IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	BRIEF ON BEHALF OF APPELLANT
v.	
NICHOLAS R. ST. JEAN Specialist (E-4) United States Army, Appellant	Crim. App. Dkt. ARMY 20190663 USCA Dkt. No. 22-0129/AR

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

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Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412 AND BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL ASSAULT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals ("Army Court") had jurisdiction over this matter under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

On May 10, July 15, and September 24-26, 2019, appellant was tried by officer and enlisted members at a general court-martial at Fort Sill, Oklahoma. Appellant was convicted, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2018) and one specification of false official statement in violation of Art. 107, UCMJ, 10 U.S.C. § 907 (2018).

On September 26, 2019, the court-martial sentenced appellant to be reduced to the grade of E-1, forfeit all pay and allowances, be confined for five years, and be dishonorably discharged. (JA 228). On October 28, 2019, the convening authority deferred reduction in grade, adjudged forfeitures, and automatic

forfeitures until entry of judgement. (JA 015). Beyond this, the convening authority did not take action on the findings or the sentence. (JA 015).

On January 13, 2022, the Army Court affirmed the finding of guilty to the sexual assault specification and set aside the finding of guilty to the false official statement specification. *United States v. St. Jean*, Army 20190663 (A. Ct. Crim. App. Jan. 13, 2022) (mem. op.). (JA 002). The Army Court reassessed appellant's sentence, reducing his confinement by two months. (JA 010-11).

Statement of Facts

The Excluded Evidence

Appellant's sexual assault conviction arises from a sexual encounter on May 5, 2018. Appellant and the named victim, MC, had recently met. (JA 039).[1] On May 3, 2018, MC invited appellant to her barracks room to purchase concert tickets. (JA 042, 085). They had a consensual encounter in MC's barracks room, involving, *inter alia*, physical sexual conduct short of sexual intercourse (kissing). (JA 310) (sealed).

The defense attempted to introduce evidence of this encounter under Military Rule of Evidence (Mil. R. Evid.) 412. (JA 299-311; 320-326; and 334-

[1] MC testified the two had met on May 3, 2018. (JA 039). An affidavit submitted by appellant during motions practice stated they met in late April, 2018. (JA 310) (sealed). For purposes of the issue before this Court, it is relevant that they had met recently, but the exact date of their meeting is immaterial.

354) (sealed).[2] The defense identified two witnesses who could corroborate the encounter by testifying that they had observed physical marks indicative of consent and participation on appellant's neck and chest in its aftermath. (JA 310) (sealed). One of these witnesses would testify that she assisted appellant in hiding these marks from public view by applying makeup (concealer). *Id.* The government acknowledged, based on their pretrial interviews, that these witnesses would testify to this effect. (JA 355) (sealed).

The Military Judge's Ruling

The military judge excluded the evidence of the May 3, 2018 encounter in its entirety. (JA 327-333) (sealed). The military judge acknowledged the evidence had some relevance as to consent but nevertheless excluded it under Mil. R. Evid. 403. (JA 332) (sealed). Critically to the resolution of this case, the military judge cited *no* Mil. R. Evid. 403 concerns relevant to the gravamen of the Mil. R. Evid. 412 evidence under consideration (the kissing). *Id.* The only Mil. R. Evid. 403 concern the military judge cited apparently related to an ancillary piece of noticed Mil. R. Evid. 412 evidence (a statement made by MC about her sexual preferences,

[2] The defense motion also unsuccessfully sought to admit evidence that MC showed appellant a photograph of herself and made certain statements in connection with the photograph. Additionally, the defense sought to admit evidence that MC slept in the same bed as appellant the night *after* the charged offense. The military judge allowed this evidence in, although, apparently due to a misunderstanding as to the timeline, the military judge seemed to believe this evidence was part of the res gestae of the charged offense.

in connection with a photograph of herself). *Id.* The military judge stated that the panel might unfairly interpret the evidence as an invitation for sexual abuse. *Id.* Although the military judge did not specify which evidence he was referring to, the only logical conclusion is that he was referring to MC's statement about her sexual preferences (which related to enjoyment of an arguably abusive sexual practice). However, rather than tailoring his ruling to exclude only this statement, and/or the corresponding photograph, the military judge excluded the entirety of the evidence, to include the kissing and other consensual activities that took place just a day before the charged incident. (JA 330-332) (sealed).

