IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

JUSTIN L. FETROW
Technical Sergeant (E-6), USAF
Appellee.

Crim. App. No. 38631
USCA Dkt. No. 16-0500/AF

ANSWER BRIEF CONCERNING CERTIFIED ISSUES

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

Issues Certified for Review

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), UCMJ, setting aside the findings and sentence on 21 January 2016. JA 1. This Court has jurisdiction based on the April 29, 2016 certification of The Judge Advocate General (TJAG) of the Air Force, pursuant to Article 67(a)(2), UCMJ.

Statement of the Case

Contrary to his plea of not guilty, a panel of officer and enlisted members convicted Technical Sergeant (TSgt) Justin L. Fetrow of various specifications of unlawful sexual conduct related to his two stepdaughters, JB and JH, all in violation of Articles 80 and 120, UCMJ. JA 85-88. Only one of the named victims, JB, testified at trial. The panel acquitted on two specifications of sexual abuse of a child and one specification of abusive sexual contact with a child. JA 85-88. The approved sentence included a dishonorable discharge, confinement for 25 years, and reduction to the lowest enlisted grade. JA 88.

Statement of Facts

Faced with only one witness to prove up the allegations concerning JB and JH, the government offered propensity evidence of conduct unrelated to the charges through TSgt Fetrow's sixteen-year-old biological daughter, JLF. JA 199.

As pertinent to the TJAG's certification, the propensity evidence included two instances of alleged indecent exposures. The first purportedly occurred between June and December 2001 when JLF was 3-4 years old. JA 104-10, 433. JLF stated that TSgt Fetrow put her in a closest while he had sex with another woman on the bed. *Id.* The second incident involved JLF seeing TSgt Fetrow's penis in the bathroom when she was 8-9 years old. JA 119-121, 433. Based on JLF's birthdate, this event would not have occurred later than 2006. *See* JA 102. The defense filed a timely motion *in limine* to exclude this and other evidence. JA 389-425.

The military judge held the closet and bathroom incidents qualified as "commission of another offense of child molestation," specifically "sexual abuse of a child, in violation of Article 120 and 120b." JA 179-81. He supplemented his ruling to conclude these

incidents "would constitute the offense of indecent exposure if analyzed under the pre-1 October 2007 version of Article 134." JA 435-36.

In a published decision, the AFCCA set aside the findings and the sentence. JA 1-16. The court held the military judge committed prejudicial error in allowing the government to admit this propensity evidence under Military Rule of Evidence (MRE) 414. The opinion focuses on the following language:

> "Child molestation" means any *offense punishable* under the uniform Code of Military justice, or a *crime* under federal law or under state law . . . that involves: (A) any *conduct* prohibited by Article 120 and committed with a child . . . .

JA 5-6 (quoting MRE 414(d)(2) (emphasis added)).

The AFCCA determined the separate "two portions of this rule are focused on different concerns and, therefore, one must look to both the law in effect at the time of the prior conduct and the law when the evidence is offered to determine whether conduct constitutes an offense of 'child molestation' under the rule." JA 6-7.

First, concerning the beginning portion of MRE 414(d)(2), the AFCCA reasoned as follows:

> 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. If the

> incident did not constitute an offense at the time of the conduct, it was lawful conduct and not a crime that could be punished under the UCMJ or federal/state law. Therefore, the conduct must have been a UCMJ offense, a federal crime or a state crime when the conduct occurred. This recognizes that the *illegality* of the prior conduct is important when determining whether it creates a propensity to engage in charged criminal conduct. If the President intended otherwise, one would expect he would have used language that made this intent clear. Our interpretation gives plain meaning to the term "offense punishable" and "crime" in Mil. R. Evid. 414(b)(2). It is also consistent with the title of Mil. R. Evid 414 ("similar crimes in child-molestation cases") and the instruction provided to panel members when such evidence is introduced (which repeatedly uses the word "uncharged offense"), as well as our superior court's admonition that courts are to apply the text of the rule strictly.

JA 8 (footnote and citations omitted).

