IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF THE UNITED STATES**
v.	)	Crim. App. No. 39761
First Lieutenant (O-2), **JAMAL X. WASHINGTON,** United States Air Force, *Appellant*.	)	USCA Dkt. No. 25-0044/AF
	)	30 May 2025

BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE PRESENTED

WHETHER THE ORIGINAL MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE STRUCK A PORTION OF APPELLANT'S TESTIMONY.

INTRODUCTION

Appellant was charged with committing abusive sexual contact upon CP by touching CP's genitals. (JA at 129.) At his court-martial, Appellant was warned by the military judge that if he wanted to raise issues related to CP's sexual predisposition toward homosexuality, he needed to first raise the issue in a closed Mil. R. Evid. 412 hearing. (JA at 272.) Despite this admonition and apparently against the instruction of his own defense counsel, Appellant took the stand during the trial on the merits and testified that, on the night of the charged incident, CP told Appellant that CP had both men and women come on to him before. (JA at

231-32.) Appellant also testified, without providing Mil. R. Evid. 412 notice, that on the night of the charged incident, he and CP exchanged a consensual, lingering hug, lied on the bed together, and that he consensually touched CP's thigh. Before Appellant's cross-examination, trial counsel informed the court that he intended to cross-examine Appellant on his direct testimony, but that doing so would likely implicate Mil. R. Evid. 412, so a closed hearing needed to be held. (JA at 233.) Appellant refused to testify in a closed Mil. R. Evid. 412 hearing because it would give the government a strategic benefit to know how Appellant would respond to questions. (JA at 290.) As a result of Appellant's failure to submit to cross-examination in the closed hearing, the military judge struck Appellant's testimony on the merits about the alleged consensual hug, lying on the bed, the thigh touch, and about CP's alleged statement about both men and women coming on to him. (JA at 257-58.)

The military judge's ruling was not an abuse of discretion, because (1) Appellant's testimony did implicate Mil. R. Evid. 412 and (2) striking an accused's testimony is a well-recognized remedy for failure to submit to cross-examination – even in a motions hearing. But in any event, the striking of Appellant's testimony was harmless beyond a reasonable doubt because Appellant testified that the charged touching of CP's genitals never happened at all. (JA at 206.) Under such circumstances, testimony that CP had homosexual tendencies or engaged in some

consensual conduct with Appellant would have done nothing to make Appellant's denial of the charged conduct more or less believable. Appellant is entitled to no relief.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.[1]

RELEVANT AUTHORITIES

Rule 412. Sex offense cases: The victim's sexual behavior or predisposition

(a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that a victim engaged in other sexual behavior; or

(2) Evidence offered to prove a victim's sexual predisposition.

(b) *Exceptions*. In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent or if offered by the prosecution; and

(3) evidence the exclusion of which would violate the accused's constitutional rights.

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[1] References to the punitive articles are to the Manual for Courts-Martial, United States (MCM) 2016 edition. All other references to the Military Rules of Evidence (Mil. R. Evid.) and Rules for Courts-Martial (R.C.M.) are to the MCM 2019 edition.

(c) *Procedure to determine admissibility*.

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the victim or, when appropriate, the victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1113 and remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant for a purpose under subdivision (b)(1) or (2) of this rule and that the probative value of such evidence outweighs the danger of unfair prejudice to the victim's privacy, or that the evidence is described by subdivision (b)(3) of this rule, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the victim may be examined or cross-examined. Any evidence introduced under this rule is subject to challenge under Mil. R. Evid. 403.

(d) *Definitions*. For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to a victim's mode

of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder. For purposes of this rule, the term "victim" includes an alleged victim.

STATEMENT OF THE CASE

A panel of members, sitting as a general court-martial at Malmstrom Air Force Base, contrary to Appellant's pleas, convicted him of one specification of abusive sexual contact upon CP (Charge I) in violation of Article 120, UCMJ, one specification of conduct unbecoming an officer and a gentleman (Charge II) in violation of Article 133, UCMJ, and five specifications of fraternization (Charge III) in violation of Article 134, UCMJ. (JA at 129-32.) The panel sentenced Appellant to a dismissal. (JA at 132.)

Relevant to this appeal, Appellant was convicted of the following offense in Charge I:

> On or about 23 September 2017, commit sexual contact upon [CP], to wit: touching his genitals directly, with an intent to gratify the sexual desires of the said First Lieutenant Jamal X. Washington, by causing bodily harm to [CP], to wit: touching his genitals directly without his consent.

(JA at 129.)

On appeal, AFCCA affirmed the findings in Charge I (abusive sexual contact of CP) and Charge II, Specification 1 (conduct unbecoming). (JA at 2.) AFCCA set aside and dismissed with prejudice Charge III, Specifications 1-4 (fraternization), and set aside and dismissed without prejudice Specification 5,

Charge III (fraternization). (JA at 2-3.) AFCCA set aside the sentence and remanded the case to the convening authority who could order a rehearing as to Charge III, Specification 5 and the sentence. (JA at 57.)

The convening authority determined that a rehearing on Charge III, Specification 5 was impractical and dismissed the specification. (JA at 81.) The convening authority ordered a rehearing on the sentence for Charge I and II. At a sentencing rehearing, the panel members sentenced Appellant to nine months confinement, forfeiture of all pay and allowances, and a reprimand. (Id.) On appeal the second time, AFCCA disapproved Appellant's term of confinement and reprimand. AFCCA affirmed the reassessed sentence to forfeitures of pay to $2,500.00 pay per month for six months. (JA at 125.)

STATEMENT OF THE FACTS

Mil. R. Evid. 412 Motion

On 4 February 2019, trial defense counsel filed a written motion to admit evidence under Mil. R. Evid. 412. (JA at 264.) Trial defense counsel gave notice of the intent to introduce the following evidence in paragraph 3 of its motion:

> a) On or about 23 September 2017, during the charged event, CP told the Accused that CP had previously had homosexual experiences. This statement was made during the time that the Accused was sexually touching CP (the same touching that is charged in this case), and communicated that CP was comfortable with the touching that was occurring because the context of the statement was that CP was experienced and therefore comfortable

> with the nature of the touching that was occurring in response to the Accused's efforts to ensure that the sexual behavior was mutually agreeably/consensual.
>
> b) At the time of the alleged assault of CP, CP was in a serious and committed romantic relationship. That relationship has continued and become more serious since the alleged event.

(JA at 265.)

At a closed Article 39(a) session (Mil. R. Evid. 412 hearing), before the military judge heard any evidence on the defense's Mil. R. Evid. 412 motion, civilian defense counsel changed his position and no longer requested to introduce CP's prior homosexual acts outlined in subparagraph 3.a. (Id.) Civilian defense counsel only intended to ask CP whether he was in a heterosexual relationship at the time of the alleged offense. (JA at 270.) Government and victim's counsel did not oppose the admissibility of this evidence. (JA at 270-71.) Civilian defense counsel told the military judge that:

> With respect to [CP's] prior homosexual acts, the defense is not intending to get into that anymore. We miss understood - - defense counsel I think misunderstood some of the facts. So, we are no longer going to be offering it - - or going to get into it on cross-examination.

(JA at 270.) Civilian defense counsel also said that if the government opens that door in eliciting testimony from CP akin to, "I'm heterosexual, I would never do this," or "I'm straight, that's why I wouldn't do that," then that would open the door for the defense to get into CP's prior homosexual acts. (Id.) Civilian defense

counsel told the military judge that he "would then ask for a 412 hearing to then get into that. . . ." if he believed CP's testimony opened the door to Mil. R. Evid. 412 matters. (JA at 270.)

Given that civilian defense counsel withdrew the Mil. R. Evid. 412 motion regarding paragraph 3.a., and all parties agreed that CP's existence of dating relationship during the charged misconduct was admissible, the military judge did not "feel the need to further rule on any. . . parameters because I'm relying on the defense's assertion that they don't intend to delve deeper into that issue." (JA at 272.) The military judge also ruled from the bench that:

> With regard to [paragraph 3.a] the defense indicated they have no intention of delving into that line of questioning with CP on cross-examination. However, if the government does open the door to such rebuttal or impeachment, then it may become relevant. And again, we'll address that also in a 39(a) setting if the defense believes that door is open.