The Charged Event

On the evening of May 4, 2018 (the day after the *excluded* consensual encounter), MC testified that she consumed two or three alcoholic drinks, which she described as "not many." (JA 046). Later that evening, MC, appellant, and a group of soldiers were spending time together. (JA 047). MC testified she "was starting to get a little tired" and went to her barracks room for the night, leaving a key card to her room with appellant so he could check on her. (JA 047). MC admitted to lying about this because she did not think people would believe her allegations if she acknowledged giving appellant a key card to her barracks room on the night in question. (JA 123-24, 127). Thereafter, MC testified she woke up in the early morning hours of May 5, 2018 to appellant having sexual intercourse

with her. (JA 047-48). MC admitted that, in previous statements, she had falsely alleged that appellant had pushed her onto the bed and held her down while she told him to stop, but this had been an intentional lie. (JA 123-24). She admitted she had purposely "made up that part of the story" so people would believe her. (JA 123-24, 127) ("The first time I told the story to the first few people, I guess I did lie so they would believe me.").

The Defense Theory (Consent)

At trial, the defense theory was that sexual intercourse had occurred but was consensual. *See, e.g.*, (JA 106-07, 200-01, 206-07, 213-14, 216). However, due to the military judge's Mil. R. Evid. 412 ruling, the defense was unable to present evidence of the prior consensual sexual interactions between appellant and MC leading up to the charged assault, nor confront MC about these interactions.

Res Gestae Evidence

In litigating the Mil. R. Evid 412 motion, defense counsel proffered that MC had left similar marks, indicative of consent and participation, on appellant's neck and chest both during the May 3, 2018 encounter *and* during the charged sexual offense on May 5, 2018. (JA 345-347) (sealed). The military judge interjected that, to the extent such marks were left during the charged offense, they constituted part of the res gestae of the alleged offense. *Id.* At trial, however, when defense counsel attempted to introduce evidence, through an eyewitness, that appellant had

these marks in the immediate aftermath of the charged offense, assistant trial counsel objected on Mil. R. Evid. 412 grounds. (JA 1088-89). The military judge (a different military judge than had made the Mil. R. Evid. 412 ruling) chastised defense counsel for not informing the court that he would go into Mil. R. Evid. 412 evidence. (JA 356) (sealed). Defense counsel responded, echoing nearly verbatim the prior military judge's words, that this was not Mil. R. Evid. 412 evidence, as it constituted part of the res gestae of the charged offense. Id. Nevertheless, the evidence was excluded because the defense counsel could not proffer a way to differentiate between marks caused on the two separate occasions. (R. at 393) (sealed).

The Army Court's Opinion

The Army Court did not write on the exclusion of the Mil. R. Evid. 412 evidence or the res gestae evidence. *St. Jean*, Army 20190663, at n.1.[3]

More facts are included below as necessary.

Summary of Argument

The military judge's exclusion of evidence that appellant and MC had a consensual sexual encounter in the same location (MC's barracks room) shortly

[3] The access logs (names and dates on envelopes containing the sealed materials) within the record of trial include annotations of prior viewings by appellate counsel from both sides and CAAF personnel but do not include any annotation of viewing by Army Court personnel.

before the charged sexual intercourse was erroneous and prejudicial. This was textbook Mil. R. Evid. 412(b)(2) evidence and implicated several constitutional rights under Mil. R. Evid. 412(b)(3).

The military judge made three main errors: (1) misconstruing *United States v. Andreozzi,* 60 M.J. 727 (A. Ct. Crim. App. 2004) to minimize the probative value of the evidence because the prior sexual conduct (an encounter short of sexual intercourse) did not involve the same specific acts as the charged sexual conduct (sexual intercourse); (2) failing to analyze the Mil. R. Evid. 412(b)(3) concerns raised by the defense; and (3) using Mil. R. Evid. 403 to exclude evidence of the kissing without citing any Mil. R. Evid. 403 concerns applicable to this evidence.