Second, the AFCCA determined "[t]o be admissible under Mi. R. Evid. 414, the 'similar crime' incident must also involve *conduct* listed in the current version of Mil. R. Evid. 414(d)(2)(A)-(G)." JA 8. In determining whether the conduct falls within the "exclusive list" that qualifies for admission under MRE 414, the AFCCA reasoned that

> [t]he current version of Mil. R. Evid. 414, along with its incorporated criminal statutes within it, constitute the Congressional and executive's current determinations of what criminal conduct is potentially relevant for propensity to commit an offense of child molestation. If certain criminal conduct is potentially relevant to an accused's propensity to commit an offense of child molestation, it should matter little

> that the crime was only recently included as prohibited conduct under the rule. As the underlying criminal conduct is the same, so is its relevance to an accused's propensity to commit an offense of child molestation. Consequently, to the extent that the conduct in Mil. R. Evid. 414(d)(2) incorporates a particular statute as prohibited criminal conduct, such as incorporating Article 120, 18 U.S.C. chapter 109A, or 18 U.S.C. chapter 110, the rule references conduct that would constitute a crime under those statutes in effect on the day of trial.

JA 8-9 (footnotes omitted).

The AFCCA explained this two-step approach gives full effect "to every word in the evidentiary rule" while avoiding unnecessary redundancy between the "offense punishable" portion of the definition and the descriptions of certain conduct by cross reference to three separate criminal statutes found in MRE 414(d)(2)(A)-(C). JA 9. "The first portion ensures the conduct was a crime, in the broadest sense, when it occurred. . . . The second portion addresses the admissibility of that criminal conduct based on how it is defined by the rule when the evidence is offered at trial." JA 9.

Applying this framework to TSgt Fetrow's trial, the AFCCA found the military judge's reasoning erroneous for two reasons. First, the court observed that "the offense of 'sexual abuse of a child' is not a violation of Article 120." JA 12. The court allowed that "'sexual abuse

of a child' *is* an offense under Article 120b," but observed that the text of the rule did not incorporate this statute into Mil. R. Evid. 414(d)(2). JA 12. Second, the AFCCA reasoned the text of MRE 414 only references "Article 120," while excluding any cross-reference to Articles 120a, 120b, and 120c. JA. 12. The AFCCA observed:

> To interpret the rule's reference to Article 120 more broadly than written, so that it also incorporates Article 120a, Article 120b, and Article 120c, would result in a counterintuitive and an unprecedented expansion of what constitutes "similar crime" evidence in child molestation cases. For example, such a reading would convert a non-sexual stalking offense involving a child under Article 120a into a potential "similar crime" under Mil. R. Evid. 414. If the President's intent was to significantly expand what types of conduct can be considered for admission for these purposes in the military, or to further differentiate the military rule from the federal rule, one would expect that it would be done explicitly and clearly.

JA 12 (citations and footnote omitted).

Upon analyzing the closet and bathroom propensity evidence, the AFCCA determined that "neither of these exposures falls within the specific categories of prohibited conduct" under MRE 414(d)(2). JA 13. After unsuccessfully surveying whether any federal case considered indecent exposure without physical contact an MRE 414 offense, the AFCCA concluded that such conduct does "not constitute 'child

molestation' for purposes of Mil. R. Evid. 414 as it is currently drafted." JA 14.

The court observed there was a then-pending proposal to amend MRE 414(d)(2)(A) to add "or prohibited by Article 120b" to the language of MRE 414(d)(2)(A). JA 12, n. 11 (citing Manual for Courts-Martial: Proposed Amendments 80 Fed. Reg. 63204 (Oct. 19, 2015). As this proposed amendment was not in effect at the time of TSgt Fetrow's trial, however, the AFCCA refused to read "or prohibited by Article 120b" into the text of the rule. *See* JA 14, n. 14.

Upon testing for prejudice, the AFCCA found the two erroneously admitted incidents of indecent exposure were "clearly a critical piece of the Government's case," adding new ammunition to a closely contested trial based primarily on a single, relatively wooden witness, JB. JA 15. The court analyzed the factors in *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007), and concluded that the erroneously admitted propensity evidence had a substantial influence on the verdict. JA 14-16.

Certification by the TJAG followed a denied a government request for reconsideration. JA 17.

Additional relevant facts are included in the argument section, below.

