications." (J.A. at 354.) In closing argument, trial counsel argued that Appellee would condition his victims, teach them what to do, and then molest them. (J.A. at 358-59.) During his argument, trial counsel described Appellee's acts with JLF and how Appellee's acts progressed to JB. (J.A. at 359-60.)

SUMMARY OF THE ARGUMENT

AFCCA committed legal error by applying an erroneous interpretation of Mil. R. Evid. 414 to the uncharged alleged acts of child molestation involving JLF. This led to AFCCA erroneously setting aside the findings and sentence in the case. In the alternative, even if this Court upholds AFCCA's interpretation of Mil. R. Evid. 414, AFCCA erred by finding that erroneous admission of the evidence at issue was prejudicial. For these legal errors, this Court should reverse AFCCA's decision setting aside the findings of guilt and sentence in Appellee's case, and remand the case to AFCCA for review of the remaining issues raised by Appellee.

ARGUMENT

I.

THIS COURT SHOULD REVERSE AFCCA'S DECISION TO SET ASIDE THE FINDINGS AND SENTENCE IN THIS CASE AS AFCCA APPLIED AN ERRONEOUS INTERPRETATION OF MIL. R. EVID. 414 THAT CONFLICTS WITH THE PLAIN LANGUAGE OF THE RULE AND THE INTENT AND PURPOSE BEHIND IT.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. United States v. Yammine, 69 M.J. 70, 73 (C.A.A.F. 2010). Questions of statutory interpretation are reviewed de novo. United States v. Gay, Nos. 15-0742 and 15-0750/AF, slip op. at 6 (C.A.A.F. 11 May 2016). Whether conduct constitutes evidence that an appellant committed an offense of "child molestation" under Mil. R. Evid. 414 is a question of law reviewed de novo. Yammine, 69 M.J. at 73.

Law and Analysis

In a case where an accused is charged with an act of child molestation, Mil. R. Evid. 414 allows for admissibility of other offenses of child molestation. Mil. R. Evid. 414(a). Prior to admitting evidence under Mil. R. Evid. 414, three threshold findings are required. United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010). The military judge must determine:

> (1) whether the accused is charged with an act of child molestation as defined by M.R.E. 414(a); (2) whether the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and (3) whether the evidence is relevant under M.R.E. 401 and M.R.E. 402.

Id. (citing United States v. Bare, 65 M.J. 35, 36 (C.A.A.F. 2007).

At the time of trial in this case,[3] Mil. R. Evid. 414 defined the term "child molestation" as

> an offense punishable under the Uniform Code of Military Justice, or a crime under federal law or under state law (as 'state' is defined in 18 U.S.C. § 513), that involves:
>
> (A) any conduct prohibited by Article 120 and committed with a child;
>
> (B) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
>
> (C) any conduct prohibited by 18 U.S.C. chapter 110;
>
> (D) contact between any part of the accused's body, or an object held or controlled by the accused, and a child's genitals or anus;
>
> (E) contact between the accused's genitals or anus and any part of a child's body;
>
> (F) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

[3] On 20 May 2016, the President signed Executive Order 13730, which added conduct prohibited by Article 120b to Mil. R. Evid. 414(d)(2)(A).

> (G) an attempt or conspiracy to engage in conduct described in subdivisions (d)(2)(A)-(F).

Mil. R. Evid. 414(d)(2).

In addition to the three predicate findings listed above, the military judge must also perform a Mil. R. Evid. 403 balancing test. United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000). Furthermore, the military judge must determine that the factfinder could find by a preponderance of the evidence that the conduct at issue actually occurred. Id. at 483 (citing Huddleston v. United States, 485 U.S. 681, 689-90 (1988)). If evidence is admitted under Mil. R. Evid. 414, it "may be considered on any matter to which it is relevant," including propensity. Mil. R. Evid. 414(a); United States v. James, 63 M.J. 217, 220 (C.A.A.F. 2006).

a. Defining "Child Molestation" under the plain language of Mil. R. Evid. 414.

It is the contention of the United States that the term "offense punishable" in Mil. R. Evid. 414(d)(2) requires that any conduct offered under the rule must meet the definition of an offense proscribed by the UCMJ or federal or state law, without regard to the date the conduct occurred or the date of applicability of the relevant UCMJ offense or federal or state statute. Similarly, the phrase "conduct prohibited by" in Mil. R. Evid. 414(d)(2)(A)-(C) requires that the conduct offered must meet the definition of an offense proscribed by those statutes, without regard to the date the conduct occurred or the date of applicability of such a statute. This

interpretation conforms to the plain language in Mil. R. Evid. 414 and the rationale used by this Court in James to interpret the prior version of Mil. R. Evid. 414. The rule contains no temporal limitation.

