MRE 413 Five Years after United States v. Hills

1. Introduction:

United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016) is the most consequential decision on military appellate practice in the past twenty-five years.

More than 90 convictions at court-martial were based, at least in part, on propensity evidence using other charged misconduct. The Army Court of Criminal Appeals alone has ordered a remand in more than 20 such convictions, and the CAAF has set aside CCA affirmances in at least 20.

Not only is the number extraordinary for a single type of error, but the nature of the offenses has been the most politically charged issue in military justice for at least the last decade. These aren't remands that require a second testimony from someone whose Nintendo was stolen—they're remands that require witnesses to potentially relive the worst events of their lives.

But at the same time, this wasn't some "loophole" issue. At their core, many sex assaults prosecuted in the military involve a genuine question as to the accused's criminal culpability. The CAAF's treatment of *Hills* review has demonstrated a persistent insistence on ensuring the error did not affect verdicts.

2. Legislative Background of MRE 413:[1]

For practitioners who have only ever tried cases in the 2000s, MREs 413 and 414 are taken as a given, if complicated, tool in the prosecution of sex offenses. But a little history, particularly about the contentiousness surrounding the passage of these rules, helps color its current status.

Congress passed FRE 413 and 414 in 1994 as part of a wide-reaching crime bill in 1994.[2] The process was outside the normal course of business for FRE changes—typically, under the Rules Enabling Act, the Judicial Conference of the United States develops and proposes rule changes, which must then be approved by the Supreme Court before being submitted to Congress.

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[1] As [MRE]s 413 and 414 are essentially the same in substances, the analysis for proper admission of evidence under either should be the same." *United States v. Dewrell*, 55 M.J. 131, 138 n.4 (C.A.A.F. 2001).

[2] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Sat. 1796, 2135-37.

Not so in 1994—rather, Congress merely required the Judicial Conference to prepare and transmit back a report within 150 days of enactment. The Act provided that regardless of the Conference's ultimate recommendations, the rules would remain unchanged unless Congress took action on those recommendations.

The Judicial Conference ultimately concluded, almost unanimously, the new rules would improperly (1) permit admission of highly prejudicial and unreliable evidence, (2) cause significant trial delay because the admission of such evidence would require defendants to contest other alleged wrongs, and (3) diminish the fundamental and time-honored protections against admission of propensity evidence developed under rules and case law. And for clarity—this opposition was based on *any* application of the rule, much less a version of it that precluded using charged offenses as propensity.

Notwithstanding the strong opposition to the new rules from the body that typically promulgated new rules, Congress took no action and they remained in effect. Under MRE 1102, amendments to the FRE cause parallel amendments to the MRE by operation of law after 18 months. As a result, MRE 413 and 414 were effective in 1996, and were then formalized in the MCM in 1998.

2. MRE 413 between enactment and *Hills*:

The most consequential post-enactment CAAF decision was *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000). There, the court rejected claims that MRE 413 violated either the Due Process or Equal Protection Clauses of the Constitution. The opinion established a three-part threshold finding before consideration of MRE 413 evidence, and then a non-exhaustive MRE 403 balancing test if the government met that initial threshold. Of special note here is that the MRE 413 evidence at issue in *Wright* was other charged misconduct—Wright pled guilty to one of the sex offenses and the military judge noted it was "charged misconduct the Government contends the triers of fact should be entitled to consider for its bearing on the offenses to which the accused has pleaded not guilty." *Id*. at 479. In its analysis, the CAAF noted this was "the type of case in which this evidence was designed to be admitted." *Id*. at 484.[3] Many an unwary prosecutor under-analyzed what the CAAF was really saying, and presumed it to condone using any charged offense as MRE 413 evidence. But, a guilty plea to an

[3] To be sure, the CAAF's opinion in *Wright* is consistent with its interpretation of the problem in *Hills*—namely, that the confusing instruction seemed to imply a factfinder could apply a lesser presumption of innocence. Where an accused actually pleads guilty to some of the offenses, it seems there would be little risk in using that evidence as propensity under MRE 413. *Hills* explicitly states the same. *Hills*, 75 M.J. at 354.

offense necessarily obviates a concern that a factfinder will apply a lesser presumption of innocence to that offense.