Summary of the Argument

This Honorable Court should affirm the AFCCA for at least two reasons. First, the opinion below faithfully applies MRE 414 under both a plain language and canonical construction. The government's resort to broad statements from legislative history fails to address how that history has been interpreted time and again by this Court. Second, the opinion below scrupulously applies the correct legal standard in a fair and objective reading of the record, ultimately concluding TSgt Fetrow was prejudiced by the erroneous admission of evidence. There is no reason to disturb this holding, and the government's newly minted theory of admissibility should be rejected.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS PROPERLY CONSTRUED MIL. R. EVID. 414

Standard of Review

Although a military judge's decision to admit evidence is reviewed for an abuse of discretion, the conclusion that an allegation "constitutes

evidence that [an accused] committed another offense of 'child molestation' under MRE 414 . . . is one of law, reviewed de novo." *United States v. Yammine*, 69 M.J. 70, 73 (C.A.A.F. 2010).

Law

MRE 414 provides as follows: "In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation. The evidence may be considered on any matter to which it is relevant."

In 2013, the definition section of MRE 414 was revised to conform with an update to its counterpart in the Federal Rules of Evidence (FRE). *See* Manual for Courts-Martial (MCM), United States, *Analysis of the Military Rules of Evidence*, app. 22 at A22-43 (2013 Supp.).

As amended prior to TSgt Fetrow's trial, MRE 414(d)(2) defines "child molestation" as follows:

> *[A]n 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 109A3 and committed with a child;
>
> (C) any conduct prohibited by 18 U.S.C. chapter 1104;

(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

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

M.R.E. (d)(2) (2013) (emphasis added).

Unlike its federal counterpart, the pre-2013 version of MRE 414 did not incorporate conduct by referencing specific statutes. Rather, the military rule described the covered conduct generically with no specific statutory reference. The pre-2013 rule defined the "offense of child molestation" as

an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved—

(1) any sexual act or sexual contact with a child proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) any sexually explicit conduct with children proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(3) contact between any part of the accused's body, or an object controlled or held by the accused, and the genitals or anus of a child;

(4) contact between the genitals or anus of the accused and any part of the body of a child;

> (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
>
> (6) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (5) of this subdivision.

Manual for Courts-Martial, United States, pt. III, (2012 ed.).

This Court has held the definition section of MRE 414 "provides an exclusive list of offenses that qualify as 'offenses of child molestation.'" *Schroder*, 65 M.J. at 53.

This Court has observed legislative intent "to provide for more liberal admissibility of character evidence in criminal cases of child molestation *where the accused has committed a prior act of sexual assault or child molestation,"* but has directed that the "liberal admissibility standard does not guide or inform its threshold inquiry: whether a prior act *is* one of child molestation." *Yammine*, 69 M.J. at 76 (emphasis in original). Because of propensity evidence's tendency "to relieve the government of its constitutional burden to prove every element of the charged offense beyond a reasonable doubt," 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.* (citations omitted).

Before admitting evidence pursuant to MRE 414, the military judge must find "(1) that the accused is charged with an act of child molestation . . . ; (2) that the proffered evidence is evidence of his commission of another offense of child molestation; and (3) that the evidence is relevant under M.R.E. 401 and M.R.E. 402." *United States v. Schroder*, 65 M.J. 49, 52 (C.A.A.F. 2007). Additionally, the military judge must conduct a balancing analysis pursuant to MRE 403 and the factors enunciated in *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000). *See id.*

Analysis

The dispute in this case implicates the second of this Court's three pronged test under MRE 414, *i.e.*, "that the proffered evidence is evidence of [the accused's] commission of another offense of child molestation." *Schroeder*, 65 M.J. at 52. Here, the AFCCA held that to satisfy this test (1) the conduct must have been illegal, in general, when it occurred; and (2) where MRE 414(d)(2) "incorporates a particular statute as prohibited criminal conduct . . . the rule references conduct that would constitute a crime under those statutes in effect on the day of trial." JA 8. The AFCCA determined the second requirement

necessarily excluded the closest and bathroom incidents, and did not reach the first prong of its test concerning this alleged conduct. JA 13.

The government disputes both components of the AFCCA's test, Gov't Br. at 14. But the government appears to concede that, for it to prevail, this Court must hold "conduct prohibited by Article 120" in MRE 414(d)(2)(A) means *any* version of Article 120, *to include superseded* versions, contained in the Manual for Courts-Martial (MCM). *See* Gov't Br. 33, n.8 (observing that the "same result would be reached" if its argument is rejected on prong one of AFCCA's test, but accepted on prong two). The government's argument should be rejected.