When determining the scope or meaning of a statute, a court must first look to its language. United States v. Murphy, 74 M.J. 302, 305 (C.A.A.F. 2015). Courts use the same interpretive process to analyze the language of a rule promulgated by the President as they do to analyze the language of a statute passed by Congress. Id.; United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007). The Supreme Court has identified that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

Although canons of construction are meant to assist a court in interpreting a statute or rule, such canons are no more than "rules of thumb." Id. "These rules of thumb give way when the words of a statute are unambiguous." United States v. Schloff, 74 M.J. 312, 314 (C.A.A.F. 2015) (quoting Sebelius v. Cloer, 133 S. Ct. 1886, 1895 (2013) (quoting Connecticut Nat'l Bank, 503 U.S. at 253-54) (internal quotation marks omitted). In other words, if the language of the rule or statute is plain, and "the disposition required by the text is not absurd," a court's sole function is to "enforce it according to its terms." Custis, 65 M.J. at 370 (quoting Harford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

In James, this Court examined the previous version of Mil. R. Evid. 414 to determine whether the rule allowed for the introduction of acts of uncharged child molestation occurring after the charged misconduct. 63 M.J. at 220-22. The starting point for analyzing Mil. R. Evid. 414 was to look to the plain language of the rule. Id. at 221. This Court initially recognized the above cited premise that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Id. (quoting Connecticut Nat'l Bank, 503 U.S. at 253-54). This Court then determined that the plain language of Mil. R. Evid. 414 "regarding any temporal limitation on the admissibility of evidence [was] the most probative method of interpreting [the rule]." Id. In addressing whether Mil. R. Evid. 414 contained any temporal limitations in regards to offered conduct, this Court noted that the rule "simply discuss[es] 'one or more offenses' with absolutely no mention of when the offense(s) might have occurred." Id. Ultimately, this Court declined to read in a temporal limitation where none existed, and held that Mil. R. Evid. 414 was not limited to conduct that took place prior to the conduct charged in the court-martial. Id. at 221.

Similarly, in Schloff, this Court refused to read language of limitation into the definition of sexual contact under Article 120(g)(2), UCMJ. Schloff, 74 M.J. at 314. Specifically, this Court found that the term "touching" in the definition of "sexual contact" included both body-to-body contact and object-to-body contact.

Id. In making this determination, this Court found that the statutory language contained "no limiting or qualifying words that would either require body-to-body contact or exclude object-to-body contact." Id. Once again, this Court refused to read in language of limitation into the rule.

At issue in United States v. McPherson, 73 M.J. 393, 394-96 (C.A.A.F. 2014), was whether the prohibitions of Article 12, UCMJ applied to civilian confinement facilities. This Court found that the language of Article 12, UCMJ was plain on its face in that it contained no geographic limitation. Id. at 395. This Court held that it would "not read any such limitation into the statute," but would presume "that a legislature says in a statute what it means and means in a statute what it says there." Id. (quoting Connecticut Nat'l Bank, 503 U.S. at 253-54).

In this case, AFCCA chose a different route and interpreted the phrase "offense punishable" in Mil. R. Evid. 414(d)(2) to mean that any conduct offered under the rule must have been punishable as an offense under the UCMJ, or federal or state law, when it was committed. (J.A. at 7-8.) AFCCA also found that for conduct to qualify as "child molestation" under Mil. R. Evid. 414(d)(2)(A)-(C), such conduct must meet the definition of an offense under a version of the applicable enumerated statute in effect at the time of trial. (J.A. at 8-9.) The United States respectfully contends that AFCCA's interpretation of Mil. R. Evid. 414, and its creation of temporal limitations, were in error.

In neither subsections (d)(2) or (d)(2)(A)-(C), does the plain language of Mil. R. Evid. 414 contain the qualifiers as written in by AFCCA. Both of the phrases "offense punishable under the Uniform Code of Military Justice" and "any conduct prohibited by Article 120 and committed with a child" contain parallel language with no limiting terms. Concerning subsection (d)(2), the drafters of the rule could have included language requiring that the conduct be an offense punishable "at the time it was committed." Similarly, in (d)(2)(A), they could have included language requiring that the conduct be "prohibited by the version of Article 120 in effect at the time of trial." However, that language is absent, and AFCCA committed legal error by enacting limitations not present in the rule.

Under a plain reading of the rule, conduct constitutes "child molestation" under Mil. R. Evid. 414(d)(2)(A) if it meets the definition of a UCMJ offense, is prohibited by any version of Article 120, UCMJ,[4] and if the conduct was committed with a child. This interpretation avoids adding language of limitation into the rule, while at the same time ensuring that any conduct admitted still meets the definition of a criminal offense. The following hypothetical better explains this point and illustrates the limitations introduced by AFCCA's interpretation.