(Id.)

Charge I – Abusive Sexual Contact CP's Testimony

CP testified to the following evidence: At the time of the abusive sexual contact in 2017, CP was stationed at Malmstrom Air Force Base. (JA at 176.) At Malmstrom, CP and Appellant were assigned to the same squadron. (JA at 177.) While CP was the Tactical Response Force (TRF) flight commander, Appellant trained CP to be the assistant convoy commander. (Id.)

In September 2017, CP went on a temporary duty assignment (TDY) to Camp Guernsey in Wyoming. (JA at 178, 228.) At that time, CP was training to be the assistant convoy commander. (JA at 178.) CP, Appellant, and other service members from the TRF and Convoy Response Force (CRF) attended this TDY. (JA at 178-79.) On the way to Camp Guernsey, Appellant, CP, and other members of the TRF and CRF stayed overnight enroute in Casper, Wyoming. (JA at 180.)

Once at Casper, Wyoming, CP checked into the hotel. CP and Appellant each had their own room next to one another on the second floor of the hotel. (JA at 181.) That night, a group of about 10 people went to Red Lobster for dinner, including CP and Appellant. (Id.) After Red Lobster, the group went to a bar called the Beacon. (JA at 185.) By the time everyone left the Beacon, CP described that he was very intoxicated. (JA at 186.) CP did not recall details from the Beacon because it was just a regular night at the bar and nothing notable happened. (JA at 187.) CP did not remember the car ride back from the Beacon, and he did not remember urinating outside after leaving the bar. (JA at 203, 204.) CP explained that there were gaps in his memory at the Beacon, but CP did remember what occurred once he returned to the hotel. (JA at 187.)

CP testified that while CP was talking to people across the hall from his room, Appellant approached him and said, "I need to tell you something." (JA at 188.) CP went into Appellant's room. (Id.) CP remembered sitting down on the

edge of the bed. (Id.) Appellant was standing across from him and the next thing CP remembered was Appellant leaned in and kissed CP on the lips. (Id.) CP did not consent to the kiss. (Id.) The kiss surprised and confused CP because he did not even know that Appellant was "into [him] in that sense." (JA at 189.)

After the kiss, Appellant took his hand and reached down CP's pants and touched his groin area over his penis. (JA at 189, 191.) CP explained that Appellant put his hand under CP's pants, but was not sure whether Appellant's hand was underneath or over his underwear. (JA at 190.)

Next, CP and Appellant had a conversation after Appellant touched his penis. (JA at 191.) CP remembered telling Appellant that "sorry. I'm not into you. I'm not into that or anything like that.[2] I can't remember what else we talked about, but I knew the incident [Appellant touching his genitals] happened again." (Id.) At that point during CP's testimony, no party made an objection. CP's testimony continued, and he stated that he did not leave Appellant's room after the first touching because CP did not think that Appellant would touch him again. (JA at 220.)

CP also testified that in between the two incidents in which Appellant touched his penis, Appellant told CP, "you have a girlfriend. I have a girlfriend. It

[2] This was not the first time this statement was mentioned in the presence of the members. In his opening statement, civilian defense counsel twice stated that CP would testify that he told Appellant "I'm not into that." (R. at 283.)

doesn't matter," or words to that effect. (JA at 191.) CP also remembered Appellant asking to perform oral sex. (Id.) CP elaborated and described that Appellant told him specifically "[l]et me suck you off," right before Appellant put his hand down CP's pants for a second time. (JA at 192-93.) CP clarified that he never told Appellant that he could touch him for a second time. (JA at 191.)

CP was shocked after Appellant touched him a second time. (JA at 192.) CP described that his alcohol consumption impacted his immediate reaction to the sexual contact. (Id.) After the second incident, CP left Appellant's room and returned to his room. (JA at 194.) CP then called his girlfriend because he was in shock. (Id.) Appellant's sexual contact caught CP off guard, and he wanted to talk to someone. (Id.) CP was very close to his girlfriend, so he felt comfortable talking to her about what had just happened. (Id.) CP explained that he did not go into detail about the sexual contacts. (JA at 195.)

Although CP was intoxicated that night, CP explained that he still recalled the incidents and conversations he had with Appellant. (JA at 193.) CP was confident the events did in fact take place because the next morning he talked to Appellant who confirmed the interactions between them. (Id.) Appellant told CP, "[c]an we just put this behind us, something like that, and can we just not talk about it." (JA at 195.) CP responded, "yeah" and agreed to move on. (Id.) For the rest of the TDY, CP interacted with Appellant in a "working sense." (JA at

196.) CP had dinners with Appellant and other non-commissioned officers but he never interacted with Appellant one-on-one. (Id.) After the TDY, CP maintained a working relationship with Appellant. (JA at 197.)

CP clarified in his testimony that although his level of intoxication impacted his memory, CP could still remember certain parts of the night "that are going to stand out." (JA at 221.) CP added that the "kissing, the touching, and a couple of those phrases stuck out." (Id.)

At no point during CP's testimony did civilian defense counsel flag to the military judge that CP's testimony opened the door to evidence governed by Mil. R. Evid. 412.

Appellant's Testimony

Appellant took the stand in his own defense and testified to the following sequence of events: Appellant disputed CP's description of the events. Appellant testified that during that night, CP entered his room uninvited. (JA at 229.) Next, CP and Appellant were standing in front of the bed talking. (Id.) The "talking leads to hugging," followed by CP and Appellant sitting on the foot of the bed. (Id.) When asked by his counsel on direct examination if the hug was sexualized, Appellant said it was "lasting." (JA at 230.)

While sitting at the foot of the bed, CP and Appellant continued talking and eventually laid down. (Id.) According to Appellant, he and CP discussed how

they had girlfriends, and at this time Appellant reached over and touched his thigh. (Id.) When asked by his counsel whether it felt like this was a progression of sexualized interaction between himself and CP, Appellant responded "yes." (JA at 230.) Appellant kept explaining, through leading questions by his own counsel, that the interactions felt natural. (Id.)

Appellant testified that they were "talking about different preferences." (JA at 230.) Appellant continued: "He relates to me that he and his girlfriend ----" (Id.) Civilian defense counsel immediately interrupted and asked if they spoke generally about "sexual preferences," and Appellant agreed. (JA at 231.) While discussing preferences, Appellant testified that he had his hand on CP's thigh. (Id.) Appellant then explained that he stopped touching CP's thigh. (Id.) And Appellant mentioned that once he broke the contact, CP "talked about, he had had [sic] men and women come on to him before." (JA at 231.)

At that point, CP's Special Victim's Counsel objected under Mil. R. Evid. 412. (Id.) In an open Article 39(a) session outside the presence of members, civilian defense counsel told the military judge twice that he "specifically instructed" Appellant not to get into Mil. R. Evid. 412 matters. (JA at 232.)

After consulting the parties, the Special Victim's Counsel withdrew her objection. (Id.) But circuit trial counsel told the military judge that he intended to ask questions "that would delve into [Mil. R. Evid. 412] territory on cross-

examination." (Id.) The military judge told the parties that the court would proceed with Appellant's direct examination and then take up the Mil. R. Evid. 412 matters in a closed session. (Id.)

Appellant's testimony continued. Appellant testified that after he touched CP's thigh, CP stayed for a few more minutes talking to Appellant before leaving for the night. (JA at 235-36.) Appellant testified that the interaction became less sexualized once Appellant stopped touching CP. (JA at 236.) Appellant denied ever putting his hand down CP's pants. (Id.) Appellant denied touching CP's penis. (Id.) Appellant never claimed to have received consent to touch CP's genitals.