Wright wasn't the only case the CAAF heard on MRE 413 over its first fifteen years. These others generally established that, provided the military judge completed a thorough analysis under MRE 403 on the record, MRE 413 propensity evidence was presumptively admissible. Further, while no opinion offered an indication that charged misconduct fell outside the penumbra of MRE 413, several were decided on other grounds. For instance, in *United States v. Dewrell*, the CAAF did not distinguish between charged and uncharged misconduct. 55 M.J. 131, 137-38 (C.A.A.F. 2001). Two more cases, *United States v. Schroder* and *United States v. Burton*, involved charged misconduct that implicated MRE 413 but were resolved on other grounds. Neither included a note of caution from the court about any risk related to that. 65 M. J. 49 (C.A.A.F. 2007) and 67 M.J. 150 (C.A.A.F. 2009).

The CCAs and justice offices around the world forged ahead. *See United States v. Barnes*, 74 M.J. 692, 697-98 (A. Ct. Crim. App. 2015) ("We find no prohibition against or reason to preclude the use of evidence of similar crimes in sexual assault cases in accordance with Mil. R. Evid. 413 due to the fact that the 'similar crime' is also a charged offense") *rev. denied* 75 M.J. 27 (C.A.A.F. 2015); *United States v. Bass*, 74 M.J. 806, 815 (N-M. Ct. Crim. App. 2015) (explicitly condoning the use of charged misconduct as MRE 413 evidence; *United States v. Maliwat*, No. ACM 38579, 2015 CCA LEXIS 443, at *5-6 (A.F. Ct. Crim. App. Oct. 19, 2015) (explicitly condoning the use of charged offenses as MRE 413 evidence, and citing *Schroder* and *Wright* in support).

3. *United States v. Hills*:

It's hard to imagine facts worse for the government's position than those presented in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). An enlisted panel convicted SGT Kendell Hills of one specification of abusive sexual contact and acquitted him of two specifications of sexual assault. All charged offenses were alleged against a single intoxicated victim on the same evening within a two-hour window—hardly the type of evidence that could indicate a "propensity" as reasonably understood. The military judge gave both a spillover instruction—informing the panel it could not use offenses to prove other offenses—*and* a propensity instruction informing it that it could, in fact, use evidence as propensity if it:

> determine[s] by a *preponderance* of evidence that it is more likely than not that the sexual offenses occurred:
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> evidence that the accused committed a sexual assault offense . . . may have a bearing on your deliberations in relation to the other charged sexual assault offenses . . . .
>
> [This may include] its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault.

Hills, 75 M.J. at 353 (emphasis added). In its unanimous opinion, the CAAF determined that the military judge abused his discretion in admitting charged evidence as MRE 413 evidence because "[i]t is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent." *Id*., at 356. The CAAF also found that the instruction was constitutional error because it had the effect of lowering or removing the presumption of innocence, and was not harmless beyond a reasonable doubt. *Id*. The CAAF reversed the CCA, set aside the findings and sentence, and authorized a rehearing. Of note is that SGT Hills was not subsequently convicted of any offense related to this incident.

4. Immediate Fallout:

The CAAF summarily remanded four cases shortly after deciding *Hills*. Complication abounded, and the following summaries demonstrate the CAAF's insistence that this error not contribute to verdicts.

No. 16-0277/AR. U.S. v. William P. Moynihan. CCA 20130855. Reversed and remanded to ACCA to consider in light of *Hills*. ACCA conducted a reasonably thorough analysis and conditionally dismissed two specifications. CAAF granted review and remanded with a directive to the ACCA to consider it in light of *Guardado*. ACCA did this and set aside 3 of 5 specifications and remanded to the convening authority, who conducted a rehearing. *United States v. Moynihan*, 2018 CCA LEXIS 610 (A. Ct. Crim. App. Nov. 26, 2018). The case ultimately returned to ACCA, which affirmed the findings and sentence, and the CAAF denied review.

No. 16-0369/AR. U.S. v. Arturo A. Tafoya. CCA 20140798. First summarily affirmed at ACCA. Reversed and remanded to ACCA in light of *Hills*. ACCA

affirmed based on the forum being judge alone. The CAAF reversed and remanded in light of *Hukill*. The ACCA then set aside all three of the abusive sexual contact convictions. There is no indication that Tafoya was tried again.

No. 16-0416/AR. U.S. v. Gene N. Williams. CCA 20130582. ACCA first affirmed the findings of guilty and the approved sentence. The CAAF summarily reversed and remanded in light of *Hills*. On remand, the CCA again affirmed the findings of guilty and the sentence, holding that although the military judge issued an improper propensity instruction, such error was harmless beyond a reasonable doubt. The CAAF disagreed and set aside several findings and the sentence. The convening authority referred additional charges along with the rehearing, several of which SGT Williams was convicted, and he was sentenced to thirty-five years of confinement (his first sentence included twenty years of confinement). Williams's conviction is currently on appeal at ACCA.

