IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JAMAL X. WASHINGTON
First Lieutenant (O-2),
United States Air Force,
Appellant.

USCA Dkt. No. 25-0044/AF

Crim. App. Dkt. No. ACM 39761

Filed: May 7, 2025

BRIEF ON BEHALF OF APPELLANT

ROBERT FELDMEIER
Civilian Appellate Defense Counsel
THE LAW OFFICES OF
ROBERT FELDMEIER
2920 Forestville Road
Suite 100-1076
Raleigh, North Carolina 27616
(336) 416-2479
robert.a.feldmeier@gmail.com
CAAF Bar No. 35622

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Counsel for Appellant

Index

Table of Authorities

FEDERAL COURT CASES

RULES AND OTHER AUTHORITIES

Issue Presented

Whether the original military judge abused his discretion when he struck a portion of Appellant's testimony.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals [hereinafter Air Force Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2019). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

Relevant Authorities

Mil. R. Evid. 412(a)-(b)—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.

Statement of the Case

On February 12 and April 8-13, 2019, a military judge and panel of members sitting as a general court-martial at Malmstrom Air Force Base (AFB), Montana, tried First Lieutenant (1st Lt) (O-2) Jamal X. Washington. Contrary to his pleas, the panel convicted 1st Lt Washington of one specification of abusive sexual contact, one specification of conduct unbecoming an officer and a gentleman, and five specifications of fraternization, in violation of Articles 120, 133, and 134, UCMJ, 10 U.S.C. §§ 920, 933 and 934 (2016).[1] Joint Appendix (JA) at 2. A panel of officer members sentenced 1st Lt Washington to be dismissed from the military service. JA at 132.[2]

On July 30, 2021, the Air Force Court affirmed the findings as to Charges I and II. JA at 2-3 (*Washington I*). The Air Force Court set aside and dismissed with prejudice Charge III, Specifications 1-4 and set aside and dismissed without prejudice Charge III, Specification 5. JA at 2-3 (*Washington I*). The Air Force Court set aside the sentence. JA at 2-3 (*Washington I*).

---

[1] All references to the punitive articles are to the *Manual For Courts-Martial, United States* (2016 ed.). All other references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] After arraignment, the government withdrew and dismissed three specifications of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2016). The panel acquitted 1st Lt Washington of three specifications of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2016).

On August 18, 2021, 1st Lt Washington petitioned this Court for a grant of review. On October 1, 2021, this Court denied the petition without prejudice. *United States v. Washington*, 82 M.J. 30 (C.A.A.F. 2021).

On November 19, 2021, after receiving the record of trial, the Convening Authority dismissed the remaining Specification of Charge III as impractical to rehear and ordered a rehearing as to the sentence for Charges I and II. JA at 81 (*Washington II*).

On September 12-15, 2022, a military judge and panel of officers sitting as a general court-martial at Malmstrom AFB re-sentenced 1st Lt Washington to a reprimand, total forfeiture of all pay and allowances, and nine months of confinement. JA at 81 (*Washington II*). The Air Force Court reassessed the sentence to include only a forfeiture of $2,500 for six months and again affirmed the findings. JA at 125 (*Washington II*). This appeal followed.

Statement of Facts

The Alleged Incident

In 2017, 1st Lt Washington was assigned to the Convoy Response Force at Malmstrom AFB. JA at 176-78. C.P., another officer, was assigned to the Tactical Response Force. JA at 176-78. They served together in the same squadron. JA at 176-78. In September of 2017, 1st Lt Washington and C.P. went on a temporary duty assignment (TDY) to Camp Gurnsey in Wyoming. JA at 178. 1st Lt

Washington and C.P. traveled with other TRF members by automobile. JA at 180. TRF members checked into a hotel en-route to Camp Gurnsey. JA at 181. C.P., 1st Lt Washington, and Sergeant LaSalle went to Red Lobster for beer and dinner and then to a bar called the Beacon. JA at 185-86. During his direct testimony, C.P was able to remember the name of the bar and of the restaurant which he visited, but not the hotel at which he stayed. JA at 185.