A. A plain language reading of MRE 414(d)(2)(A) references only the current version of Article 120, UCMJ

The government's argument fails to adhere to the plain meaning of MRE 414(d)(2)(A). As this Court has recently observed "an unambiguous statute is to be enforced according to its terms." *EV v. United States*, 2016 CAAF LEXIS 497, *6 (C.A.A.F. Jun. 21, 2016) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1,6 (2000)). Likewise, this Court looks first to the language of a rule promulgated by the President in determining its scope or meaning. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015).

When the words of a statute, or rule, "are unambiguous," interpretive canons are unnecessary and "give way" to the text. *United States v. Schloff*, 74 M.J. 312, 314 (C.A.A.F. 2015).

The government's argument requires reading the following bracketed text into MRE 414(d)(2)(A): "any conduct prohibited by [any version contained in the MCM of] Article 120 and committed with a child." *See* Gov't Br. at 14; 33, n.8. To be sure, the government contends that AFCCA's holding requires changing MRE 414(d)(2)(A) to read "prohibited by *the version of* Article 120 *in effect at the time of trial*." *See* Gov't Br. at 18; JA 27 (emphasis added). But the government's argument is unpersuasive. A reasonable person would understand that the default meaning of a rule of evidence's cross-reference to an Article of the UCMJ refers to the current version of that statute.

For example, when this Court references "Article 66(c)" in its opinions, it is properly understood to refer to the present version of Article 66(c), absent some qualifying or amplifying language accompanying the reference. *See*, *e.g.*, *United States v. Chin*, 74 M.J. 220 (C.A.A.F. 2016) (employing multiple references to "Article 66(c)").

Accordingly, it is unnecessary for this Court to add language such as "the version of Article 66(c) in effect at the time of review," to its opinions because the plain meaning when referencing a statute is the version currently in effect.

The opposite is not true. A reasonable person would not understand a cross-reference to a statute to include both its current and superseded versions without some additional signal indicating otherwise. Accordingly, the government's argument that the AFCCA added language into MRE 414(d)(2)(A) should be rejected.

Underscoring this plain-language reading in the 2013 version of MRE 414(d)(2)(A) is the phrase "and committed with a child" immediately following "any conduct prohibited by Article 120 . . . ." If the government is correct that "Article 120" includes the prior version of the statute covering conduct from 1 October 2007 through 27 June 2012, this additional language is unnecessary surplusage because that superseded statute already covers a broad range of sexual offenses against children. *See generally Gustafon v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (instructing courts to avoid a construction rendering a portion of a statute redundant).

Likewise, the AFCCA justifiably relied on the heading of MRE 414, which references "[s]imilar crimes." JA 8. The "title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (alteration and citation omitted).

The plain reading of MRE 414(d)(2)(A) as it existed at TSgt Fetrow's trial is perhaps why the President found it necessary to add additional language to include a broader spectrum of conduct prohibited by other statutes in addition to the present version of Article 120, UCMJ. On May 2016, the President signed Executive Order 13730, revising MRE 414(d)(2)(A) to read "any conduct prohibited by Article 120 and committed with a child, *or prohibited by Article 120b*" (emphasis added). Executive Order No. 13730, 81 Fed. Reg. 33331 (May 20, 2016); s*ee also* Manual for Courts-Martial; Proposed Amendments, 80 FR 63204, 63208 (Oct. 19, 2015) (proposed amendment).

If the "plain language" interpretation the government advances is correct, there would be no need for the President to add new language because the offenses located in the superseded version of Article 120 in effect from 1 October 2007 through 27 June 2012 would already cover

such conduct. Although the government addresses—in a footnote—that the President recently amended MRE 414(d)(2)(A), it fails to explain why such an amendment was necessary if its proposed argument is, indeed, the "plain meaning" of the statute. *See* Gov't Br. at 13, n.3.

The government's hypothetical, apparently intended to paint the AFCCA's construction as generating absurd results, simply demonstrates the government's policy disagreement with the version of the rule in effect during TSgt Fetrow's trial. JA 19. Whether the MRE 414(d)(2)(A) should—in the normative sense—include conduct criminalized in the current version of Article 120b is a matter of policy that is not before this Court. *Cf. United States v. McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014). Although the government's policy preferences may dictate that every indecent liberty offense be covered under MRE 414, this Court previously noted in *Schroder* that the pre-2013 version of MRE 414 did "not give the military judge the discretion to admit uncharged misconduct in every case in which the accused has allegedly committed indecent acts or indecent liberties with a child . . . ." *Schroder*, 65 M.J. at 53. Likewise, as the AFCCA correctly observed,

the post-2013 version of MRE 414 did not cover indecent exposure at the time of TSgt Fetrow's trial. JA 14.