No. 16-0697/AR. U.S. v. Douglas E. Reynolds, Jr. CCA 20140856. First summarily affirmed at ACCA. Remanded to ACCA in light of *Hills*. Affirmed at ACCA. Remanded to ACCA in light of *Hukill*. ACCA dismissed one specification and reduced the sentence to confinement by eight months. *United States v. Reynolds*, 2017 CCA LEXIS 731 (A. Ct. Crim. App. Nov. 28, 2017).

5. Back to CAAF—There are no Standard Exceptions to *Hills* Errors:

After *Hills*, convictions based on charged propensity evidence could have gone one of three ways. First, *Hills* could have been cabined by forum and left judge-alone trials untouched. Second, the CCAs and then the CAAF could have cabined the opinion to a relatively small set of facts—*Hills*, again, involved facts as far afield of common-sense "propensity" as could be. Third, *Hills* could force reversals in dozens of cases, regardless of forum, as a result of thoughtful, considered approaches to the prejudice analysis. The following three cases established the third course.

United States v. Hukill, 76 M.J. 219 (C.A.A.F. 2017): Perhaps no case offered a better opportunity for the CAAF to limit *Hills* than *Hukill*. The CAAF used *Hukill* to "clarify that under Hills, the use of evidence of charged conduct as MRE 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected . . . evidence of a charged and contested offense, of which an accused is presumed innocent, cannot be used as propensity evidence in support of a companion charged offense." *Id*. at 222. The CAAF reasoned that the presumption that military judges

know and follow the law actually worked against the government's position here: the law, prior to *Hills*, was that charged offenses were fair game for MRE 413 propensity purposes—a judge would presumably apply the improper analysis.

United States v. Guardado, 77 M.J. 90 (C.A.A.F. 2017): The panel acquitted Guardado of three of the four charged offenses that were implicated by the improper propensity instructions. The CAAF held that this alone does not establish the propensity instruction was harmless beyond a reasonable doubt. Further, the CAAF reemphasized the confusing nature of instructions that seemingly reduce the presumption of innocence.

United States v. Williams, 77 M.J. 459 (C.A.A.F. 2018): The CAAF clarified how seriously it had intended the CCAs to take its *Hills* decision by lamenting "that our lower courts have attempted to impermissibly narrow that holding by carving out exceptions that run contrary to an accused's presumption of innocence." *Williams*, 77 M.J. at 462. In *Williams*, the CAAF rejected another effort by a CCA to find an exception to *Hills*—this one based on the "direction" of the error. In short, the CCA attempted to demonstrate that one specification was unaffected by the erroneous instruction. Thus, it showed the panel was convinced beyond a reasonable doubt that Williams committed that offense, and if it then used that offense as propensity to convict on the other offense it would obviate the improper instruction. The CAAF disagreed.

United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019): The CAAF clarified that forfeited *Hills* errors—because they are constitutional—must be reviewed by the CCAs under the harmless beyond a reasonable doubt standard. It remains to be seen whether this will endure after *Greer v. United States*, 141 S. Ct. 2090 (2021) (Court reviewed a nonstructural constitutional error for plain error under Fed. R. Crim. P. 52(b)).

6. Recent Developments:

Cases involving *Hills* issues are still working their way through direct review. Just last term, the CAAF decided three cases that involved propensity issues.

United States v. Adams, 2021 CAAF LEXIS 819 _ M.J. _ (2021): A fascinating case—Adams was convicted in 2013 and confined for life without the possibility of parole. ACCA set aside the findings of guilt and sentence in 2017 on the basis of *Hills* error. The government then amended the charges—to include adding new ones—which were referred to a GCM. A military judge convicted Adams in 2018

and sentenced him to 43 years of confinement. Here, the CAAF set aside and dismissed the new specifications as falling outside the statute of limitations, and remanded the case back to the ACCA to reassess the sentence or order a rehearing on sentence.

United States v. Long 81 M.J. 362 (2021): The CAAF completed a thorough review of the prejudice resulting from a *Hills* error and found material prejudice to the appellant's rights. This case also questions, without deciding, whether CAAF's holding in *Tovarchavez* is still correct after *Greer v. United States*, 141 S. Ct. 2090 (2021). *Long*, 81 M.J. at 371.

United States v. Upshaw, 81 M.J. 71 (2021): The CAAF conducted another extremely thorough analysis of the facts and found that the *Hills* error was not harmless beyond a reasonable doubt.