Closed Article 39(a) Session

After Appellant's direct examination concluded, the military judge conducted a closed hearing. The military judge started the session by stating that "the accused has testified regarding matters that are clearly covered under M.R.E. 412." (JA at 279.) The military judge said that Appellant's testimony suggested that CP "engaged in mutually consensual, sexually related hugging," that CP and Appellant laid down together, and that CP mutually consented to Appellant touching him on the leg. (Id.) The military judge noted that in the defense's motion to admit Mil. R. Evid. 412 evidence, there was no reference to hugging, laying on the bed, and touching of the leg. (Id.) Lastly, the military judge noted

that according to Appellant, CP told Appellant that he had prior homosexual experiences. (Id.) The military judge also highlighted that because the defense withdrew its Mil. R. Evid. 412 motion about CP, no evidence on the topic was elicited and therefore no ruling issued. (JA at 280.) Further, the military judge never made a ruling as for the admissibility of any suggestion about CP's sexual predisposition, such as sexual orientation.

When asked by the military judge why these acts were not noticed, civilian defense counsel responded "the only testimony that was elicited was the hugging and the leg touching which has a sexualized piece to it. That is the allegation in this case." (JA at 280.) Trial defense counsel then argued that Appellant's testimony did not talk "about the past sexual behavior or predisposition of the alleged victim," but:

> The actual behavior in the moment, is the res gestae of the crime itself, that's it. The reason I noticed what I noticed is because that's a reference to the sexual predisposition or sexual history of the alleged victim. We did not raise it. I specifically instructed to move past that and not to include that, I was only talking about the conduct of the res gestae itself.

(JA at 280-81.)

The military judge told civilian defense counsel his concern that Appellant's testimony – the consensual acts such as the hugging and thigh touch – implicated that CP was a homosexual. (JA at 282-83.) CP's homosexuality was at first

noticed in the defense's motion, but then the defense disavowed any intention to introduce that evidence. (JA at 283.) While the military judge understood the argument on res gestae, the military judge also emphasized that CP's sexual preference was sexual predisposition – a matter covered under Mil. R. Evid. 412. (Id.)

The military judge did not rule that Appellant's testimony was inadmissible under an exception under Mil. R. Evid. 412, but highlighted that the evidence was not addressed in a Mil. R. Evid. 412 hearing, and the Special Victim's Counsel did not have a chance to respond. (JA at 284.) The military judge emphasized that he must strictly adhere to Mil. R. Evid. 412 procedures. (Id.)

Circuit trial counsel told the military judge that during cross-examination he intended "to raise some evidence based on the direct examination of the accused." (JA at 285.) Circuit trial counsel did not have any proffer then, because he had not interviewed the proponent of the evidence – Appellant. (Id.) Circuit trial counsel told the military judge that "I intend to ask questions of the witness [Appellant] of the specifics told to him by [CP]," when CP allegedly said, "that he had experienced men and women coming on to him." (JA at 285-86.) Circuit trial counsel did not know the responses and therefore had no proffer for the court. (JA at 285-86.)

The military judge said, "the most appropriate way" for trial counsel to examine Appellant further about CP's alleged statements would be in a closed session with Appellant on the stand. (JA at 286.) Civilian defense counsel objected to Appellant "being compelled to testify in this session outside the presence of the members." (Id.) The military judge responded, "that's the remedy" – eliciting Appellant's testimony outside the presence of the members and then deciding whether an exception under Mil. R. Evid. 412 applied. (Id.)

Civilian defense counsel told the military judge that having Appellant submit to cross-examination in a closed hearing would give the government a strategic advantage to know what Appellant would say in his cross-examination before members. (JA at 290.) Circuit trial counsel responded that although the government had a strategic decision to make, the court was nonetheless bound by the process of Mil. R. Evid. 412 to conduct the hearing. (JA at 291.)

The military judge noted three remedies: 1) a mistrial; 2) excluding a portion of Appellant's testimony; and 3) not excluding Appellant's testimony and not allowing the government to cross-examine Appellant on the Mil. R. Evid. 412 matters raised in Appellant's testimony. (JA at 298.) The military judge said that a mistrial would be a drastic remedy and did not give it much consideration. (JA at 305.)

The military judge made the following ruling. First, "sexualized conduct that meets the definitions in [Mil. R. Evid. 412] that occurs leading up to or just following an alleged sexual assault, is always and routinely addressed within the confines of [Mil. R. Evid. 412]. That was not done in this case." (JA at 303.) Second, that "CP's sexual orientation and any evidence elicited that implicates the sexual orientation also amounts to sexual predisposition as defined in [Mil. R. Evid. 412(d)] and therefore should have been properly noticed and addressed in the [Mil. R. Evid. 412] setting. That was also not done in this case." (Id.) Third, and finally, the implication of Appellant's testimony is that CP "consented to the conduct that led up to the alleged offense even though [Appellant] denies the actual assault occurred. The implication also leaves the suggestion that [CP] may be homosexual." (Id.)

The military judge also noted that Appellant's testimony could lead the members to conclude that CP fabricated his testimony because he did not want his girlfriend at the time to know he had homosexual tendencies. (JA at 304.) As a result, the government raised the issue of being able to explore Appellant's assertions about CP's sexual tendencies – Mil. R. Evid. 412 matters – on cross-examination. (Id.) The military judge then made the following comment on fundamental fairness:

> The government should certainly have an opportunity to challenge an accused's claim that sexual conduct leading up to an alleged assault is consensual. Allowing the accused to present a theory of defense while preventing the government to challenge that theory, violates the fundamental notions of fairness in the court-martial process.

(JA at 304.) Thus, the court gave Appellant two options:

> First, the accused can submit to an examination by the trial counsel in a closed session in accordance with [Mil. R. Evid. 412] so that the matters can by fully explored, and so that the Court can determine whether an exception to M.R.E. 412 applies. And if so, to what extent the evidence can be examined.
>
> The second option is that the Court instructs the members to disregard the accused's testimony regarding his interactions with [CP] when he entered the hotel room. The two hugged, laid on the bed, and the accused placed his and on CP's leg. As well as the testimony from the accused that made any suggestion or reference to [CP's] sexual orientation.

(JA at 305.)

Civilian defense counsel continued to argue that Appellant's testimony was sexual behavior of the alleged act or in other words res gestae. (JA at 306-07.) The military judge rejected this argument and said that Appellant's testimony was "[Appellant] put his hand on the alleged victim's thigh. The alleged victim's testimony is, 'No you didn't, you put your hand down my pants.' They're different aspects, they're different sexual contacts. . . ." (JA at 306.)

After multiple discussions on the matter, Appellant maintained his refusal to testify in a closed hearing. (JA at 309.) As a result, the military judge ruled that he would instruct the members to disregard a portion of Appellant's testimony. (Id.)

Military Judge's Instructions

In an open hearing, with the panel members present, the military judge gave the following instruction:

> Members of the court, you heard testimony from [Appellant] that he believed the contact between himself and [CP] occurring prior to the charged conduct alleged in the Specification of Charge I, was consensual in nature and may have also implicated [CP's] sexual orientation. You are to disregard this portion of [Appellant's] testimony. However, you must consider the testimony by [Appellant] wherein he denied the specific charged conduct alleged in the Specification of Charge I.

(JA at 257.) In response to a question from a panel member, the military judge clarified his instruction:

> So any suggestion or implication regarding CP's sexual orientation is to be disregarded, and any testimony with regard to the sexual contact that was described, the hug, et cetera, that was as [sic] consensual, disregard that. However, do not disregard his flat denial that the alleged misconduct that's articulated in the Specification of Charge I, his denial that that occurred. That, you absolutely must consider.

(JA at 258.)

Appellant's cross-examination (Charge I)

On cross-examination, circuit trial counsel asked Appellant whether he asked CP to join him in his room, and Appellant responded no. (Supp. JA at 313.) Appellant denied the charged allegation related to CP. (Supp. JA at 314.) Appellant agreed that CP shadowed him on the TDY. (Id.) Appellant told circuit trial counsel that for the rest of the TDY, CP never attended any of the house parties, and he interacted with CP professionally and socially in the presence of others. (Supp. JA at 315.)