At the Beacon, 1st Lt Washington was present with C.P. and other TRF members, including J.A., a noncommissioned officer. JA at 134. J.A. was drinking heavily. JA at 137. J.A. engaged in macho banter with various TRF members concerning his purported ability to impress women. JA at 139. J.A. claimed that 1st Lt Washington "nut tapped [him] and said, 'You won't use that tonight.'" JA at 139. J.A. claimed that in the van ride home, 1st Lt Washington again repeated this behavior and said that 1st Lt Washington bet him $100.00 that his prediction was accurate. JA at 141. J.A. thought that this conduct "was no big deal." JA at 144. J.A.'s response was to demand the $100.00. JA at 139-41. J.A. felt that the entire course of conduct was a joke. JA at 153. J.A. felt that 1st Lt Washington's willingness to socialize and be personable raised morale. JA at 160. His opinion 1st Washington's behavior constituted harmless fun did not change until he heard rumors that 1st Lt Washington was homosexual. JA at 156. J.A. has past integrity issues involving plagiarism. JA at 160.

C.P. also consumed a large amount of alcohol and was "very intoxicated" by the time he left. JA at 156. He claimed not to remember who bought drinks for whom, what he did while he was at the Beacon, or what others did. JA at 198-99. Others, however, saw C.P. buying alcohol for 1st Lt Washington. JA at 137.

C.P. claimed not to remember publicly urinating outside of the Beacon. JA at 202. However, J.A. saw him urinating. JA at 154. Later in his testimony, C.P. indicated that he both could not remember 1st Lt Washington's location while at the Beacon and that he did, in fact, recall sitting with 1st Lt Washington and Sergeant LaSalle for most of the evening. JA at 200-01

When he returned to the hotel at which he and 1st Lt Washington were staying, C.P. had a conversation with other hotel guests. JA at 187-88. He then entered 1st Lt Washington's room. JA at 187-88. He voluntarily sat on the edge of 1st Lt Washington's bed despite the availability of a chair. JA at 188, 206. C.P. claimed that 1st Lt Washington then tried to kiss him. JA at 189. He also claimed that 1st Lt Washington attempted to touch his penis. JA at 189. But, C.P. was uncertain whether 1st Lt Washington had his hand merely underneath his pants or his underwear as well; C.P. was not certain whether 1st Lt Washington actually touched his penis. JA at 190.

C.P. could have left 1st Lt Washington's hotel room at this point. Instead, he chose to remain in the room and discuss his girlfriend and his sexual

preferences with 1st Lt Washington. JA at 190-01. C.P. claimed that he told 1st Lt Washington "I'm not into you. I'm not into that or anything like that." JA at 190.

Afterward, C.P. discussed the alleged incident with another officer. He did not mention that 1st Lt Washington engaged in any forcible touching. C.P. also spoke with his then-girlfriend, H.H., on the evening of the alleged incident. C.P. did not mention that 1st Lt Washington touched his penis. JA at 168. At the time, H.H. and C.P. were cohabiting and in a serious relationship. JA at 166.

1st Lt Washington Tries to Testify in his own Defense

1st Lt Washington attempted to testify in his own defense at the court-martial. 1st Lt Washington explained that he went inside his hotel room on the night in question and C.P. followed behind him. JA at 49 (*Washington I*). They talked for an extended period and then shared a consensual hug. JA at 49 (*Washington I*). 1st Lt Washington stated that while they were on the bed, they discussed whom they were dating. JA at 49-50 (*Washington I*). 1st Lt Washington reached over and touched C.P.'s thigh in what felt like was a natural progression. JA at 50 (*Washington I*). 1st Lt Washington also testified that they discussed sexual preferences and C.P. told him that "he had men and women come on to him before." JA at 50. C.P.'s special victims' counsel objected. JA at 50. In a closed Mil. R. Evid. 412 hearing, the military judge found that evidence of consent in C.P.'s behavior immediately surrounding the incident and his sexual preferences

were matters falling under Mil. R. Evid. 412. JA at 50-51. In response to this ruling, Capt. C.P.'s special victim's counsel affirmatively waived C.P.'s Mil. R. Evid. 412 protections and agreed that the military judge could consider the admissibility of the government's proposed cross-examination on the basis of matters already considered. JA at 289-90.

Despite this concession, the military judge ruled that there were only two options available to 1st Lt Washington: (1) he could submit to government examination in a Mil. R. Evid. 412 hearing; or (2) the military judge could provide an instruction directing members to disregard this portion of 1st Lt Washington's testimony. JA at 43, 309. The military judge did not provide any other option, despite the availability of less drastic measures. JA at 43, 309.