7. Post-conviction [non] Relief:

Turning now to those individuals whose direct appellate reviews were final prior to *Hills*. Retroactive applicability of such a decision is governed by *Teague v. Lane*, 489 U.S. 288 (1989). The general rule "[u]nder . . . *Teague*" . . . is that "federal habeas corpus petitioners may not avail themselves of new rules of criminal procedure." *Beard v. Banks*, 542 U.S. 406, 408 (2004). As such, petitioners must show that *Hills* is a substantive (vice procedural rule), or that it was not a new rule. Until *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) there existed the false hope of a narrow exception to this test—that a change be a "watershed" change to criminal procedure—but the Court explicitly did away with that.

Lewis v. United States, 985 F.3d 1153 (9th Cir. 2021): Lewis was convicted at a 2012 court-martial after the military judge gave a similar instruction to that in *Hills*, and confined for nine years. His direct appeal was final in February 2015 after the CAAF denied review. Lewis first filed for extraordinary relief at the AFCCA, and then in the Southern District of California where he lost. The Ninth Circuit determined *Hills* was a new procedural rule that did not fall under an exception warranting retroactive application. *See also Lewis v. United States*, 76 M.J. 829 (A.F. Ct. Crim. App. 2017) (Court denied writ for coram nobis because Lewis was still in confinement, which necessitated him filing for habeas in federal district court).

Ward v. United States, 982 F.3d 906 (4th Cir. 2020): Ward was sentenced to 8 years of confinement and his direct appeal was complete in February 2015.

Interesting case in that the 4th Circuit dismissed the habeas petition because Ward didn't establish sufficient prejudice. The court conducted a brief prejudice analysis (it seemed to use harmless vice harmless beyond a reasonable doubt) and determined that because the defense theory of the case was that the two victims conspired against him, it was unlikely the propensity instruction had much sway.

Evans v. Horton, 792 Fed. App. 568 (10th Cir. 2019): Similar background—Evans was convicted at court-martial and sentenced to 20 years' confinement. His direct appeal was complete on March 10, 2016 (noteworthy for being between the time granted and decided *Hills*, but Evans didn't raise the error in his petition). Probably a more interesting opinion than *Lewis* because Evans didn't object to the instruction at trial or raise the issue in any capacity during his military appeal. So, the 10th Circuit found Evans waived the issue for collateral review, and that he did not have cause or prejudice to surmount that waiver.

Coleman v. Commandant, U.S. Disciplinary Barracks, No. 19-3163-JWL, 2019 U.S. Dist. LEXIS 203197 (D. Kan. Nov. 22, 2019): Another interesting permutation—here, the District Court found that Coleman's issue was fully and fairly considered by military appellate courts. That issue was the retroactivity of *Hills*, not whether the *Hills* error was prejudicial to his case.

Burleson v. United States, 2018 CCA LEXIS 87 (N-MC Ct. Crim. App. Feb. 26, 2018): Burleson filed a writ petition based on *Hills* for his 2006 conviction. The NMCCA opinion offers an interesting analysis of the lesser-known writ of *audita querela*.

8. Trial Practitioners Adjust and Drive on:

Trial Counsel should always seek justice. Before *Hills* and *Hukill*, a trial counsel faced with an accused who was facing multiple victims should have had a fairly straightforward approach. The Trial Counsel would have preferred charges related to victims for which the trial counsel believed they could obtain a conviction and leave any charges related to other victims as uncharged – being able to make a MRE 413 propensity argument related to all the charged and uncharged sexual offenses. As discussed above, using charged offenses for MRE 413 purposes is untenable. Given the CAAF's constriction of MRE 413, trial counsel must look to other mechanisms for gaining the benefit of MREs 413 and 414. For the purposes of this outline and our talk, we will discuss two charging theories which loosely called "Judicial Economy" and "Full MRE 413."

Judicial Economy: Under the Judicial Economy approach, trial counsel would follow the recommendations in the Discussion of RCM 601(e)(2) – bringing all charges of which they thought they could obtain and sustain a conviction to one court martial. Any charges for other victims which the Trial Counsel thought they could not prove beyond a reasonable doubt would remain as uncharged misconduct to be used for MRE 413 purposes. The advantages to this methodology are judicial economy (less cost in time and money for commands) and a greater sense of fairness by subjecting the accused to only one trial. Having only one court martial would also minimize the chance for re-victimization of the victims. Under this methodology, the government would not get the benefit of MRE 413.