Findings Instructions

During findings instructions, the military judge instructed the members not to draw any negative inferences from his ruling striking Appellant's testimony:

> During the testimony of the accused, I instructed you to disregard portions of accused's testimony. The fact the Court instructed you to disregard portions of the accused's testimony should in no way be considered by you when evaluating accused's testimony. You will not draw any inferences adverse to the accused from the fact that the Court instructed you to disregard a portion of his testimony.

(Supp. JA at 319.)

The members found Appellant guilty of touching CP's genitals through clothing, without CP's consent. (JA at 129.)

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion by striking Appellant's testimony for two reasons. First, Appellant's testimony implicated matters covered by Mil. R. Evid. 412, and therefore the military judge had the duty to adhere to the procedures outlined in Mil. R. Evid. 412(c) to determine the admissibility of evidence, including Appellant's cross-examination. Second, when Appellant failed to submit to cross-examination, it was well within the military judge's discretion to strike a portion of Appellant's testimony not subjected to cross-examination.

Appellant's testimony implicated Mil. R. Evid. 412. Any testimony by Appellant suggesting that CP had homosexual tendencies was evidence of sexual predisposition covered by Mil. R. Evid. 412. And Appellant's statements about the consensual hug, lying in bed, and the thigh touch constituted "other sexual behavior" under the plain language of the rule. Mil. R. Evid. 412(d) defines sexual behavior as "any sexual behavior not encompassed by the alleged offense." The only sexual contact involving CP on the charge sheet was Appellant's touching of CP's genitals. (JA at 129.) So logically, the alleged consensual hug and thigh touch and lying on the bed Appellant described were "other sexual behaviors," since they were not part of the charged touching of the genitals. And what is more, in his own description of events, Appellant denied touching CP's genitals. (JA at 236.) The hugging, thigh touch, and lying in bed could not be "encompassed" by

an alleged offense that Appellant claimed never happened. Per Appellant's own testimony, these were "other sexual behaviors." Thus, the military judge did not abuse his discretion in finding that Appellant's testimony was still covered by Mil. R. Evid. 412.

The military judge also did not abuse his discretion when he excluded Appellant's testimony on the merits after Appellant failed to submit to cross-examination at a closed hearing about matters that he made relevant in his direct examination before the factfinder. Various jurisdictions have excluded testimony when a defendant refused to be cross-examined at a motion hearing outside the presence of the factfinder. United States v. Baskin, 424 F.3d 1, 4 (1st Cir. 2005); State v. Lea, 934 P.2d 460, 465 (Or. Ct. App. 1997). Given that the adversarial system entitles the opposing party to cross-examine a witness, here, the government was entitled to cross-examine Appellant at a Mil. R. Evid. 412 hearing regarding evidence he made relevant during his direct testimony before the factfinder. United States v. Brown, 356 U.S. 148, 157 (1958).

Even if the military judge committed error, it was invited by the defense. United States v. Raya, 45 M.J. 151, 154 (C.A.A.F. 2006). Before the trial on the merits, the defense agreed to bring up any matters to the court that they felt implicated Mil. R. Evid. 412 in a closed hearing. (JA at 270.) The military judge reinforced that they should do so. (JA at 272.) Appellant took the stand and

testified to matters that should have first been brought to the court's attention in a closed hearing. Complicating matters, Appellant then refused to submit to cross-examination in a closed hearing despite being both the proponent and source of the evidence. (JA at 309.) If Appellant had followed the military judge's guidelines to first raise these issues in a Mil. R. Evid. 412 hearing, he very well might have avoided having any testimony stricken. He should not gain a windfall from this invited error.

Assuming the military judge erred in striking a portion of Appellant's testimony, it was harmless, and even harmless beyond a reasonable doubt. The government's case was strong. CP testified credibly, and the government called two outcry witnesses who corroborated CP's testimony.

Further, the defense had no coherent theory of the case. Appellant claimed he **did not** touch CP's genitals. (JA at 236.) Yet, civilian defense counsel argued that consent could explain why Appellant **did** touch CP's genitals. (Supp. JA at 347.) Perhaps, arguably, the Appellant's excluded testimony --momentarily-- related to a consent defense. However, once Appellant denied ever touching CP's genitals, Appellant conceded there was no consent for any genial touching. Importantly, Appellant at no point ever claimed to receive consent to touch CP's genitals. If the members believed a touching occurred, they also knew from Appellant's testimony it was done without consent. They did, and it was not. In

sum, the excluded testimony could not have caused the members to find Appellant was not guilty.

Moreover, the military judge only excluded part of Appellant's testimony. Appellant's testimony regarding his theory of the case before the members, which was that the charged conduct never occurred, remained admissible. In fact, the military judge three times told the members that they had to consider Appellant's testimony that denied the allegation. (JA at 257-58.) The military judge did not commit constitutional error because Appellant still had his constitutional right to assert a defense, which he did. United States v. Adams, 44 M.J. 251, 252 (C.A.A.F. 1996). Any error did not contribute to the verdict and was harmless beyond a reasonable doubt. Since there was no abuse of discretion or prejudice to Appellant, this Court should affirm the decision of the Court of Criminal Appeals.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY STRIKING A PORTION OF APPELLANT'S TESTIMONY.

Standard of Review

This Court reviews a military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 for an abuse of discretion. United States v. Ellerbrock, 70 M.J. 314, 317 (C.A.A.F. 2011). This Court reviews a military judge's decision to strike testimony also under the abuse of discretion standard.

United States v. Longstreath, 45 M.J. 366, 374 (C.A.A.F. 1996). "Under the abuse of discretion standard, a military judge's ruling will be reversed only if his or her 'findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.'" United States v. St. Jean, 83 M.J. 109, 114 (C.A.A.F. 2023) (internal citations omitted).

Law and Analysis

Two pieces of evidence are at issue in this appeal. The first is evidence that CP told Appellant that men and women had come on to him before. The second is that, in the hotel room on the night of the charged incident, CP and Appellant engaged in consensual sexual behavior that included hugging, lying down on the bed together, and Appellant touching CP's thigh. Appellant provided Mil. R. Evid. 412 notice of the first piece of evidence, but not the second. A closed Mil. R. Evid. 412 hearing had not been held on either piece of evidence before Appellant testified on the merits at trial.

A. The military judge did not abuse his discretion when he found that portions of Appellant's direct testimony was governed by Mil. R. Evid. 412.

For the reasons discussed below, Appellant's stricken testimony discussed "other sexual behavior" and "sexual predisposition" governed by Mil. R. Evid. 412. The military judge's ruling that Appellant testified to evidence covered by Mil. R. Evid. 412 was not abuse of discretion because this finding was within the range of choices given the facts and law.

1. Appellant's testimony addressed both CP's sexual predisposition and "other sexual behavior" of CP not encompassed by the charged genital touching.

Appellant incorrectly asserts that the contested evidence here – a consensual hug, lying on the bed, a consensual thigh touch, and CP's statement that he had other men and women come on to him – was not "other sexual behavior" or "sexual predisposition" covered by Mil. R. Evid. 412 (App. Br. at 14.) Appellant testified that CP "talked about, he had men and women come on to him before." (JA at 231.) This statement along with Appellant's testimony about the consensual hug, lying in bed, and consensual thigh touch suggested that CP had homosexual preferences, evidence protected under Mil. R. Evid. 412. *See* United States v. Grant, 49 M.J. 295, 297 (C.A.A.F. 1998) (finding that sexual predisposition includes a victim's sexual orientation). As AFCCA aptly recognized, "[t]he inference from this line of questioning was clear: CP consented to the conduct in Appellant's hotel room because he was either gay or bisexual." (JA at 50.) The

military judge did not abuse his discretion in determining that testimony that CP consented to homosexual hugging and touching with Appellant and that CP made statements about previous encounters with males implicated CP's sexual predisposition and therefore covered by Mil. R. Evid. 412.