[4] Further supporting this conclusion is that conduct proscribed by the previous versions of Article 120, UCMJ is still deemed criminal under Article 120, UCMJ. *See* Manual for Courts-Martial, United States, A27-1-A28-7 (2012 ed.). For example, if an accused committed a sexual act on a 14-year-old child in 2008, he would be charged and convicted of aggravated sexual assault of a child under the 1 October 2007-27 June 2012 version of Article 120, UCMJ.

In May of 2012, an accused convinces his four year old daughter to dress in skimpy underwear, demands that she dance around his bedroom, and masturbates repeatedly in front of her. He does not touch her. In 2013, the accused is court-martialed for this conduct and convicted of indecent liberties with a child under the 1 October 2007–27 June 2012 version of Article 120, UCMJ. In 2015, it is discovered that the accused had, in September of 2013, committed sexual acts on a female child-age neighbor. After the investigation, the accused is brought to a second court-martial. The government is considering entering the accused's 2012 conduct that led to an Article 120, UCMJ conviction.

In this hypothetical, the accused's conduct from 2012 not only meets the definition of an offense proscribed by the UCMJ, it is conduct that resulted in an actual conviction under Article 120, UCMJ. However, under AFCCA's interpretation, the indecent liberties conduct would not qualify for admission under Mil. R. Evid. 414, as the Article 120, UCMJ conviction would not meet its definition of "conduct prohibited by Article 120, UCMJ." This illustrates how AFCCA's interpretation directly clashes with the plain language of the rule. On the other hand, under the interpretation advanced by the United States, the conduct leading to the Article 120, UCMJ conviction would qualify as "conduct prohibited by Article 120, UCMJ." This not only leads to a more rational result, it follows the plain language of the rule, while still ensuring that the conduct at issue meets the

definition of conduct we as a society deem criminal.

The United States respectfully asserts that AFCCA's interpretation of Mil. R. Evid. 414 has resulted in separate definitions of parallel clauses that use the same tense and verbiage. AFCCA's interpretation has led to a result this Court explicitly avoided in James, McPherson, and Schloff — enacting language of limitation into a rule or statute that cannot be found in the plain text. Instead, under the plain language of the rule, conduct constitutes "child molestation" under Mil. R. Evid. 414(d)(2)(A) if it meets the definition of a UCMJ offense, meets the definition of an offense listed in any version of Article 120, UCMJ, and if the conduct was committed with a child. Accordingly, AFCCA committed legal error requiring reversal of its decision.

b. Legislative History and Intent behind Mil. R. Evid. 414.

As discussed above, the plain language of Mil. R. Evid. 414 is unambiguous on this issue, in that it is void of the language of limitation written in by AFCCA. Because the rule is unambiguous, "the plain language of the statue will control unless it leads to an absurd result." *See* United States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013). Consequently, there is no need to resort to legislative history. However, in the event this Court determines that language at issue is ambiguous, it may turn to legislative history to aid in its analysis. *See* Connecticut Nat'l Bank, 503 U.S. at 255 (Stevens, J., concurring) (explaining that in the event the language

of a statute is uncertain, courts are "prudent to examine its legislative history"); *see also* Schell, 72 M.J. at 343-44 (considering legislative history after assuming, for the sake of analysis, that the statute at issue was ambiguous). If this Court does determine that the language of the Mil. R. Evid. 414 is ambiguous, the interpretation put forth by the United States advances the legislative intent behind the rule, whereas AFCCA's interpretation contradicts it.

First, in drafting Fed. R. Evid. 414,[5] "the clear intent of Congress was to create a rule that the courts 'must liberally construe' so that factfinders could accurately assess a defendant's criminal propensities and probabilities." James, 63 M.J. at 220 (quotations omitted). In fact, during the legislative process, Congress made it clear that:

> the effectiveness of the new rules will depend on the faithful execution by judges of the will of Congress in adopting this critical reform. The courts should **liberally construe the rules** so that the defendant's propensities, as well as questions of probability in light of the defendant's past conduct, can be properly assessed.

[5] In interpreting and analyzing Mil. R. Evid. 414, this Court has cited to, and relied upon, the legislative history of Fed. R. Evid. 413-414, noting that such rules are virtually the same as their military counterparts. *See* Wright, 53 M.J. at 480-83; *see also* James, 63 M.J. at 220; Drafters Analysis, Supplement to Manual for Courts-Martial, United States A22-43 (2012 ed.) (citing to the legislative history to Fed. R. Evid. 414).

140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Robert Dole) (emphasis added); *see also* 140 Cong. Rec. H8968, at 8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

It is true that this Court has clarified that this liberal admissibility standard does not guide or inform the question of whether prior conduct qualifies as "child molestation" under the rule. Yammine, 69 M.J. at 75. In fact, this Court has interpreted "whether an offense 'qualifies' under M.R.E. 414 strictly, rather than expansively, and continue[s] to require that the offense 'fall within the [rule's] specific definition." Id. (citing United States v. Schroder, 65 M.J. 49, 53 (C.A.A.F. 2007)). However, in this case, the interpretation of the language present in Mil. R. Evid. 414 does not concern whether the conduct at issue fits within a specific definition, but rather relates to how the rule and definitions are to be interpreted. Therefore, in this instance, Mil. R. Evid. 414 must be liberally construed as intended by its drafters.