In a case with only charged sexual offenses, trial counsel must remain vigilant to avoid improper argument. While this effort would seem cut and dry, many who have served as trial counsel and fought for justice for victims will know the challenges of not allowing their passions to be inflamed and saying the wrong thing during rebuttal closing. More risk is injected into the case of a court martial with a combination of charges with multiple victims and uncharged misconduct sought under MRE 413. With the added complexity of the situation, trial counsel would need to ensure the military judge's instructions were very clear on spillover and which evidence could be used as MRE 413 propensity evidence, if any. While some counsel may eschew PowerPoint, this situation may lend itself to pulling up specific excerpts of the military judge's instructions to ensure trial counsel's argument tracks them. A very conservative trial counsel may even avoid MRE 413 altogether, seeking to bring in any uncharged sexual offense evidence as MRE 404b (motive, lack of mistake, etc.) evidence.

Full MRE 413: To still garner the benefit of MRE 413 and maximize the chance of obtaining a conviction, trial counsel might decide to hold multiple courts martial when an Accused has multiple victims. Most likely, the trial counsel would first charge the sexual offense(s) related to the victim with the best case for conviction. The trial counsel could put on evidence of the sexual offenses related to the other victims as uncharged misconduct, gaining the benefit of the MRE 413 propensity instruction. Anecdotally, in discussions with many trial counsel, special victims counsel, and victims' legal counsel, most victims want their attackers to be convicted, registered as sex offenders, and kicked out of the military even if not for their offense. Thus, a single conviction based, in part, on using uncharged propensity evidence MRE 413 or 414 may be the best course of action at times.

Should the accused be acquitted at the first court martial, the trial counsel could prefer charges related to the victim with the second-best set of facts, and bring in any remaining uncharged sexual offense from additional victims as MRE 413 evidence. Additionally, the trial counsel could seek to bring in evidence from the first court martial as uncharged misconduct in the second court martial, but would have to contend with a robust MRE 403 motion. In *United States v. Solomon*, 72 M.J. 176, 180 (C.A.A.F. 2013), the CAAF reversed a conviction based on a military judge admitting MRE 413 evidence of an acquitted offense but said previously acquitted offenses could be admitted under MRE 413 given a proper MRE 403 analysis (in *Solomon*, the Court stressed the acquitted offense had solid alibi evidence the military judge did not address and the military judge allowed the prior acquitted charges to overtake the court martial).

Under this charging framework, the Government receives the full benefit of MRE 413 and has multiple opportunities to obtain a conviction. It mitigates the risk of counsel misspeaking and arguing MRE 413 propensity for charged offenses and it eliminates the chance of a military judge providing incorrect instructions based on charged offenses. However, this methodology has multiple drawbacks. From the victim perspective, the possibility of multiple court-martial could further traumatize them. From the Command's perspective, each successive court martial would include more cost in money and time (possible chasers, bailiff, members, and witnesses). Most importantly, from the accused's perspective, this methodology seems unfair, like some sort of gamesmanship by the Government.

Specifically, for sentencing, the defense could argue that multiple courts-martial overexpose the accused to penalty. For instance, the rules do a better job of protecting an accused against unjust consecutive punishments when all known charges are tried together. *See* RCM 1002(d)B). Moreover, defense would likely file a motion for improper referral, stating the discussion of Rules for Court Martial (RCM) 601(e)(2) says "Ordinarily all known charges should be referred to a single court martial." However, RCM 601(d)(1)'s discussion says the Convening Authority is not obliged to refer all charges which the evidence might support, and the text of RCM 601(e)(2) says joinder is "in the discretion of the convening authority." Even if this method is allowed, some service standard operating procedures could frustrate the intent of this method – specifically, while the Marine Corps generally modifies convening orders for each court martial, providing a fresh set of eyes for each trial, the Army uses the same panel for extended periods of time. If trial counsel tried this charging theory in the Army, they may not receive the benefit of this scheme if they put the same facts, though charged differently, before a panel who has already acquitted an accused.

While this methodology seems unwieldy and has many disadvantages for victims, accused, and commands, *Hills* has provided incentives to take this approach. As pressure from victims' organizations, the media, and Congress continues to mount to gain more convictions, it would be human nature to follow the incentives provided by the Court to follow the "Full MRE 413" methodology.

Currently, charging and referral decisions are ultimately decided at the general court-martial convening authority level, being informed by trial counsel's proposed strategies and staff judge advocates' advice. This scheme has kept charging and referral decisions at relatively low levels. With the passage of the National Defense Authorization Act for Fiscal Year 2022 and its creation of "special trial counsel" who will have the sole authority to refer sexual assault cases and report to a special chain of command, we could see more standardized charging decisions. As the head special trial counsel for each Service will be an O7 and held at a higher scrutiny for Senate confirmation, one could see political pressure finding its way into a centralized charging scheme for each Service.