The plain language of Mil. R. Evid. 412(d) also establishes that Appellant's testimony discussed "other sexual behavior" by CP. "Statutory construction begins with a look at the plain language." United States v. Ron Pair Enterprises, Inc. 489 U.S. 235, 241-42 (1989) *see also* United States v. Matthews, 68 M.J. 29, 36 (C.A.A.F. 2009) (finding that the rules of statutory construction are used to construe the military rules of evidence). Mil. R. Evid. 412(d) has plain and unambiguous language: "Sexual behavior includes any sexual behavior not encompassed by the alleged offense." The allegedly consensual hug, thigh touch, and lying on the bed were not encompassed by the offense described on the charge sheet: touching CP's genitals. Each of those actions could have and did happen independently from the charge offense.

Appellant specifically testified that he never touched Appellant's penis. If one were to accept Appellant's assertion that the charged conduct never took place, then the other acts that he testified to – the consensual hug, thigh touch, and lying on the bed – certainly constituted "other sexual behavior." Logically, such behaviors cannot be "encompassed" by an offense that never occurred.

Appellant mainly relies on an unpublished opinion from the Army Court of Criminal Appeals, United States v. Gaddy, ARMY 20150227, 2017 CCA LEXIS 179 (A. Ct. Crim. App. 20 March 2017) (unpub. op.) for the proposition that Appellant's stricken testimony was res gestae. In Gaddy, the defense sought to introduce evidence that the victim and the appellant "in the moments *immediately preceding the alleged assault* . . . had engaged in highly sexualized dancing that 'simulated sex.'" Id. at *5. (emphasis in original). The court found that this evidence of "grinding" moments before the alleged nonconsensual intercourse was res gestae of the offense because it was "inexorably intertwined with the alleged offense itself." Id. The court concluded that Mil. R. Evid. 412 "does not exclude evidence of the offense itself, to include the appellant's version of what transpired during the transaction." Id. at *6.

First, Gaddy is not binding on this Court, since it is an unpublished service court opinion. And second, Gaddy, a summary disposition with a paltry explanation of the facts, is of limited value. Gaddy does not explain where the "grinding" or sexual intercourse took place. Were the appellant and victim "grinding" on a dance floor and, as that was occurring, he penetrated her? Without that context is it difficult to understand the reach of the Army Court's res gestae analysis. Even so, it is not obvious that Gaddy's analysis comports with the plain language of Mil. R. Evid. 412(d). The disputed evidence in Gaddy, the sexualized

dancing, was an act "not encompassed by the alleged offense" of penile penetration, and therefore should have constituted "other sexual behavior." Although perhaps the evidence of "grinding" should have been admitted under an exception to Mil. R. Evid. 412, treating it under Rule 412 would not have comported with the Rule's plain language.

In the end, this Court should decline to adopt Gaddy's nonbinding analysis. Gaddy notwithstanding, it was not an abuse of discretion for the military judge to look at the plain language of the definition of "sexual behavior" and conclude that the allegedly consensual hug, lying on the bed, and thigh touch were "any sexual behavior not encompassed by the alleged offense" of touching of the genitals.

Appellant also cites United States v. Raniere, 2019 U.S. Dist. LEXIS 84634, at *7 (E.D.N.Y May 3, 2019) for the proposition that an accused and alleged victim's "behavior in engaging in the sexual acts at issue here. . .is outside the scope of Rule 412." (App. Br. at 11.) Appellant's reliance on Raniere is also misplaced because Raniere described what "other sexual behavior" means in the Fed. R. Evid. 412 context. Fed. R. Evid. 412 does not contain Mil. R. Evid. 412(d)'s definition of "sexual behavior" as "any sexual behavior not encompassed by the alleged offense." It is unclear whether the district court in Raniere would have decided the issue the same way applying the definition from the military Rule.

This Court should find a Court of Appeals of Iowa case, State v. Tovar, more persuasive. 871 N.W.2d 127, 2015 Iowa App. LEXIS 684, at *5 (Iowa Ct. App. 2015). In Tovar, the court refused to apply the res gestae or "inextricably intertwined" doctrine to determine if contested evidence of a victim's sexual behavior fell under Iowa R. Evid. 412. Id. at *5, n.2. The court reasoned that Rule 412(d)'s definition of "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which sexual abuse is alleged" – not the res gestae doctrine – "determines whether evidence comes within the ambit of the rule." Id. So too here. This Court should decline to apply any res gestae doctrine and instead simply follow the plain language definition of "sexual behavior" found in Mil. R. Evid. 412(d).

In sum, the plain language of the Mil. R. Evid. 412(d) specifies that other acts not encompassed by the charged sexual offense are protected under Mil. R. Evid. 412. There was no binding authority on the military judge dictating that the allegedly consensual hugging, lying on the bed, and thigh touching were res gestae evidence outside the ambit of Mil. R. Evid. 412. Given the state of the law and plain language of the Rule, it was within the range of choices reasonably available to the military judge to conclude that CP's alleged consensual behaviors were "not encompassed by the alleged offense" of Appellant touching CP's genitals. Thus,

the military judge did not abuse his discretion in treating the stricken testimony as falling under Mil. R. Evid. 412.

2. The military judge did not abuse his discretion by declining to strike CP's testimony.

Appellant also argues that the military judge erred in failing to strike portions of CP's testimony upon the defense's request because that testimony also implicated Mil. R. Evid. 412. (App. Br. at 17.) But again, the military judge did not abuse his discretion or plainly err.[3]

After the military struck Appellant's testimony, civilian defense counsel asked the military judge to strike CP's testimony about the kissing and CP's statement that "he is not into things like that" because the Government failed to provide Mil. R. Evid. 412 notice. (JA at 260; Supp. JA at 316-18.) The military judge declined, saying that he did not strike Appellant's testimony based on a failure to provide Mil. R. Evid. 412 notice, but because of Appellant's failure to submit to cross-examination. (Supp. JA at 317.) The judge also noted that no party objected to CP's testimony under Mil. R. Evid. 412 and that CP "was examined extensively by both parties." (Id.)

[3] AFCCA addressed this question under a plain error standard because Appellant failed to object to CP's testimony until much later in the trial. (JA at 48.) Under either a plain error or abuse of discretion standard, the government prevails.

The military judge did not err because there were several key differences between CP and Appellant's testimonies. First, while Appellant testified to allegedly consensual "behaviors" by CP during the encounter, CP testified that Appellant kissing him was not consensual and perpetrated by Appellant alone. Thus, those specific nonconsensual happenings could not be considered "behavior" by CP within the definition of Mil. R. Evid. 412; they were Appellant's behaviors. Next, CP's statement "I'm not into that or anything like that," was somewhat ambiguous – it might or might not have implicated CP's sexual orientation and was less obviously encompassed by Mil. R. Evid. 412.[4] In contrast, Appellant's version of CP's statement, that men had come on to him before, more blatantly implicated CP's sexuality. Had trial counsel inquired further into the specifics of what CP had said about those incidents with other men, Appellant's answers very likely would have related to CP's sexual predispositions. No one objected to CP's testimony on Mil. R. Evid. 412 grounds, and the defense professed no need to explore Mil. R. Evid. 412 matters to fairly cross-examine CP. In fact, in opening

[4] The admissibility of CP's prior testimony "I'm not into that or anything like that," came up at Appellant's sentencing rehearing. The rehearing military judge described the ambiguity saying, "it can be interpreted that the statement is a manifestation of a lack of consent. Or it could be interpreted that [CP] is a heterosexual." (Supp. JA at 374.) The rehearing judge found that "in the context of the testimony presented at the prior trial, [the statement] was properly admitted as evidence that [CP] did not consent and manifested that lack of consent to [Appellant]. (Id.)

statement, without expressing any Rule 412 concerns, civilian defense counsel himself twice referenced CP's expected testimony that he had told Appellant "I'm not into that." (R. at 283.) And most importantly, unlike Appellant, CP was subject to extensive cross-examination. Given all these distinctions, it was within the military judge's discretion to allow CP's testimony to stand, despite striking Appellant's.[5]

3. Assuming CP's testimony opened the door to CP's sexual predisposition, the military judge still did not err by requiring the matter to be raised in a closed Mil. R. Evid. 412 hearing.