Second, the fundamental premise behind Fed. R. Evid. 414 was not to introduce evidence that the accused violated a crime or a law. Rather, Congress created Fed. R. Evid. 414 out of a desire to allow for the admissibility of other acts by an accused that suggest a prurient sexual interest in children. This was based on the rationale that an accused who had demonstrated a sexual interest in children was more likely to commit a similar act in the future. Whether such acts or

conduct could be qualified as “offenses” was merely a qualifier or limitation on whether such conduct was admissible under the rule. At a minimum, the legislative history behind the rule establishes that the words “crime” or “offense,” were not terms of art, but rather were interchangeable with the term conduct, or acts. For example, the following analysis was included when Fed. R. Evid. 414 was introduced to the Senate:

> The admissibility of evidence of similar crimes under the proposed new rules is analogous to the current "motive" exception, and is justifiable on similar grounds. The proposed sexual assault rule (Rule 413), as noted above, does not indiscriminately admit evidence of other bad things the defendant may have done, but only evidence of his commission of other criminal sexual assaults. In other words, the evidence must be of such a **character as to indicate that the defendant has the unusual combination of aggressive and sexual impulses that motivates the commission of such crimes, and a lack of effective inhibitions against acting on such impulses**.
>
> **Where there is evidence that the defendant has such impulses-and has acted on them in the past-a charge of sexual assault has far greater plausibility than if there were no evidence of such a disposition on the part of the defendant**. See generally The Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Ref. 707, 725-26 (1989). This seems to be the main point underlying the judicial decisions that have straightforwardly admitted evidence of similar crimes in sex offense cases as evidence of the defendant's "lustful disposition."
>
> The case for admission on these grounds is equally strong, if not stronger, in child molestation cases.

> Evidence of **other acts of molestation indicates that the defendant has a type of desire or impulse-a sexual or sado-sexual interest in children-that simply does not exist in ordinary people**. In such cases, the evidence is generally relevant as proof of "motive" in common sense terms, and admission could normally be sustained even under the current Rules on a sufficiently broad reading of the "motive" exception category. See Elliott v. State, 600 P.2d 1044, 1048-49 (Wyo. 1979).

137 Cong. Rec. S3240 (daily ed. March 13, 1991) (Introduction of S. 635, Comprehensive Violent Crime Control Act of 1991, Section-by-Section Analysis) (emphasis added). To emphasize the point:

> The reform effected by these rules is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases to which it applies. In child molestation cases, for example, a history of **similar acts** tends to be exceptionally probative because it **shows an unusual disposition of the defendant-a sexual or sado-sexual interest in children-that simply does not exist in ordinary people**.

140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Robert Dole).

In fact, throughout its opinion in James, this Court referred to the conduct at issue not only as offenses but also as, "[s]ubsequent acts," "bad acts," "behavior," and "other acts of sexual misconduct." James, 63 M.J. at 220-21; *see also* Schroder, 65 M.J. at 51-52 (in the context of a Mil. R. Evid. 414 issue, referring to "sexual molestation acts," "other acts," and "uncharged acts"). In James, this Court also noted that the historical discussion of Fed. R. Evid. 414 spoke in terms

of "past similar transgressions" or "past sexual offenses," as well as "past acts." James, 63 M.J. at 220. Thus, the impetus behind the rule was not to admit evidence that an accused had engaged in conduct that we as a society had deemed criminal, but to provide for the admission of conduct which shows a sexual interest in children. This is not only supported by the legislative history, but also the fact that often it is the evidence of the conduct that is placed in front of the members, not the conduct's status as a crime.

Second, the drafters of Fed. R. Evid. 414 purposely left the rule void of any temporal limitations. The drafters did so based on a realization that relevant conduct could be separated by a substantial length of time from the offenses charged in the trial. Once again, the analysis accompanying the bill introducing Fed. R. Evid. 414 contained the following:

> Time limitation. Proposed Rules 413-15 do not place any particular time limit on the uncharged offenses that may be offered in evidence. The view underlying this formulation is that a lapse of time from the uncharged offense may properly be considered by the jury for any bearing it may have on the evidence's probative value, **but that there is no justification for categorically excluding offenses that occurred before some arbitrarily specified temporal limit**.
>
> There is no magic line in time beyond which similar crimes evidence generally ceases to be relevant to the determination of a pending charge.