The defense maintained that they had not violated Mil. R. Evid. 412 notice requirements because the evidence was part of the *res gestæ* of the alleged offense. *See, e.g.*, JA at 308-09. The defense rejected the Court's first option of subjecting 1st Lt Washington to examination in a closed Mil. R. Evid. 412 hearing. JA at 309. The military judge ruled that "[C.P.]'s sexual orientation and any evidence elicited that implicates the sexual orientation [is] . . . 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." JA at 42. Thus, the military

judge ordered the panel to disregard 1st Lt Washington's testimony. *Id*. at 44. He specifically instructed the panel as follows:

> Members of the court, you heard testimony from the accused that he believed the contact between himself and [C.P.] occurring prior to the charged conduct alleged in the Specification of Charge I, was consensual in nature and may have implicated [C.P.]'s sexual orientation. You are to disregard this portion of the accused's testimony. However, you must consider testimony by the accused wherein he denied the specific allegations, the specific charged conduct alleged in the Specification of Charge I. Any questions from any of the court members on that instruction?

JA at 44 (*Washington I*).

The members asked questions which indicated that, in accordance with the military judge's instruction, they disregarded 1st Lt Washington's testimony concerning the surrounding consensual circumstances of his encounter with C.P. JA at 44 (*Washington I*); JA at 258-59. The military judge clarified the instructions as follows: [A]ny suggestion or implication regarding [C.P.]'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 consensual, disregard that." JA at 44 (*Washington I*).

1st Lt Washington subsequently moved to strike C.P.'s testimony and asked the military judge to apply his Mil. R. Evid. 412 ruling to C.P.'s testimony. JA at 260. Specifically, 1st Lt Washington moved to strike C.P.'s testimony about the same physical acts about which 1st Lt Washington attempted to testify. JA at 260.

He also moved to strike C.P.'s testimony asserting his heterosexuality – that he is "not into anything like that." JA at 260. The military judge refused to strike C.P.'s testimony. JA at 260.

Summary of Argument

The military judge abused his discretion by striking 1st Lt Washington's testimony. The military judge abused his discretion because Mil. R. Evid. 412 did not apply to 1st Lt Washington's testimony since it concerned the circumstances surrounding the charge sexual act. Even if Mil. R. Evid. 412 did apply, the military judge's striking of 1st Lt Washington's testimony was an abuse of discretion because a wholesale striking of testimony is not a remedy for a Mil. R. Evid. 412 violation because there were other, less drastic remedies available. Finally, even were that not the case, the military judge erred in striking 1st Lt Washington's testimony that implicated C.P.'s homosexual or bisexual orientation without also striking C.P.'s testimony concerning his purported heterosexual orientation.

The government leveraged the military judge's excision of 1st Washington's testimony to argue that he was dishonest. "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." JA at 262. This court should set aside both remaining convictions because the military judge's improper ruling

so "undermined Appellant's credibility" that it "ultimately [impacted] his right to a fair trial." JA at 76 (*Washington I*).

Standard of Review

This Court reviews a military judge's Mil. R. Evid. 412 ruling for an abuse of discretion as to his factual conclusions and reviews his legal conclusions de novo. *United States v. Longstreath*, 45 M.J. 366, 374 (C.A.A.F. 1996).

Law

Mil. R. Evid. 412

Mil. R. Evid. 412 applies when the defense seeks to admit evidence of "other sexual behavior." "Other sexual behavior" is "any sexual behavior not encompassed by the alleged offense." Mil. R. Evid. 412(d). "The word 'other' is used [in Fed. R. Evid. 412] to suggest some flexibility in admitting evidence 'intrinsic' to the alleged sexual misconduct." Fed. R. Evid. 412 advisory committee's note.

For behavior to be "other" sexual behavior, it must be separate in time from the sexual act which is the subject of the allegation. *United States v. Schelmettey*, ARMY 20150488, 2017 CCA LEXIS 445, at *5 (A. Ct. Crim. App. June 30, 20217). "Rule 412 does not exclude evidence of sexual conduct 'included in,' 'intrinsic to,' and 'inextricably intertwined' with that charged in an indictment." *United States v. Frey*, 2:19-cr-537, 2022 U.S. Dist. LEXIS 116036, at *13-14

(E.D.N.Y. June 30, 2022); *see also United States v. Ray*, 20-cr-110, 2022 U.S. Dist. LEXIS 43077, at *2 (S.D.N.Y March 10, 2022).

Sexual behavior is not "other" sexual behavior when there is a temporal and logical nexus between sexual behavior and the allegation. *United States v. Key*, 71 M.J. 566, 569 (N-M. Ct. Crim. App. 2012). Evidence of sexual behavior that is "inextricably intertwined with the charged sexual misconduct does not fall under the prohibition of Mil. R. Evid. 412 because it is not 'other sexual behavior.'" *United States v. Taylor*, ARMY 20160744, 2018 CCA LEXIS 499, at *11 (A. Ct. Crim. App. Oct. 16, 2018). Inextricably intertwined behavior is not "other" sexual behavior because it is part of the *res gestæ* of the alleged offense. *United States v. Gaddy*, ARMY 20150227, 2017 CCA LEXIS 179, at *6 (A. Ct. Crim. App. Mar. 20, 2017) . An accused "and the alleged victims' behavior in engaging in the sexual acts at issue here . . . is outside the scope of Rule 412." *United States v. Raniere*, 18-CR-204-1, 2019 U.S. Dist. LEXIS 84634, at *7 (E.D.N.Y. May 3, 2019) (emphasis added).