Appellant also argues that the military judge erred in excluding evidence of CP's sexual preference because CP's "testimony opened the door for evidence contradicting CP's in court assertions of exclusive heterosexuality."[6] (App. Br. at 17.) But the military judge never prohibited Appellant from rebutting CP's testimony – he simply enforced rule-based limitations on how Appellant could do

[5] To the extent that Appellant's brief states that CP referenced a leg touch in his testimony (App. Br. at Appendix), that is a mischaracterization of the evidence. A closer look at the record shows that CP referenced Appellant's hands touching his belt which directly related to the charged offense because Appellant approached his hand towards CP's belt to drive his hand down his pants to touch his genitals through clothing. (JA at 212.) CP never affirmed that Appellant touched his leg. (JA at 217.) When asked whether he told HH that Appellant touched his leg or knee, CP responded, "I don't know what I told her specifically. . . ." (JA at 217.) Appellant makes great efforts to intertwine Appellant's and CP's testimony, but they are distinct.

[6] CP said, "I'm not into you. I'm not into that or anything like that." (JA at 191.)

so. Per the military judge's ruling from the bench earlier in the trial, the defense had to notify the military judge if they believed CP's testimony opened the door to his sexual orientation. (JA at 270.) Yet the defense did not follow the military judge's directed protocol before Appellant testified about CP's statement about men coming on to him and the alleged consensual homosexual conduct between CP and Appellant.

Appellant is correct in that "[w]here the Government uses the sexual orientation in way that implies the impossibility of consent, or a reasonable mistake of fact as to consent, the defense must be allowed to rebut that inference." United States v. Villanueva, NMCCA 201400212, 2015 CCA LEXIS 90 *10 (N.M. Ct. Crim. App. 4 Feb 2016) (unpub. op.) (App. Br. at 17). Appellant's statements about CP's sexual preferences may have been admissible. But the conundrum here was that Appellant's testimony about CP's sexual preferences was not subject to cross-examination due to Appellant's refusal to testify first in a closed Mil. R. Evid. 412 hearing. (JA at 286, 309.) Thus, this Court should reject Appellant's argument that the military judge erred when he excluded evidence about CP's sexual predisposition. Given Appellant's choice not to testify at a closed hearing, the military judge had to exclude a portion of his testimony to ensure a fair trial because the government had no opportunity to cross-examine Appellant.

In sum, Appellant's testimony elicited evidence about CP's "other sexual behavior" and sexual preferences covered by Mil. R. Evid. 412. And Appellant failed to notify the military judge that he thought that CP's testimony opened the door to question CP's sexual preferences. For these reasons, the military judge did not abuse his discretion in finding that Appellant's testimony implicated Mil. R. Evid. 412 and that a closed hearing was required before cross-examination.

B. The military judge did not abuse his discretion by striking Appellant's testimony.

Because Appellant's testimony elicited evidence protected under Mil. R. Evid. 412, an evidentiary hearing under Mil. R. Evid. 412(c) was warranted to determine the scope of admissibility of the government's cross-examination. The military judge did not abuse his discretion in adhering to the procedures set forth in Mil. R. Evid. 412 that required a closed hearing to determine the admissibility of evidence. And when Appellant refused to testify at a closed motions hearing, the military judge did not err by striking a portion of Appellant's testimony not subject to cross-examination.

1. Given that Appellant was the source of the evidence he made relevant in his direct testimony, the military judge did not abuse his discretion by requiring Appellant to testify in a closed session.

Appellant makes various arguments that the military judge erred in concluding that Appellant had to testify at a closed hearing to determine the admissibility of the evidence. (App. Br. at 20-23.)

Appellant argues that striking testimony was not a remedy under Mil. R. Evid. 412 because there were less drastic remedies available. (App. Br. at 9.) This argument has no merit; the only other less drastic remedy available would be to keep Appellant's testimony and deny the government the right to cross-examine and challenge Appellant's testimony. This would not have been a remedy but a windfall to Appellant.

Next, Appellant asserts that he did not have to testify because the military judge could have considered documentary evidence, inadmissible hearsay, oral or written proffers of evidence. (App. Br. at 20.) While this may be true in other cases, these options did not exist in this case. Appellant was initially the proponent of the evidence and made CP's sexual orientation a relevant matter. And although the government was the proponent of the cross-examination, Appellant was still the source of the information. The government did not know what Appellant was going to say during cross-examination, so it was impossible for the military judge

to rule on the admissibility of the testimony under Mil. R. Evid. 412 without hearing the evidence directly from Appellant.

Appellant also suggests that the government was the proponent of the Mil. R. Evid. 412 evidence when it stated that he "was under no obligation to assist the government in complying with Mil. R. Evid. 412." (App. Br. at 21.) While this is true in a sense given that the government was the proponent of its cross-examination, Appellant fails to acknowledge that it was in fact his direct testimony that put the facts at issue. Appellant created the Mil. R. Evid. 412 issue before the military judge and did not comply with Mil. R. Evid. 412 procedures, as his defense counsel had earlier agreed to do.

Finally, Appellant asserts that the military judge could have made a ruling based on Appellant's testimony already admitted. (App. Br. at 22.) But how so? Circuit trial counsel in good faith told the court that he intended to get into Mil. R. Evid. 412 matters during cross-examination, but did not know exactly what Appellant would say. (JA at 233.) As a result, the military judge had to hold an evidentiary hearing since Appellant was the source of the evidence.

The military judge's efforts to comply with Mil. R. Evid. 412 were well within a range of choices "reasonably arising from the applicable facts and law." St Jean, 83 M.J. at 115.

2. Striking testimony not subjected to cross-examination was not an abuse of discretion.

"[T]he right of an accused to present evidence in his defense must still yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence.'" United States v. West, 27 M.J. 223, 225 (C.A.A.F. 1988). Thus, Appellant's right to testify did not purge the military judge's obligation to conduct Mil. R. Evid. 412 proceedings.

Instructive here is Brown where the Supreme Court held that when the petitioner took the stand in her own defense, she abandoned her privileges against self-incrimination. 356 U.S. at 157. In essence, an accused waives his right to the privilege against self-incrimination as to any relevant matters reasonably raised by his direct testimony. Id. Further, when a witness takes the stand, such as a defendant, "his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination." Id. at 154-55. "He has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." Id. at 155. The right of cross-examination "helps assure the accuracy of the truth-determining process," and "its denial or significant diminution calls into question the ultimate integrity of the fact-finding process." Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

Appellant argues that his decision to testify on the merits only required him to submit to cross-examination before the finder of fact. (App. Br. at 18.) Appellant cites no authority to support his argument that he did not waive his right to remain silent at the Mil. R. Evid. 412 hearing based on his testimony on the merits. And his argument does not square with Brown. Brown states that "an accused waives his right to privilege against self-incrimination as to *any* relevant matters reasonably raised by his direct testimony." 356 U.S. at 157. (emphasis added). Because Appellant was the proponent and source of the evidence and made CP's sexual preferences and behavior relevant on direct examination, he waived his right against self-incrimination about this matter and could not have avoided cross-examination – even if it first had to occur in a closed hearing to determine admissibility. Appellant cannot use his privilege against self-incrimination as a shield and sword.