137 Cong. Rec. S3240 (daily ed. March 13, 1991) (Introduction of S. 635, Comprehensive Violent Crime Control Act of 1991, Section-by-Section Analysis) (emphasis added). Put another way,

> In line with this judgment, the rules do not impose arbitrary or artificial restrictions on the admissibility of evidence. Evidence of offenses for which the defendant has not previously been prosecuted or convicted will be admissible, as well as evidence of prior convictions. **No time limit is imposed on the uncharged offenses** for which evidence may be admitted; as a practical matter, **evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses**.

140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Robert Dole)(emphasis added).

Given that the motivating factor behind the rule was the admissibility of conduct showing a prurient sexual interest in children, and because the drafters purposely excluded temporal limitations, it follows then that the rule was not intended to set limits in regards to the timing of the acts as compared to the statutes stated within the rule. To draft into the rule requirements that would, in effect, set temporal limitations on admissibility of such acts would cut against such intent and purpose. Instead, the history and intent of the rule encourages a reading that allows the admissibility of acts indicating a sexual prurient interest in children when those acts meet the definition of any of the offenses listed in the rule, without

regard to the date of the conduct and the dates of applicability of the enumerated statutes.[6]

b. Addressing the rationale underlying AFCCA's interpretation of Mil R. Evid. 414.

In its opinion, AFCCA stated that "for an offense to be 'punishable' under the law, it is reasonable to conclude that the pertinent incident must have been against the law when the conduct occurred." (J.A. at 7.) AFCCA stated that such a conclusion "recognizes that the *illegality* of the prior conduct is important when determining whether it creates a propensity to engage in charged criminal conduct." (J.A. at 8.) (emphasis in original). As discussed above, the rationale behind the rule was not to show that the accused engaged in criminal conduct, therefore he is more like to commit another crime. Rather, the rule was based on the idea that the expression of a prurient sexual interest in children is relevant for determining whether an accused has a propensity to molest a child. Whether such action meets the definition of a criminal offense is merely a qualifier or limitation.

Further addressing AFCCA's rationale, AFCAA not only enacted limiting language into the rule, it then read temporal limiting language out of Article 120,

[6] This is also supported by the fact that when military judges are conducting their Mil. R. Evid. 414 analysis they are not required to find that these "similar crimes" meet any jurisdictional requirements, such as whether a member was on active duty at the time of the offense. *See* United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005) (finding accused's conduct, committed when he was 13, admissible under Mil. R. Evid. 413, but ultimately inadmissible under Mil. R. Evid. 403.)

UCMJ. (J.A. at 12-13.) As stated above, AFCCA determined that Mil. R. Evid. 414(d)(2)(A) requires that the conduct at issue must meet the definition of an offense listed under the version of Article 120, UCMJ, in effect on the day of trial. (J.A. at 8-9.) Despite this qualification, AFCCA, through its application of this test, set aside the temporal limitation of the current Article 120, UCMJ. *See* (J.A. at 12-13) (finding Appellee's commission in 2001 of an indecent act constitutes an abusive sexual contact under the current version of Article 120, UCMJ, which applies only to offenses committed on or after 28 June 2012). Thus, if AFCCA was able to define "conduct prohibited by Article 120" as conduct that meets the definition of the current Article 120 without regard to its temporal limitation, than it also should have found such language to include any other version of Article 120, UCMJ, still in effect.

In responding to any concern of redundancy in the rule, the "offense punishable" portion of rule will never be redundant with Mil. R. Evid. 414(d)(2)(A)-(C). Redundancy would exist if the "offense punishable" language pertains to no other actions other than those described in the following definitions. However, this is not the case, as an offense punishable under the UCMJ, or crime under federal or state law, encompasses more conduct than the limiting definitions below it. For example, if an accused committed an assault consummated by a battery against a child, an act involving no sexual intent, such an act would

constitute an offense punishable under the UCMJ, but not qualify under any of the following limiting definitions. Thus, the offense punishable language is a general starting point in the definition, which is then narrowed by the following definitions. Therefore, redundancy is not a concern.

In its decision, AFCCA also noted that it has not found a federal case that concluded that an indecent exposure would constitute child molestation under Fed. R. Evid. 414. (J.A. at 14.) At this point, undersigned counsel yet to find such a case.[7] However, as similar as the federal rule is to Mil. R. Evid. 414, the federal rule does not incorporate Article 120, UCMJ. It also should be noted that the previous version of Mil. R. Evid. 414 included sexually explicit conduct, which captured a wide range of acts not encompassed by the federal statute. Manual for Courts-Martial, United States, Mil. R. Evid. 414 (2012 ed.). Thus, currently, and historically, Mil. R. Evid. 414 has been broader than the federal rule.