"By its plain text, Mil. R. Evid. 412 applies equally to the government as it does to an accused." *United States v. Olson*, ARMY 20190267, 2021 CCA LEXIS 160, at *15 (A. Ct. Crim. App. Apr. 1, 2021) (mem. op.). "[I]f an accused is prohibited from presenting evidence [as to a sexual act or predisposition], it stands

to reason that the government should not be able to assert the victim's [lack of sexual act or predisposition]." *Olson*, 2021 CCA LEXIS 160, at *15-16.

"Whether the sexual behavior was consensual or forced is not . . . dispositive under the rule." *Taylor*, 2018 CCA LEXIS 499, at *20 n.11.

A party "may properly present the complete facts . . . including the *res gestae* of the [alleged] crime, without surgically removing those facts that paint [others] in a negative light." *United States v. Wermuth*, No. ACM 39856 (f rev), 2022 CCA LEXIS 520, at *25 (A.F. Ct. Crim. App. Sept. 1, 2022) (citing *United States v. Lozano*, No. ACM S32043, 2013 CCA LEXIS 809, at *6 (A.F. Ct. Crim. App. Sept. 19, 2013)).

Res Gestæ Evidence

Res Gestæ evidence involves "the events at issue, or other events contemporaneous with them." *United States v. St. Jean*, 83 M.J. 109, 110 n.2 (C.A.A.F. 2023) (citing BLACK'S LAW DICTIONARY 1565 (11th ed. 2019)). "*Res Gestae* evidence is vitally important in many trials. It enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation." *United States v. Hasan*, 84 M.J. 181, 218 n.28. (C.A.A.F. 2024) (quoting *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992)) (footnote omitted in original) (citation omitted in original).

Sexual Orientation and Mil. R. Evid. 412

The government may not use "sexual orientation as a sword [to prove a lack of consent], then . . . hide behind Mil. R. Evid. 412's shield" to exclude evidence that questions that orientation. *United States v. Villanueva*, NMCCA 201400212, 2015 CCA LEXIS 90, at *9 (N-M. Ct. Crim. App. Mar. 19, 2015). Where the Government uses sexual orientation in a 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. *Id.* at *9-*10.

Where a homosexual orientation provides the basis for a motive to fabricate, it is relevant and admissible. *United States v. Phillips*, 52 M.J. 268, 269-70 (C.A.A.F. 2000); *United States v. Dorsey*, 16 M.J. 1, 4 (C.M.A. 1983). Mil. R. of Evid. 412 does not automatically exclude evidence of homosexuality where that evidence shows a motive to lie about consent because of harm to social standing. *United States v. Grant*, 49 M.J. 295, 297 (C.A.A.F. 1998).

Right to Testify

An accused servicemember has a constitutional right to testify in his own defense. *United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)). "Every criminal defendant is privileged to testify in his own defense." *Harris v. New York*, 401 U.S. 222, 225 (1971). A defendant's right to testify in his own defense is a component of his right to present

a defense. *Nix v. Whiteside*, 475 U.S. 157, 164-65 (1986). "[T]he right to testify in one's own behalf is a fundamental, personal right." *United States v. Dewrell*, 52 M.J. 601, 612 (A.F. Ct. Crim. App. 1999).

An accused's decision to exercise his right to testify requires him to submit to cross-examination in open court. An accused "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." *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900) (emphasis added). "A witness [may not] withdraw from the cross-fire of interrogation . . . **before the trier of fact**." *Brown v. United States*, 356 U.S. 148, 155 (1958) (emphasis added).

Analysis

Mil. R. Evid. 412 does not apply to the *res gestæ* of the offense.