In addressing a defendant's Sixth Amendment substantive right to present criminal defense evidence before a jury, the Supreme Court noted the following: "The Sixth Amendment does not confer the right to present testimony free from legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." Taylor v. Illinois, 484 U.S. 400, 412-13 (1988). Thus, the military judge here understood the adversarial nature of Appellant's court-martial and struck a portion

of his testimony that was not subject to cross-examination to prevent Appellant from only presenting an unchallenged half-truth to the court-martial panel.

i. Other courts have stricken testimony or excluded evidence when a defendant failed to submit to cross-examination in a motions hearing.

Courts have rejected the notion that the requirement to submit to cross-examination does not apply to hearings outside the presence of the factfinder. Multiple state and federal courts have recognized that a testifying defendant still has an obligation to submit to cross-examination away from the finder of fact. In Baskin, the defendant sought to admit an affidavit, from himself, in support of his Fourth Amendment claim in that he had a reasonable expectation of privacy in the room he rented. 424 F.3d at 4. At a motion hearing, the government attempted to cross-examine the defendant about the evidence in the affidavit, but the defendant refused to respond to the questions and invoked his Fifth Amendment privilege against to self-incrimination. Id. at 5. The circuit court of appeals held that the district court did not abuse its discretion in excluding the defendant's affidavit. Id. As part of its reasoning, the court acknowledged that a trial judge may strike a witness's testimony if he refused to answer cross-examination questions "related to 'the details of his direct testimony,' thereby undermining the prosecutions ability to 'test the truth of his direct testimony.'" Id. (internal citations omitted).

In United States v. Rodger, the defendant testified in a suppression hearing and gave his version of events that led to his arrest and identification as the robber.

2010 U.S. Dist. Lexis 65850, at *29 (S.D. Ga. 2010). The defendant refused to submit to cross-examination. Id. The trial judge informed the defendant that "if he refused to submit to cross-examination in the hearing, his testimony would be stricken from the record." Id. The defendant still refused to testify. As a result, the district court struck his testimony. Id.

Similarly, in State v. Brantley, the defendant testified in a suppression hearing challenging the validity of a search warrant. 2020 N.J. Super. Unpub. Lexis 86, at *14 (N.J. Super Ct. App. Div. 2020). The defendant refused to answer questions on cross-examination. Id. And therefore, the Superior Court of New Jersey found that the trial court properly struck his testimony. Id.

In State v. Mende, the defendant moved to dismiss the charge against him for speedy trial violations. 741 P.2d 496, 498 (Or. 1987). In support of his motion, the defendant filed an affidavit stating that the delay in arrest was prejudicial. Id. At the motions hearing, the state called the defendant as a witness to cross-examine him on the factual matters alleged in the affidavit. Id. at 498. The defendant declined to answer questions on cross-examination asserting his privilege against self-incrimination. Id. As a result the trial court struck the allegations in the defendant's affidavit. Id. The Oregon Supreme Court held that trial court did not err by striking portions of the defendant's testimony because by

submitting an affidavit the defendant waived his privilege against self-incrimination, and the state was entitled to cross-examine the defendant. Id.

Likewise, in State v. Lea, the defendant argued that striking his testimony during a motions hearing was improper because it placed him in a "cruel trilemma" because he had to choose between: 1) answering the prosecutor's question at a suppression hearing and therefore run the risk that his responses be introduced at trial before the factfinder; or 2) refusing to answer and have his testimony at the suppression hearing stricken. 934 P.2d 460, 465 (Or. Ct. App. 1997). The Oregon appellate court found that the defendant's argument was irreconcilable with long established authority that held that a criminal defendant who elects to testify in a criminal proceeding waives the privilege against self-incrimination to matters covered on direct examination and therefore subjected to cross-examination on those matters raised in direct. Id.

The law is well established that once an accused takes the stand, he waives his privilege against self-incrimination in any matters made relevant in his direct testimony. This applies equally to an accused's testimony during a motions hearing outside the presence of the factfinder. Even if the government might gain some tactical advantage to use on the merits from hearing the accused's testimony outside the presence of the factfinder, that still does not excuse a failure to testify. Lea, 934 P.2d at 465. Striking testimony not subject to cross-examination is a

remedy well within the discretion of the court. Thus, the military judge here did not abuse his discretion when he struck Appellant's testimony that was not subject to cross-examination "free from legitimate demands of the adversarial system." *See* Taylor, 484 U.S. at 412-13.

3. Given lack of precedent squarely addressing the unique circumstances of this case, striking Appellant's testimony was within the range of choices available to the military judge based on the most analogous law available.

The MCM and case law do not directly address the predicament Appellant put the military judge in – refusing to be cross-examined in a closed hearing *after* testifying before a panel of members about matters covered under Mil. R. Evid. 412. But the rules do help to explain what a military judge can do when a witness asserts the privilege against self-incrimination during testimony. Mil. R. Evid. 301(e)(1) states that if a witness asserts privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or part, unless the matters to which the witness refuses to testify are purely collateral. And as discussed above, other courts have struck testimony for a defendant's refusal to submit to cross-examination in a motions hearing. Here, too, Appellant refused to be cross-examined at a Mil. R. Evid. 412 hearing. Thus, the MCM and case law suggested that the military judge had the option to strike a portion of his testimony, and this remedy was within his authority

to exercise reasonable control over the presentation of evidence. *See* Mil. R. Evid. 611.

Given the unprecedented nature of the issue before this Court, and the lack of any case law suggesting the chosen remedy was improper, striking a portion of Appellant's testimony was not an abuse of discretion. It was well within the range of reasonable choices available to the military judge to ensure a fair trial for both sides. *See* United States v. Carter, 74 M.J. 204, 209 (C.A.A.F. 2015) (finding that the military judge did not abuse her discretion in ruling against the appellant on an area of unsettled law).

C. Assuming error, it was invited by the defense.

Under the invited error doctrine, Appellant "cannot create error and then take advantage of a situation of his own making." Raya, 45 M.J. at 254. "This doctrine is intended to hold parties responsible for their own actions." Id. The military judge notified Appellant that if he believed the door was opened to discuss CP's sexual predisposition, the matter needed to be addressed in a closed hearing first. (JA at 272.) Appellant's civilian defense counsel indicated he intended to follow this procedure. (JA at 270.) Nonetheless, Appellant took the stand, and apparently against the instruction of his own counsel (JA at 232), chose to testify about CP's sexual orientation without first requesting a closed hearing. The military judge, in accordance with the procedural rules, then had to conduct a

closed hearing to determine the admissibility of the government's cross-examination of Appellant. Mil. R. Evid. 412(c)(2). Appellant's choices left the military judge with very few viable options: 1) have Appellant testify in a closed hearing to determine the scope of trial counsel's cross-examination; or 2) strike a portion of Appellant's testimony. (JA at 305.)

Appellant created this issue by failing to follow the military judge's directed protocol. If Appellant had properly raised the issue before testifying, then perhaps the issue could have been resolved without striking any of Appellant's testimony already put before the members. Instead, Appellant's failure to follow direction put the military judge in a difficult situation. Any error was invited by the defense, and Appellant should not benefit on appeal for an issue he created. The military judge chose an appropriate remedy by striking a portion of Appellant's testimony.

D. Even if the military judge erred, striking a portion of Appellant's testimony was harmless beyond a reasonable doubt.

Assuming error, striking a portion of Appellant's testimony was not constitutional error. (JA at 54.) But even if this Court applies the harmless beyond a reasonable doubt standard, the government met its burden of showing that the error was harmless beyond a reasonable doubt. This Court tests for prejudice involving improperly excluded Mil. R. Evid. 412 by questioning whether there is a "reasonable probability that the evidence [or error] complained of might have contributed to the conviction." Ellerbrock, 70 M.J. at 321. Here, there was no

reasonable probability that striking Appellant's testimony contributed to the guilty verdict.