As part of its rationale, AFCCA also voiced a concern with Mil. R. Evid. 414 encompassing "a situation where an individual's lawful conduct is later

[7] At least one federal district court has reviewed habeas challenges to California Code § 1108, which is analogous to Fed. R. Evid. 414 and allows for the admission of prior sexual offenses, including indecent exposure. *See* Lawrence v. Lockyer, No. C 05-3541 SI (pr), 2007 U.S. Dist. LEXIS 16225 (N.D. Cal. 22 February 2007); Johnson v. Malfi, No. C 06-05539 CW, 2008 U.S. Dist. LEXIS 83718 (N.D. Cal. 2 September 2008). At issue in at least two of those cases was the admission of prior acts of indecent exposure. Lawrence, unpub. op. at *5-6, *21-*29; Johnson, unpub. op. at *11-*18. In both cases, the Court denied the petitioners' writs of habeas corpus. Lawrence, unpub. op. at *59-60; Johnson, unpub. op. at *55.

classified as a 'similar crime' and used as evidence of his propensity to commit the crime of child molestation." (J.A. at 9.) However, as AFCCA noted in its opinion, "legislative enactments creating procedural rules which merely permit members to consider certain types of evidence for certain purposes do not raise ex post facto concerns." (J.A. at 9 n.9 (citing Thompson v. Missouri, 171 U.S. 380, 387 (1898)). Mil. R. Evid. 414 is that type of procedural rule. Thus, an interpretation of Mil. R. Evid. 414 capturing such a circumstance is acceptable.

In its opinion, AFCCA found that its approach "gives the maximum effect to each and every word of the evidentiary rule, while still avoiding an implausible, strained, or contorted result." (J.A. at 9.) The United States instead respectfully contends that the effect of such an interpretation unnecessarily and significantly narrows the type of conduct admissible under Mil. R. Evid. 414, relies on statutory construction canons in contradiction of the plain language of the rule, and creates a version of the rule the drafters certainly did not intend.

In Mil. R. Evid. 414(d)(2), the terms "offense punishable" and "conduct prohibited by" require that the conduct at issue must meet the definition of an offense listed within the enumerated criminal statutes without regard to the date of the offense or the date of applicability of the statutes. This is a consistent and uniform interpretation of the rule. Such an interpretation still gives meaning to the terms "offense" and "crime," avoids redundancy, and does not add limiting

verbiage and temporal limitations to the rule. This interpretation results in the broadest inclusion of conduct which demonstrates a sexual interest in children, while still ensuring that such conduct is serious enough to rise to the level necessary to be defined as a criminal offense. Finally, this interpretation does not contradict the legislative intent and purpose behind the rule, but rather promotes it. Accordingly, this Court should hold that AFCCA erred in its interpretation of Mil. R. Evid. 414.

c. Applying the United States' interpretation to the three incidents in this case.

Applying the above interpretation to this case, the three incidents involving JLF offered at trial were in fact admissible under Mil. R. Evid. 414. First, the bedroom closet incident is not only an offense under the UCMJ, but is also prohibited by Article 120, UCMJ. The military judge found that Appellee knowingly put his 3-4-year old daughter in a closet so that she could watch him have sexual intercourse with a woman. (J.A. at 435.)

By deciding that such conduct qualified as a lewd act under the current version of Article 120b, UCMJ it is apparent that the military judge found that Appellee either exposed himself with the intent to arouse or gratify the sexual desire of any person, or that Appellee engaged in indecent conduct. (J.A. at 435.) As the military judge found, this incident satisfied the elements of the offense of indecent exposure under Article 134, UCMJ in the pre-1 October 2007 UCMJ.

(J.A. at 435.) However, taking into account the conduct and the findings of the military judge, this conduct is also punishable under the 1 October 2007-27 June 2012 version of Article 120, UCMJ as an indecent liberty with a child.

Continuing the analysis, this evidence makes it more probable that Appellee would molest his other daughters. Relevancy is especially clear when one considers that this incident involved Appellee's female daughter and occurred in the home under similar circumstances as the charged offenses. (J.A. at 435-36.) Therefore, as the military judge found, the incident is relevant under Mil. R. Evid. 414 and admissible under Mil. R. Evid. 403. (J.A. at 435-38.)

Next, the bathroom exposure episode is also conduct punishable by the UCMJ and prohibited by Article 120, UCMJ. The military judge found that Appellee had exposed his penis to his daughter with the intent to arouse or gratify the sexual desire of any person. (J.A. at 436.) Once again, the incident does qualify as indecent exposure under Article 134 in the pre-2007 UCMJ. (J.A. at 436.) However, it also is punishable under the 1 October 2007-27 June 2012 version of Article 120, UCMJ as an indecent liberty with a child. Furthermore, for the same reasons cited above, the evidence is relevant and admissible under Mil. R. Evid. 403. (J.A. at 436-38.)