B. This Court's precedents demonstrate the AFCCA's construction is sound

Assuming for purposes of argument that the reference in MRE 414(d)(2)(A) to "conduct prohibited by Article 120 and committed with a child" is ambiguous as to whether it references the current version of Article 120 only, or also includes—as the government suggests—all previous versions "contained within the MCM," this Court's precedent supports the AFCCA's decision.

This Court's direction that the "exclusive list of offenses that qualify" under the definition section of MRE 414 is to be interpreted "strictly, rather than expansively," looms large. *See Yammine*, 69 M.J. at 75. Interpreting the phrase "conduct prohibited by Article 120 and committed with a child," to mean the version of Article 120 in effect at the time of trial is the less expansive choice when juxtaposed to the government's plea to include in the exception "any version of Article 120, UCMJ." Gov't Br. at 18.[1]

[1] Before AFCCA, the government argued that the 2013 version of MRE 414(d)(2)(A) encompassed not only conduct prohibited by Article 120 and its superseded versions, but also suggested it included the

The government mightily attempts to avoid this principle, suggesting "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." Gov't Br. at 22. This argument cannot be reconciled with the fact that MRE 414(d)(2) is a "specific definition" of "child molestation" which includes MRE 414(d)(2)(A) as one item among an "exclusive list of offenses." *See Yammine*, 69 M.J. at 75. This language is precisely what this Court admonished should be interpreted "strictly." *See id.* Accordingly, if the government's argument is accepted, it is difficult to see what is left of this Court's past interpretive guidance concerning the rule.

The government relies heavily on *United States v. James*, 63 M.J. 217 (C.A.A.F. 2006) in arguing that the AFCCA placed a "temporal

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present Article 120b. *See* JA 38, n.7 ("The United States does not concede that the phrase "Article 120" . . . does not include Article 120b"). There is no principled textual limit to such a contention, which is why the AFCCA properly rejected any intimation that "Article 120" included Articles 120a, 120b, or 120c. JA 12 (noting such an expansive reading would "convert a non-sexual stalking offense involving a child under Article 120a into a potential 'similar crime' under Mil. R. Evid. 414"). JA 12.

limitation" on MRE 414. *See* Gov't Br. at 16-17. In *James*, this Court held that "uncharged sexual assaults that occurred subsequent to the charged offenses are not barred from being admitted" by MRE 413 or 414. *See United States v. Hills*, No. 15-0767, slip op. at 6 (C.A.A.F. June 27, 2016) (citing *James*, 63 M.J. at 218). In so holding, this Court observed the "rules simply discuss 'one or more *offenses'* with absolutely no mention of when *the offense(s)* might have occurred." *James*, 63 M.J. at 221 (emphasis added). This Court's references to "offenses" in *James* underscores that it did not remove the foundational requirement—rooted in the text of MRE 414—that an "offense" must have occurred to invoke the rule.

Here, the AFCCA's decision simply identifies what law is to be consulted in applying MRE 414(d)(2). Contrary to the government's argument, the AFCCA's decision imposes no "temporal limitation," such as requiring that the "offense" occur *prior* to (1) the charged acts, as discussed in *James*; or (2) the running of the statute of limitations, as addressed in *United States v. Henley*, 53 M.J. 488, 490 (C.A.A.F. 2000) (observing that there is no statute of limitations bar to admitting offenses under MRE 413 or 414). The AFCCA's decision simply inquires

whether the conduct was unlawful conduct *whenever it occurred—with no time limitation*,[2] and, if offered under MRE 414(d)(2)(A)-(C), whether the conduct fits within the current version of the cross-referenced statutes on the day of trial. JA 7-8. These are not extra-textual "temporal limitations."

The AFCCA's conclusion that the cross-referenced statutes in MRE 414(d)(2) were the versions of the statutes in effect on the day of trial is based on the reasonable premise that MRE 414 is the "[c]ongressional and executive's current determinations of what criminal conduct is potentially relevant for propensity to commit an offense of child molestation . . . ." JA 8. This conclusion does not add a "temporal limitation" on when conduct must have occurred. The AFCCA simply notes that the text of the rule itself cross-references certain statutes and concludes the rule refers to those statutes not superseded by the political branches.