1. The government's case was strong.

The government presented a compelling case. CP maintained during direct and cross-examination that although he did not remember parts of the evening, he remembered the abusive sexual contact because it was a shocking moment, and he had no doubt in his mind that Appellant touched his penis through his clothing. (JA at 193.) CP testified credibly and the government called two outcry witnesses who corroborated CP's testimony. On the night of the allegation CP called his then girlfriend HH and recounted some details of what occurred with Appellant, including that Appellant tried to kiss CP and touched him in some manner. (JA at 166, 168.) HH described Appellant as very upset and shocked. (Id.) And during February 2018, CP also told AM about the night of the allegation. AM testified that CP told him that Appellant suggested that he could perform oral sex on CP. (JA at 226.)

In sum, HH's testimony supported that Appellant was in shock the night of the assault and affirmed that Appellant touched CP. AM's testimony affirmed that Appellant told CP he would like to perform oral sex. These outcry statements enhanced CP's credibility.

2. Appellant still asserted his defense despite the stricken testimony.

By striking Appellant's testimony, the military judge did not preclude Appellant from asserting his theory of the case – that he never touched CP's penis. The judge did not strike all of Appellant's testimony related to the abusive sexual contact charge involving CP. In fact, the military judge clarified for the members three times that they "must consider testimony by the accused wherein he denied the specific charged conduct alleged in the Specification of Charge I." (JA at 257-58.). Appellant had the right to testify and assert a defense, and he did just that.

In United States v. Ramone, 218 F.3d 1229, 1231 (10th Cir. 2000), the appellant claimed that the district court violated his constitutional right and abused its discretion in limiting his ability to present evidence of specific instances of sexual behavior between himself and the victim. The court held that the exclusion of evidence under Rule 412 was not disproportionate because the appellant was not completely prevented from testifying about his prior consensual sexual relationship, and therefore there was no Sixth Amendment violation. Id. at 1235-36. The same can be said in this case. Although the military judge excluded parts of Appellant's testimony, Appellant was still able to present a defense that included his denial of the charged offense – that he never touched CP's penis. For this reason, if the military judge erred, it was certainly not constitutional error. (JA at 54.)

3. Given that Appellant denied that the charged touching of the genitals even occurred, evidence that CP had homosexual tendencies and consented to some other sexual behavior with Appellant would have done little to tip the scales in Appellant's favor.

The defense's case was weak because they did not present a coherent theory at trial. Although Appellant denied touching CP's penis during his testimony, civilian defense counsel still argued the issue of consent:

> The other part of it that's really difficult to swallow is the kiss. It happened, and [CP] described it as lingering. Did [Appellant] interpret that as a sign to continue the sexualized conduct? Perhaps when you're looking at the idea of consent, my point is words are not necessary. It can be the facts and circumstances surrounding it. It can be a lingering kiss communicates that a progression of touching is acceptable.

(Supp. JA at 347.) If CP had actually consented to Appellant touching his genitals as trial defense counsel was suggesting, then Appellant would have lied on the stand by saying the genital touching never occurred.

The stricken evidence had no very minimal relevance, if any, to make a fact at issue more or less probable. While evidence of CP's homosexual predisposition and consensual hugging and touching with Appellant might have tended to show that CP consented to the charged touching of his genitals, it would have done little to support Appellant's testimony that the touching never occurred. The stricken evidence also did not support a mistake of fact as to consent, since that defense was not at issue in this case because Appellant denied that he touched CP's penis.

Indeed, the military judge did not instruct the members on that defense. And any suggestion that CP fabricated the genital touching because he wanted to hide his homosexual tendencies from his girlfriend strains credulity. If all that had happened was hugging and thigh touching while alone in a TDY hotel room, it would have made much more sense for CP to remain quiet rather than bringing the incident to everyone's attention by making a false allegation of sexual misconduct.

The excluded testimony would not have caused the members to believe Appellant. Appellant also testified on behalf of the other charges against him in which the panel found him guilty – Specification 1 of Charge II (touching JA's genitals through the clothing that was not set aside on appeal). (JA at 130.) Those portions of Appellant's testimony were not stricken. This proved that the panel members did not find Appellant credible. As a result, striking Appellant's testimony was harmless beyond a reasonable doubt.

4. <u>The panel members were presumed to have followed the military judge's instructions to draw no negative inference from Appellant's excised testimony.</u>

Appellant also argues that the members did not follow the military judge's instructions to draw no negative inference from the striking of Appellant's testimony because the members found Appellant guilty of fraternization absent any evidence about the proof of custom required to prove such an offense. (App. Br. at 24-25.) Appellant cites no authority holding that if a specification is set aside for

lack of factual or legal sufficiency, then the members cannot be presumed to have followed *any* of the military judge's instructions in the case. Since there was no evidence to the contrary, this Court should presume that the members did follow the military judge's instruction to draw no negative inference from the striking of Appellant's testimony. *See* United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000).

5. Circuit trial counsel did not leverage the exclusion of Appellant's testimony to attack Appellant's credibility.

Contrary to Appellant's assertion, circuit trial counsel did not use the military judge's ruling striking Appellant's testimony to leverage a negative inference about Appellant's credibility. (App. Br. at 24.) In his brief, Appellant quotes circuit trial counsel as saying, "I want to be very crystal clear on this. The military judge instructed you about portions of his testimony that you must disregard. . . This man came before you and lied." (App. Br. at 24 citing JA at 262.) In fact, circuit trial counsel argued the following:

> I want to be very crystal clear on this: The military judge instructed you about portions of his testimony that you must disregard. You must disregard. There's also portions of his testimony you must consider. You must consider that he denies what happened with [CP]. But, members, "consider" just means think about it. Consider certainly doesn't mean accept that as true. Consider means think about it, and all - - all - - of the problems with his credibility go to whether you give that any weight, any weight whatsoever. Consider? Sure. Weight? None. None. This man came before you and lied.

(JA at 262.) Appellant mischaracterizes the argument. Trial counsel had spent much of his preceding argument explaining why the members should not find Appellant's testimony regarding multiple specifications to be credible – based on the totality of evidence introduced on the merits. (Supp. JA at 320-38.) No reasonable person considering the entire context of the argument would have understood trial counsel to mean the striking of Appellant's testimony showed that he lied.

6. This Court should disregard Appellant's cumulative error argument.

In his brief, Appellant argues that circuit trial counsel's argument conflicted with this Court's holding in United States v. Mendoza, __ M.J __, 2024 CAAF LEXIS 590 (CA.A.F. 7 October 2024). This is not a granted issue in this case, nor did Appellant raise this issue in his petition for grant of review. Appellant did not cite any specific portion of closing argument in his brief to support his claim that circuit trial counsel conflated lack of consent and incapacitation theories of liability. In fact, circuit trial counsel argued lack of consent:

> [CP] didn't freely give agreement when [Appellant] approached him in this way and stuck his hands down his pants. He did not freely give agreement to that. That's not consent. He did not freely give agreement when he did it a second time.

(Supp. JA at 330.) Trial counsel also highlighted that in response to the question "Did you consent," CP testified "Negative." (Id.) Circuit trial counsel did not

conflate theories of liability in violation of Mendoza. Just because a fact pattern charged as a "without consent" case might also contain evidence of a victim's intoxication does not mean that it is improper for trial counsel to mention intoxication at all. Mendoza, 2024 CAAF LEXIS 590 at *22. Here, circuit trial counsel presented evidence that CP expressed nonconsent by telling Appellant he "wasn't into" him, and then specifically argued that CP did not make a freely given agreement to the conduct. This case does not implicate Mendoza in any way.

Appellant had the benefit of this Court's Mendoza opinion at the time he petitioned for review with this Court on 24 December 2024. For these reasons, this Court should reject Appellant's argument on cumulative error.

In sum, Appellant's stricken testimony did not impact his ability to assert a defense. And the stricken testimony would have done nothing to bolster Appellant's testimony that he never touched CP's genitals in the first place. If striking the testimony was error, there is no reasonable probability that the error contributed to the verdict. As a result, any error was harmless and harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court, Air Force Appellate Defense Division, and civilian appellate defense counsel on 30 May 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 12,993 words. This brief complies with the typeface and type style requirements of Rule 37.

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Dated: 30 May 2025