Finally, as AFCCA found in its opinion, the incident in which Appellee slid his hand up JLF's thigh constitutes the offense of indecent act under Article 134 of

the pre-2007 UCMJ as well as abusive sexual contact under the current version of Article 120, UCMJ. (J.A. at 12-13.) Additionally, the evidence is relevant and admissible under Mil. R. Evid. 403. (J.A. at 12-13.) Consequently, Appellee's conduct during all three incidents was punishable under the UCMJ, prohibited by Article 120, UCMJ, and relevant and admissible under Mil. R. Evid. 403. It follows then that Appellee's conduct with JLF constituted "child molestation" as defined in Mil. R. Evi. 414(d)(2)(A) and was properly before the members.[8]

Taking into account the above, this Court should hold that AFCCA erred in its interpretation of Mil. R. Evid. 414. This Court should find that the evidence offered through JLF constituted "child molestation" for the purpose of the rule, and that such evidence was properly before the members. Accordingly, this Court should reverse AFCCA's decision to set aside the findings and sentence in this case and remand the case to AFCCA for consideration of Appellee's remaining issues.

II.

ALTERNATIVELY, AFCCA COMMITTED LEGAL ERROR WHEN IT FOUND THAT THE ERRONEOUS ADMISSION OF APPELLEE'S COMMISSION OF TWO ACTS OF INDECENT LIBERTIES INVOLVING HIS CHILD-AGE

[8] The same result would be reached even if this Court finds that "offense punishable" means the conduct must meet the definition of an offense under the UCMJ on the date it was committed, but finds that "conduct prohibited by Article 120" means any version of Article 120 contained in the Manual.

DAUGHTER HAD A SUBSTANTIAL INFLUENCE ON THE MEMBERS' VERDICT REQUIRING SET ASIDE OF HIS CONVICTION.

Standard of Review

Whether a nonconstitutional error materially prejudices the substantial rights of an accused is reviewed de novo. Yammine, 69 M.J. at 78.

Law and Analysis

The test for whether a nonconstitutional error materially prejudices the substantial rights of an appellant is whether the error "had a substantial influence on the members' verdict in the context of the entire case." United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007). To determine whether erroneously admitted evidence had a substantial influence on the members' verdict, courts consider four factors. United States v. Barnett, 63 M.J. 388, 397 (C.A.A.F 2006). Those factors are: "(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." Id. (quoting United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)). The burden is on the government to demonstrate that erroneous admission of evidence was harmless. United States v. Flesher, 73 M.J. 303, 318 (C.A.A.F. 2014).

Even if this Court adopts AFCCA's interpretation of Mil. R. Evid. 414, the admission of JLF's testimony did not materially prejudice the substantial rights of

Appellee. First, the strength of the government's case was strong. This was not a case of "dueling facts," as Appellee did not testify. *See* Yammine, 69 M.J. at 78. The testifying victim in the case, JB, was credible and provided detailed testimony given her age and the length of time that lapsed since the charged offenses. (J.A. at 244-49, 251-62.) Regarding her delayed disclosure and lack of emotion, a government expert testified that both characteristics are normal for child sexual abuse victims. (J.A. at 311-12.) Despite her youth and the passage of time, JB was able to recall approximate dates of the offenses using memory landmarks. (J.A. at 250, 252-53, 263-65, 267-68.) Given her age, and the systematic and normalized type of abuse she endured at the hands of Appellee, a failure to recall specific dates down to the day is to be expected. Furthermore, the government introduced text messages that corroborated JB's testimony describing Appellee's affinity for sexual "massages" from his young victims. (J.A. at 382-88.)

On the other hand, the defense case was weak. On cross examination, the defense was unable to effectively expose any motive to lie on JB's part or successfully confront her with prior inconsistent statements. (J.A. at 264-85, 378-79, 381.) The testimony of a family friend discussing the lack of abnormal behavior of JB and JH contained little actual substance, was only relevant from 2012 forward, and was nullified by the expert testimony in the case. (J.A. at 311-13, 315-19.) This evidence was so insignificant, trial defense counsel did not

mention it in his closing argument. (J.A. at 374-79.)

Although the defense attempted to establish an alibi to the 2007 offenses, Appellee's alleged separation from his victims actually explained why his sexual abuse of JB in 2007 continued for five nights and then abruptly stopped. (J.A. at 249, 265, 334-35.) The defense did present evidence that Appellee had a genital piercing, and did argue that JB's testimony did not include mention of this piercing or the resulting scar from the piercing. (J.A. at 324-26, 376.) However, this evidence was dramatically undercut when Appellee's wife, who exhibited a bias for Appellee, testified that Appellee's penis felt normal to the touch when the actual piercing device is removed. (J.A. at 341, 379.)