The AFCCA did not, therefore, "enact[] language of limitation into a rule or statute that cannot be found in the plain text." Gov't Br. at 20.

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[2] Again, it must be stressed that the government concedes the first prong of the AFCCA's test is not outcome determinative. *See* Gov't Br. 33, n.8.

Rather, the AFCCA correctly observed that the text of the rule uses the terms "offense punishable," "crime," and "Article 120," and proceeded to construe what these terms meant. JA 7-8.[3]

Likewise, the government's resort to legislative history ultimately fails to buttress its complaints with the AFCCA's decision. First, the government argues for a general gloss of "liberal admissibility." Gov't Br. 21-26. This Court, however, has already taken great pains to explain that the "liberal admissibility" standard addressed in the legislative history applies to remove the historical bar on propensity evidence, but "does not guide or inform its threshold inquiry: whether a prior act *is* one of child molestation." *See Yammine*, 69 M.J at 75. Second, the government reasserts its argument based on "temporal limitations," noting that Congress placed no time limit on the

[3] This Court's decisions in *United States v. McPherson*, 73 M.J. 393, 394-96 (C.A.A.F. 2014) (rejecting a government argument that Article 12, UCMJ fails to cover civilian confinement facilities) and *United States v. Schloff*, 74 M.J. 312 (C.A.A.F. 2015) (rejecting an accused's argument that "sexual contact" as defined in Article 120(g)(2), UCMJ fails to cover object-to-body contact) are certainly helpful in observing the general rules of statutory construction, but the government's argument concerning these cases is unpersuasive because it merely invokes them as talismanic incantations to "language of limitation," with no meaningful comparison to AFCCA's construction of the text of MRE 414. *See* JA 18, 20.

admissibility of evidence under Federal Rules 413-15 (Gov't Br. 25-26). However, for the reasons states above, this argument is a distraction; it fails to acknowledge that AFCCA placed no temporal restriction on admissibility of MRE 414 evidence, but merely identified what law the definitions in MRE 414(d)(2) reference.

Conclusion

"The purpose of the Military Rules was to provide predictability, clarity, and certainty through specific rules rather than a case-by-case adjudication of what the rules of evidence would be." *United States v. Rodriguez*, 54 M.J. 156, 158 (C.A.A.F. 2000). The lower court's decision merely adhered to the President's definition of "child molestation." The government is free to advance its expansive proposed definition of "child molestation" in MRE 414 (Gov't Br. at 31), but the decision to modify it "rests with the President, not this Court." *Rodriguez*, 54 M.J. at 161. "There is no rule of statutory construction that allows for [the government] to append additional language" to a rule of evidence "as it sees fit." *United States v. Simmermacher*, 74 M.J. 196, 201 n.4 (C.A.A.F. 2015).

II.

THE GOVERNMENT CANNOT MEET ITS BURDEN TO DEMONSTRATE THE ERRONEOUS ADMISSION OF PROPENSITY EVIDENCE WAS HARMLESS

Standard of Review

This Court reviews *de novo* whether the admission of "nonconstitutional error 'had a substantial influence on the members' verdict in the context of the entire case." *Yammine*, 69 M.J. at 78. The burden of persuasion on this matter rests with the government. *See United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014).

Law

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (quoting Article 59(a), UCMJ). The government must demonstrate that "the error did not have a substantial influence on the findings." *Id.* (citation omitted).

In evaluating whether the government has met its burden of proof, this Court considers four factors: "(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." *Yammine*, 69 M.J. at 78.

"When a fact was already obvious from testimony at trial and the evidence in question would not have provided any new ammunition, an error is likely to be harmless. Conversely, when the evidence does provide new ammunition, an error is less likely to be harmless." *Id.* (quoting United States v. *Harrow*, 65 M.J. 65 M.J. 190, 200 (C.A.A.F. 2007) (internal quotation marks and ellipses omitted).

Analysis

The AFCCA's opinion includes an objective review of the evidence presented, and there is no sound basis in law for this Court to reach a different result than the lower court. *See* JA 14-16. The government attempts to meet its burden with two arguments: one that discusses the record of trial, and the other—presented in a footnote—introducing a new theory of admissibility not advanced in the record until the government requested reconsideration at AFCCA. Gov't Br. at 38, n.9. Both of these arguments should be rejected.