Mil. R. Evid. 412 does not apply to the testimony the military judge ordered struck because it was the *res gestæ* of the offense. The military judge erred when he ruled that the preliminary sexual acts which 1st Lt Washington testified about should be struck from the record because they implicated Mil. R. Evid. 412. They did not. The separate sex acts that constitute a sexual transaction are not "other sexual behavior" which would place them within the provisions of Mil. R. Evid 412. Rather, they are the *res gestæ* of the offense. *Gaddy*, 2017 CCA LEXIS 179, at *6. Here, the military judge ordered the panel to disregard 1st Lt Washington's

testimony about the consensual circumstances of the sexual interaction. He specifically instructed the panel as follows:

> Members of the court, you heard testimony from the accused that he believed the contact between himself and [C.P.] occurring prior to the charged conduct alleged in the Specification of Charge I, was consensual in nature and may have implicated [C.P.]'s sexual orientation. You are to disregard this portion of the accused's testimony. However, you must consider testimony by the accused wherein he denied the specific allegations, the specific charged conduct alleged in the Specification of Charge I. Any questions from any of the court members on that instruction… [A]ny suggestion or implication regarding [C.P.]'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 consensual, disregard that.

JA at 257-58.

1st Lt Washington testified that he talked with C.P. for an extended period, then the two began hugging consensually. JA at 229. He further testified that he and C.P. lay on 1st Washington's bed together, that 1st Lt Washington placed his hand on C.P.'s thigh, and that they discussed sexual preference. JA at 235. These acts occurred contemporaneously with the alleged sexual assault. This testimony was *res gestæ* of the offense and not covered by Mil. R. Evid. 412. 1st Lt Washington was not required to disclose these matters or submit them to Mil. R. Evid. 412 proceedings because they were *res gestæ* and were not "other" sexual behavior. The military judge erred when he struck 1st Washington's testimony for supposed non-compliance with Mil. R. Evid. 412 because Mil. R. Evid. 412 did not apply.

In briefing before the Air Force Court, the government conceded that *res gestæ* evidence contained in CP's testimony was not "other sexual conduct" because "Capt CP's testimony related directly to the charged offenses . . . (and) was [therefore] 'encompassed by the alleged offense' and, thus, outside of the Mil. R. of Evid. 412's scope." JA at 133. It argued the same theory before the military judge. "As a blanket proposition, these are evidence of the elements of the offense." JA at 263.

The government may not assert before this court that *res gestæ* evidence is within the scope of Mil. R. Evid. 412 when it asserted the opposite below. "Any matter put in issue and finally determined by a court-martial reviewing authority, or appellate court which had jurisdiction to determine the matter may not [subsequently] be disputed by the United States." R.C.M. 905(g). Under the government's reasoning, 1st Lt Washington's excluded testimony also was "'encompassed by the alleged offense'" because, in many instances, the excluded testimony was the same physical act. *See* Appendix. The military judge therefore erred in excluding 1st Lt Washington's testimony concerning the *res gestæ* of the alleged offense because, by the government's concession, it was not within the scope of Mil. R. Evid. 412.

The military judge erred when he failed to apply his Mil. R. Evid. 412 ruling to the government.

1st Lt Washington moved to strike C.P.'s testimony concerning the same physical acts about which 1st Lt Washington attempted to testify. JA at 260. The military judge erred when he struck the testimony because it indicated that C.P.'s has a homosexual or bisexual orientation, but did not exclude evidence that C.P. is not homosexual and has no interest in homosexual acts.

In response to government questioning about the charged homosexual acts, C.P. testified "I remember talking to him afterwards telling him sorry. I'm not into you. **I'm not into that or anything like that**." JA at 191 (emphasis added). This testimony opened the door for evidence contradicting C.P.'s in court assertions of exclusive heterosexuality. "Where the Government uses sexual orientation in a way that implies the impossibility of consent . . . the defense must be allowed to rebut that inference." *Villanueva*, 2015 CCA LEXIS 90, at *9-*10.

Villanueva dealt with an allegation of non-consensual homosexual sodomy. In *Villanueva,* the Government elicited from the alleged victim testimony that he was not homosexual. Specifically, in response to government questioning, the alleged victim said that he "'doesn't swing that way' [and] 'was straight.'" *Id*. at *9*10. The military judge prohibited the defense from introducing evidence that contradicted this assertion, even though this testimony "could only have left the members with the impression that, since [the alleged *Villanueva* victim] was not

gay, he would not have consented to the sodomy." *Id.* at *10. The Navy-Marine Corps Court reversed the conviction because the military judge's use of Mil. R. Evid. 412 denied "appellant his right to mount a defense and allows the Government to meet its burden based on an incomplete description of events." *Id.* at *9-*10.

Here, similar to *Villanueva*, C.P. accused 1st Lt Washington of a non-consensual homosexual touching of his clothed genitalia. Further similar to *Villanueva,* C.P. testified that he is not "into that or anything like that." JA at 191. In both cases, the panel received the impression that, since the alleged victim was not homosexual, he would not have consented to the homosexual act. The military judge therefore erred when he excluded evidence rebutting this allegation. This court should find that the military judge's ruling denied 1st Washington his right to mount a defense by denying him the opportunity to rebut the government's assertions of C.P.'s heterosexuality.