In regards to the materiality of the evidence at issue, even if this Court adopts AFCCA's interpretation, the thigh touching evidence involving JLF was still admissible. (J.A. at 12-13.) Accordingly, the military judge would still have provided a Mil. R. Evid. 414 instruction. (J.A. at 451.) Furthermore, the thigh touching incident was the most powerful conduct from an evidentiary standpoint given the unique memory of this incident as expressed by JLF and the fact that it involved actual touching of the child's body. (J.A. at 210-11.) In regards to the other two incidents, this is not a case where the evidence at issue was more serious than the charged offenses. *See* United States v. Morrison, 52 M.J. 117, 123 (C.A.A.F. 1999). Nor in the context of all the evidence presented and the charged

offenses, could this evidence be considered powerful, persuasive, or confusing. *See* United States v. McDonald, 59 M.J. 426, 431 (C.A.A.F. 2004) (finding erroneously admitted evidence of a 20-year allegation of appellant's exposure, masturbation, and attempted digital penetration with an 8 year-old-girl prejudicial due to its powerful, persuasive, and confusing nature).

Further addressing the materiality factor, assistant trial counsel's opening statement contained merely a recitation of the facts to be testified to by JLF. (J.A. at 165-66.) Trial counsel's utilization of this evidence in closing argument was not propensity based, but instead used JLF's testimony to put forth an argument that

Appellee had a common plan[9] to groom and sexual abuse his daughters. (J.A. at 358-60, 365.) Once again, it must be recognized that even under AFCCA's interpretation, trial counsel could have made the same argument, albeit limited to just the thigh touching incident.

Continuing, the quality of the evidence was mixed. The only evidence presented at trial of the uncharged conduct was the testimony of JLF. (J.A. at 198-239.) Unlike their cross examination of JB, the defense was able to minimize JLF's testimony through prior inconsistent statements and lack of recall. (J.A. at

[9] As part of its prejudice analysis, this Court should also consider that Appellee's abuse of JLF was alternatively admissible under Mil. R. Evid. 404(b) to show a common plan or motive on the part of Appellee to sexually abuse and groom his young daughters. *See* United States v. Henley, 53 M.J. 488 (C.A.A.F. 2000); United States v. Munoz, 32 M.J. 359 (C.A.A.F. 1991). The United States acknowledges that the government did not present this theory to the military judge at trial. *See* United States v. Avila, 27 M.J. 62, 66 (C.M.A. 1988) (citing United States v. Watkins, 21 M.J. 224, 226 n. 2 (C.M.A. 1986)); *see also* United States v. Pastor, 8 M.J. 280, 281 (C.M.A. 1980) (holding that admissibility of the evidence at issue was limited to purpose advanced at trial). Furthermore, the military judge did not rule on the admissibility of the evidence under Mil. R. Evid. 404(b), as he admitted the evidence under Mil. R. Evid. 414. *See* (J.A. at 438-39.) In Morrison, this Court considered an argument for the admissibility of evidence based on a purpose not litigated at the trial level. Morrison, 52 M.J. at 122-23. In addressing that argument, this Court did not cite to the above noted authorities and summarily set aside the government's position. *See* id. at 123. Instead, this Court left open the question of whether the government's attempt to advance a purpose for admissibility of evidence for the first time on appeal implicated due process rights. *See* id. Based on that rationale and holding, the United States contends that whether the government may advance a purpose for admissibility of evidence for the first time on appeal is an open question. Also, the United States advanced this Mil. R. Evid. 404(b) argument to AFCCA in its motion for reconsideration and reconsideration en banc. (J.A. at 43-44.)

217-19, 224-25.) Finally, despite admission of the evidence, the members acquitted Appellee of some offenses. (J.A. at 85-88.) This suggests that admission of Appellee's conduct with JLF did not inflame the members or override their ability to carefully weigh and parse the evidence.

Taking into account the above, even if this Court upholds AFCCA's interpretation of Mil. R. Evid. 414, admission of Appellee's acts with JLF did not prejudice the substantial rights of Appellee. The government's case was strong, whereas the defense's case was weak. Even under AFCCA's interpretation of Mil. R. Evid. 414, the thigh groping incident was admissible. This entitled the government to the same propensity instruction given at trial, and gave the government the ability to present this incident as part of its findings argument. Therefore, even in the event this Court upholds AFCCA's interpretation of Mil. R. Evid. 414, this Court should find that AFCCA erred in finding that the erroneous admission of JLF's testimony was prejudicial. Accordingly, this Court should reverse AFCCA's decision to set aside the findings and sentence in this case.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court reverse AFCCA's legally erroneous interpretation of Mil. R. Evid. 414, as well as AFCCA's decision to set aside the findings and sentence in this case. In the alternative, the United States respectfully requests that this Honorable Court

reverse AFCCA's legally erroneous finding of prejudice in this case, as well as its related decision to set aside the findings and sentence. This Court should remand Appellee's case to AFCCA for consideration of the other issues raised by Appellee.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 31 May 2016.

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