A. The government's discussion of the record is unconvincing

In finding the government had not met its burden to prove

harmless error, the AFCCA noted that the government's case was not inherently strong. JA 15. It was "based primarily on the testimony of one witness, JB, regarding conduct that purportedly happened two to six years earlier." JA 15. JB's interview with OSI did not meet with prevailing forensic interview standards. JA 277-78, 281, 321. As the AFCCA observed, JB's accusations were delayed and she was unable to provide specific dates for the charges. JA 15, 243, 265, 283. JB was an "apparently unemotional" witness, necessitating that the government call an expert witness in an attempt to explain her testimony. JA 15, 287, 302-314.

As noted by the AFCCA, the defense case included "a partial alibi defense to the late 2007 allegations, arguing that Appellant was out of town and the children were staying with family in Texas during these alleged offenses." JA 15, 334-35. Further, a family friend from Wyoming testified that she had significant interaction with TSgt Fetrow's children, to include serving as their hair dresser while his wife was deployed; and they appeared to be normal, happy children. JA 15, 316-18.

Additionally, many of the allegations concerned JB touching or

viewing TSgt Fetrow's penis. The defense "highlighted JB's failure to testify" concerning TSgt Fetrow's genital piercing, observing the implausibility that anyone would be intimate with him and not notice such a piercing. JA 15, 324-26, 340-41.

The AFCCA carefully considered that it had ruled an incident where JLF testified her dad touched her thigh was admissible for a potential propensity inference. JA 15. The AFCCA noted correctly, however, that this "lone incident was the least helpful of the three for the Government since, when viewed alone, it could be more easily interpreted in varying ways by the members." JA 15.

The AFCCA's characterization is a fair reading of the evidence. JLF's testimony was that she was three or four years of age when her dad touched her thigh while they were playing in a tent. JA 210. She did not testify that it was her "inner thigh," or anywhere near her private parts. *Id.* JLF said it was normal during this time for her dad to pick her up and carry her around, and that her dad hugged her and rubbed her back when she was sick or tired. JA 216, 237. She never indicated any of these touches were sexual in nature, but indicated she remembered thinking the thigh touch when she was three or four years

old did not feel right so, "now I claim it as seductive." JA 237.

Unsurprisingly, the government characterizes the evidence against TSgt Fetrow as "strong" and his defense as "weak." Gov't Br. at 35. If the government's case were as strong as it states, however, it is unclear why the members ultimately acquitted on two specifications of sexual abuse of a child and one specification of abusive sexual contact with a child. JA 85-88. (The military judge also noted inherent weaknesses in the government's case by dismissing some of the charges for failure of proof. *Id.*) The reality is that this was a hotly contested trial with only one witness supporting the charged conduct.

In light of the above, the AFCCA accurately described the closet and bathroom indecent exposure evidence as a "material" component of the government's case. JA 15. "As this was a situation where the Government was forced to rely almost exclusively on the testimony of a 17-year-old stepdaughter about what happened years earlier, the Mil. R. Evid. 414 evidence played a significant role in suggesting that [TSgt Fetrow] had a prurient sexual interest in his children, that this conduct may have constituted early attempts to groom his children for later sexual activity, and that he was therefore more likely to have

committed the offenses testified to by JB." *Id.* Likewise, the government's devotion of a significant portion of its opening and closing statement to discussing the challenged evidence is an indicator of its importance. *See* JA 165-66; 358-60, 65.

Finally, as to the quality of the evidence, the AFCCA accurately described the propensity inference from the closet and bathroom incidents as "powerful." JA 16. The government's concession that the evidence was at least "mixed," (Gov't Br. at 38) is telling. "Unlike the testimony of the victim, however, JLF's testimony was apparently emotional and heartfelt. . . . JLF told the members that it was very difficult for her to testify because she loved her father. In the context of this case, JLF's testimony about these prior acts was powerful." JA 16.

Under this record, JLF's testimony "could have been of considerable significance in the minds of the panel," *see Flesher*, 73 M.J. at 318, and offered "new ammunition" for the government. *See Yammine*, 69 M.J. at 78. The erroneous admission of the closet and bathroom propensity evidence cannot, therefore, be considered harmless.

B. The government's new theory of admissibility should be rejected as it has no basis in the record

In a footnote, the government contends that admission of the closet and bathroom incidents was harmless because they should have been offered and admitted under MRE 404(b) "to a show a common plan or motive . . . ." JA 38, n.9. The record establishes, and the government also concedes, that this theory of admissibility was not litigated before the military judge at trial. *See id.* ("The United States acknowledges that the government did not present this theory to the military judge at trial"); *see also* Appellee's Answer to Appellant's Motion to Supplement the Record (June 2, 2016).