1st Washington's decision to testify in his own defense required him only to submit to cross-examination before the finder of fact.

The Air Force Court's decision in *Washington I* expanded *Brown, Fitzpatrick*, and other decisions to require an appellant to submit to questioning away from the finder of fact in a Mil. R. Evid. 412 hearing. In this case, 1st Lt Washington did not "affirmatively waive his right to remain silent [away from the panel by] voluntarily [taking] the witness stand [in open court]." JA at 43

(*Washington I*). If true, in court testimony would require an accused to submit to police interrogation, for example, once he testified about an offense of which he was accused. Rather, testimony in open court requires only an accused's submission to cross-examination in open court. 1st Lt Washington complied with this requirement.

1st Lt Washington did not waive his right to remain silent at the Mil. R. Evid. 412 hearing because he did not testify at that hearing. Instead, 1st Lt Washington's direct testimony required only that he submit to cross-examination "before the trier of fact." *Brown*, 356 U.S. at 155 (emphasis added). 1st Lt Washington submitted to cross-examination before the trier of fact. "[A]fter the military judge told the members to disregard 1st Washington's testimony that his interactions with CP before the alleged assault were consensual, Appellant became subject to cross-examination, and in fact, subjected himself to a cross-examination." JA at 75 (*Washington I*) (Meginley, J. dissenting) (emphasis in original). This court should therefore find that the military judge's excision of 1st Lt Washington's testimony was erroneous because 1st Lt Washington had no obligation to submit to examination away from the panel.

Even if Mil. R. Evid. 412 applied, the Military Judge erred when he ruled that 1st Lt Washington could only comply with Mil. R. Evid. 412 by submitting to cross-examination in a Mil. R. Evid. 412 hearing.

The military judge erred when he presented 1st Lt Washington with the binary choice of submitting to cross-examination in a Mil. R. Evid. 412 closed hearing or having his testimony stricken. JA at 43, 309. This ruling was based on the false premise that 1st Lt Washington must submit to cross-examination in order to comply with Mil. R. Evid. 412. Neither the text of the rule nor this court's precedent support this proposition.

"At a [Mil. R. Evid. 412 closed hearing], the parties **may** call witnesses, including the victim, and offer relevant evidence." Mil. R. Evid. 412(c)(2) (emphasis added). The rule does not require an examination of that evidence, word-for-word, question-for-question. Instead, the military judge may consider documentary evidence, inadmissible hearsay, or oral or written proffers of evidence in order to determine whether the proponent meets Mil. R. Evid. 412's preliminary requirements for admissibility. Interlocutory questions of admissibility under any rule decided in the Art. 39(a) session may be decided on the basis of proffers of evidence. *Discussion*, R.C.M. 801(e); *see United States v. Sanchez*, 44 M.J. 174, 177-78 (C.A.A.F. 1996). Contrary to the military judge's ruling, "the proffer is not tested by direct and cross-examination, and all balancing under the Constitution or under the Rules of Evidence must be tilted in the

proponent's favor." *Sanchez*, 44 M.J. at 178 (emphasis added). This is to "prevent[] the hearing from being used as a discovery device." *Id*. at 178. For this reason, Mil. R. Evid. 301(e)(1) does not list failure to submit to cross-examination at a Mil. R. Evid. 412 hearing as grounds for striking testimony in open court.

The military judge apparently recognized that a party may comply with Mil. R. Evid. 412 without submitting to cross-examination in a closed hearing because he allowed C.P.'s *res gestæ* testimony to remain admitted, even though C.P. did not submit to cross-examination in a closed Mil. R. Evid. 412 hearing. JA at 260. The military judge only required 1st Lt Washington to comply with his novel procedure for determining Mil. R. Evid. 412 admissibility. The military judge's failure to apply his own erroneous ruling equally to the government requires reversal because it "compromised [1st Lt Washington's] right to a fair trial." JA at 75 (*Washington I*) (Meginley, J., dissenting).

1st Lt Washington was also under no obligation to assist the government in admitting its desired cross-examination. The moving party has the burden of establishing the admissibility of Mil. R. Evid. 412-covered evidence under an exception contained within that rule. *United States. v. Erikson*, 76 M.J. 231, 235 (C.A.A.F. 2017) (citing *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010)). Assuming, *arguendo*, that Mil. R. Evid. 412 applies to *res gestæ* evidence, and

assuming that the government could not show compliance with Mil. R. Evid. 412 requirements by offering a proffer of its proposed areas of cross-examination, 1st Lt Washington was under no obligation to assist the government in complying with Mil. R. Evid. 412.

Finally, even assuming that 1st Lt Washington had some obligation to assist the government with its cross-examination, the military judge's ruling was disproportionate. "[T]he military judge could have held a [Mil. R. Evid. 412] hearing and made a ruling on this part of [appellant's] testimony [already admitted]." JA at 67 (*Washington I*) (Meginley, J., dissenting). Rules of evidence may not be applied in a way which is "disproportionate to the purposes they are designed to serve." *Rock,* 483 U.S. at 56. Here, the military judge disproportionately struck 1st Lt Washington's testimony about C.P.'s sexual conduct with 1st Lt Washington. This evidence was plainly admissible because, even if it was "other" sexual behavior, it was sexual behavior "with respect to the person accused of the sexual misconduct" and was highly relevant. Mil. R. Evid. 412(b)(2). Mil. R. Evid. 412's purpose is to exclude "marginally relevant evidence." *United States v. Gaddis*, 70 M.J. 248, 252-53 (C.A.A.F. 2011). Its purpose is not to exclude *res gestæ* evidence because *res gestæ* evidence is "vitally important" because of its relevance. *Hasan*, 84 M.J. at 218, n.28. This Court

should therefore find that the military judge's ruling was not consistent with the purposes of Mil. R. Evid. 412 and was disproportionate to the purposes of that rule.

The law contains no principle "Mil. R. Evid. 412 for thee, but not for me." The military judge, the government, and the Air Force Court have failed to identify any precedent, civilian or military, in which any other court has applied the procedure that the military judge applied here, let alone any precedent where such a ruling was applied only to one side. This court should therefore find that the ruling was error.

The error was not harmless beyond a reasonable doubt and engulfed both remaining Charges.

Trial counsel's improper argument transformed the military judge's excision of 1st Lt Washington's testimony into judicial approval of trial counsel's suggestion that 1st Lt Washington was dishonest. A trial counsel who invites a panel to "interpret the military judge's ruling as evidence that [the witness's] testimony was a lie" has engaged in inappropriate argument. *United States v. Pomarleau*, 57 M.J. 351, 365 (C.A.A.F. 2002). When an accused testifies and denies the charges against him, his credibility is directly in issue for the factfinder. *United States v. Ryan*, 21 M.J. 627, 631 (A.C.M.R. 1985).

An accused has a series of constitutional rights designed "to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." *Berger v. California*, 393 U.S. 314, 315 (1969). Violation of those rights requires

reversal unless the error is harmless beyond a reasonable doubt. *Id*. Here, the military judge excised major portions of 1st Lt Washington's testimony in which he attempted to establish his innocence. Trial Counsel leveraged this excision to make inappropriate arguments. Trial Counsel argued that because 1st Lt Washington's testimony after excision was not credible, 1st Lt Washington was not credible as to any of the testimony that he gave. "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." JA at 262 (emphasis added). This argument invited the panel to conclude that the excision was indicative of 1st Lt Washington's untruthfulness. Trial counsel therefore engaged in improper argument because he implied that the military judge's ruling rendered 1st Lt Washington untruthful.

Although the military judge generally instructed the panel not to draw any negative inference from his excision of 1st Lt Washington's testimony, JA at 261, this Court cannot presume that the panel followed the military judge's instruction. The "presumption of compliance with the military judge's instructions can be rebutted by competent evidence to the contrary." *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F 1994). Here, the military judge instructed the panel as to the burden of proof, but the panel convicted 1st Lt Washington in the absence of any evidence as to the proof of custom required as an element of Charge III. The

failure of the panel to follow the military judge's burden of proof instruction rebuts the presumption that the panel followed the military judge's instruction concerning the excision of 1st Lt Washington's testimony. Trial counsel used the military judge's ruling striking 1st Lt Washington's testimony as a means to attack 1st Lt Washington's credibility. Given the state of the evidence, this error was not harmless by any measure.

Finally, the error from Trial Counsel's improper argument was compounded by his conflation of non-consent and incapacity. This court does not examine an improper argument in isolation but also considers the cumulative effects of all error in argument in determining whether the argument is prejudicial. *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018). Here, the Military Judge instructed the panel that:

> A "competent person" is a person who possesses the physical and mental ability to consent. An 'incompetent person' is a person who lacks either the mental or physical ability to consent because he or she is asleep or unconscious; impaired by a drug, intoxicant or other similar substance; or suffering from a mental disease or defect or a physical disability. To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to another person.