The government's revised theory presents a substantial question outside the MRE 404(b) context because, as this Court observed in *United States v. Morrison*, 52 M.J. 117, 123 (C.A.A.F. 1999), allowing the government to present new theories of admissibility not litigated at trial implicates substantial due process concerns.

One of the due process issues presented by the government's newly minted theory is that the members were not instructed in a manner consistent with MRE 404(b) at the trial. The members were instructed pursuant to MRE 414 on the contested evidence that they

could consider it for its tendency "to show the accused's propensity or predisposition to engage in child molestation offenses." JA 354. If the evidence had been offered pursuant to MRE 404(b), the members should have been instructed on the specific theory pertinent to the evidence, with the caveat that they "may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged." *See* Military Judge's Benchbook, Instruction 7-13-1, Note 3.2; *see also* R. 620 (military judge provides the MRE 414 instruction, rather than the MRE 404(b) instruction under Note 2).

If the contested evidence was admissible under MRE 404(b), instructions should have been tailored to differentiate what evidence could be considered for a propensity purpose and what evidence was admissible only for an MRE 404(b) purpose. This did not occur. Because the government did not present this theory to the military judge, TSgt Fetrow was deprived of notice and the opportunity to be heard on this crucial issue.

Because the government failed to raise the issue until

reconsideration before the AFCCA, there is a strong argument that it has waived this point. *See, e.g.*, *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) (observing that a party failing to identify or argue an issue in their opening brief constitutes waiver of that issue on appeal).

Likewise, judicial estoppel should preclude the government from asserting this new theory for the first time on appeal when it took a position before the military judge solely based on MRE 414. *See Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897 (6th Cir. 2004) (noting that "[t]he doctrine of judicial estoppel generally prohibits a party from asserting a legal or factual position that contradicts or is inconsistent with a prior position taken by the same party"); *see also* JA 51-52.

Further, the TJAG did not certify the issue of whether the AFCCA erred by not considering MRE 404(b) *sua sponte* or at the request of the government on reconsideration. Rather, TJAG has certified whether "the erroneous admission of two acts of indecent liberties . . . had a substantial influence on the members' verdict." *See* Docketing Notice, No. 16-0500/AF (Apr. 29, 2016) (original capitalized). This Court should reject the government's effort to broaden the scope of the issues before

it. *See generally United States v. Williams*, 75 M.J. 244 (C.A.A.F. 2016).

Even if this Court were to reach the substance of the MRE 404(b) theory now offered by the government, the cases it cites are inapposite. In *United States v. Henley*, 53 M.J. 488, 490 (C.A.A.F. 2000), the "Government originally sought" a dual theory of admissibility and the military judge made appropriate findings under both theories. Likewise, *United States v. Munoz*, 32 M.J. 359, 364 (C.M.A. 1991), a case decided prior to the enactment of MRE 414, offers no help to the government because the record was supported by factual findings where the "military judge rejected" the accused's legal arguments based on the specific facts of that case.

In *Morrison*, this Court distinguished *Munoz* and found that sexual acts performed on the accused's natural daughter, his niece, and an unrelated girl over a period of years were "not sufficiently similar" to show a common plan or scheme and did not have the "high degree of similarity required" to show modus operandi under MRE 404(b). 52 M.J. at 123. This Court observed that the probative value of the evidence as proof of predatory motive and intent was weak because "[t]he charged acts were so overtly sexual that motive and intent were

not in issue." *Id.* at 123.

Based on the record before it, this Court should decline the government's invitation to speculate on the effect of new theories of admissibility not presented at trial. Likewise, this Court should affirm the AFCCA's fair and objective reading of the record in finding the erroneous admission of propensity prejudiced TSgt Fetrow.

WHEREFORE, Appellee respectfully requests that this Honorable Court affirm the decision of the AFCCA.

Respectfully submitted,

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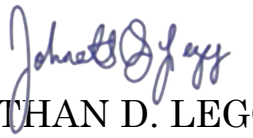
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 30 June 2016.



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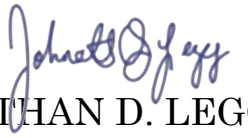

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