JA at 33. CP was drunk at the time of the incident. *See, e.g.*, JA at 4, 550. And, trial Counsel's argument blurred the distinction between non-consent and incapacity.

Trial Counsel's argument was contrary to this court's subsequent holding in *United States v. Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590 (C.A.A.F. 2024). In *Mendoza,* this court considered whether it is error to conflate a theory of incapacity with a theory of nonconsent and held that it was. *Id.* at *2-*3. A trial counsel commits error when he argues incapacity where non-consent is the charged theory because such an argument "conflate[s] two different and inconsistent theories of criminal liability—[and] raises significant due process concerns." *Id.* at *3. Here, nonconsent was the charged theory of criminal liability. Incapacity was not.

Trial Counsel's implication that because Capt. C.P. could not manifest non-consent he must have withheld consent, was precisely the conflation of incapacity and nonconsent which *Mendoza* expressly forbids.

> [W]e hold that subsection (b)(2)(A) and subsection (b)(3)(A) establish separate theories of liability. Subsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent. Subsection (b)(3)(A) criminalizes the performance of a sexual act upon a victim who is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance when the victim's condition is known or reasonably should be known by the accused... [however] what the Government cannot do is charge one offense under one factual theory and then argue a different offense and a different factual theory at trial. Doing so robs the defendant of his constitutional 'right to know what offense and under what legal theory he will be tried and convicted.' *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016) (citation omitted) (internal quotation marks omitted)."

Id. at *13 (emphasis added).

This court should consider the *Mendoza* error present here together with the military judge's error in striking 1st Lt Washington's testimony under the cumulative error doctrine. Even if this court is not convinced that the military judge's striking of the testimony did not alone prejudice 1st Lt Washington, this court should consider that error in combination with the *Mendoza* error present here and set aside and dismiss the charges under the cumulative error doctrine.

Conclusion

WHEREFORE, 1st Lt Washington respectfully requests that this Honorable Court grant him the relief outlined above.

Respectfully submitted,

ROBERT FELDMEIER
Civilian Appellate Defense Counsel
THE LAW OFFICES OF
ROBERT FELDMEIER
2920 Forestville Road
Suite 100-1076
Raleigh, North Carolina 27616
(336) 416-2479
robert.a.feldmeier@gmail.com
CAAF Bar No. 35622

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Certificate of Compliance with Rules 24(b) and 37

This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(b) because this brief contains 6,431 words. This brief also complies with the typeface and type style requirements of Rule 37.

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Certificate of Filing and Service

I certify that an electronic copy of the forgoing was electronically sent to the Court and served on the Government Appellate Division, at af.jajg.afloa.filng.workflow@us.af.mil, on May 7, 2025.

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-2807
trevor.ward.1@us.af.mil
USCAAF Bar Number 37924

Appendix – Table of Comparative Testimony

JA Pages	Transcript Pages	C.P.'s Testimony (Admitted)	JA Pages	Transcript Pages	Washington's Testimony (Stricken)
168	578	Accused's kiss of Capt. C.P. and hand placement on Capt. C.P.'s leg	229-30	801-02	Accused's hug of Capt. C.P. and hand placement on Capt. C.P.'s leg
188-89	598-99	Capt. C.P. sitting on bed with accused and kiss of Capt. C.P.	229-30	801-02	Capt. C.P. sitting on bed with accused and accused's hug of Capt. C.P.
191	601	Evidence of Capt. C.P.'s sexual orientation (heterosexual) "I'm not into you. I'm not into that or anything like that."	230-31	802-03	Evidence of Capt C.P.'s sexual preference (bisexual): "He talked about, he had had men and women come onto him"
195	605	Accused's kiss of Capt. C.P.	230	802	Accused's hug of Capt. C.P.
210	620	Accused's kiss of Capt. C.P. and hand placement on Capt. C.P.'s leg	229-30	801-02	Accused's hug of Capt. C.P. and hand placement on Capt. C.P.'s leg
212	622	Accused's kiss of Capt. C.P. and hand placement on Capt. C.P.'s leg	229-30	801-02	Accused's hug of Capt. C.P. and hand placement on Capt. C.P.'s leg
215	625	Accused's kiss of Capt. C.P. and hand placement on Capt. C.P.'s leg	229-30	801-02	Accused's hug of Capt. C.P. and hand placement on Capt. C.P.'s leg
227	627	Accused's placement of his hand on Capt. C.P.'s leg	229-30	801-02	Accused's placement of his hand on Capt. C.P.'s leg