The third error (the misapplication of Mil. R. Evid. 403) is particularly significant, because Mil. R. Evid 403 was the mechanism by which the military judge ultimately excluded the evidence.[4] The military judge used a Mil. R. Evid. 403 concern relevant to one piece of evidence (MC's statement in connection with a photograph) to exclude another completely segregable and much more relevant piece of evidence (the physical kissing). It is an abuse of discretion to use a Mil. R. Evid. 403 concern about one piece of evidence to exclude a different piece of

[4] As Mil. R. Evid. 403 inherently involves a balancing of the probative value of evidence, the military judge's erroneous minimization of the evidence's probative value contributed to the ultimate error of excluding it under Mil R. Evid. 403.

evidence. When a proper Mil. R. Evid. 403 analysis is performed, there is little, if any, prejudice to the gravamen of the excluded evidence: the physical kissing on May 3, 2018. The fact that MC, an independent unmarried young adult, engaged in consensual sexual conduct on 3 May 2018 with another independent unmarried young adult presents none of the concerns Mil. R. Evid. 403 guards against.

The military judge's abuse of discretion in excluding this evidence prejudiced appellant. The government's case had substantial weaknesses to include MC admitting on the stand that she had lied about the charged assault in *multiple* prior statements. (JA 123-24, 127, 203) (admitted lie about being pushed and held down); (JA 049, 127) (admitted lie about appellant spending night in room); (JA 046-47, 118) (admitted lie to CID about timeline). The defense's case was correspondingly strong, to include calling a witness who testified that, the day after the charged sexual encounter, MC told him that there had been a consensual sexual encounter between herself and appellant, that she regretted it, and that she was concerned about her reputation. (JA 200). The excluded evidence was material as it would have significantly strengthened the defense's theory of consent and devastated the government narrative. The quality of the evidence was strong, with two corroborating witnesses.

Additionally, the military judge's exclusion of evidence that MC participated in the res gestae of the charged offense was erroneous and prejudicial.

There can be no question that appellant was constitutionally entitled to present evidence that MC (whom the government portrayed as asleep and catatonic during the charged offense) had, in fact, participated in the charged sexual act itself, to such an extent that her participation left physical marks indicative of consent on appellant's body. This res gestae evidence, for which the defense stood ready to call corroborating witnesses, is so fundamental to the issue in controversy that a prejudice analysis is almost an absurdity. It certainly cannot be said that the exclusion of evidence that alleged victim participated in and consented to the charged sexual activity was harmless beyond a reasonable doubt.

Argument

THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412 AND BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL ASSAULT.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (internal quotation marks and citations omitted). A military judge abuses their discretion if their findings of fact are clearly erroneous or their conclusions of law are incorrect. Id. (internal quotation marks and citations omitted). A military judge abuses their discretion when their evidentiary rulings are based on an

erroneous view of the law. *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (internal quotation marks and citations omitted).

The application of Mil. R. Evid. 412 to proffered evidence is a legal issue that appellate courts review *de novo*. *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010) (citations omitted).

Law

Mil. R. Evid. 412

Mil. R. Evid 412 provides that, in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions. The burden is on the defense to overcome the general rule of exclusion by demonstrating an exception applies. *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1998) (citations omitted).

The second exception includes "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. . . ." Mil. R. Evid. 412(b)(2). Evidence that fits this exception may nevertheless be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice to the alleged victim's privacy. Mil. R. Evid. 412(c)(3).

The third exception provides that the evidence is admissible if its exclusion "would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(3). Generally, evidence of other sexual behavior by an alleged victim is constitutionally required and "must be admitted within the ambit of [Mil. R. Evid.] 412(b)[3] when [it] is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citations omitted). Under the Sixth Amendment, an accused has the right to confront the witnesses against him or her. This right necessarily includes the right to cross-examine those witnesses, which "is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Evidence of prior sexual history may be constitutionally required to protect the right to present a mistake of fact as to consent defense. *United States v. Zak*, 65 M.J. 786, 793 (A. Ct. Crim. App. 2007) ("Moreover, appellant's defense of mistake of fact as to consent certainly is much less credible absent any evidence that SPC C felt comfortable stripping down to her panties and allowing appellant to massage her mostly-nude body. The military judge's exclusion of this evidence, therefore, violated appellant's Constitutional right to present a defense.").

Mil. R. Evid. 403

Mil. R. Evid. 412(c)(3) provides that even evidence which is otherwise relevant under one of the exceptions set forth in 412(b) "is still subject to challenge under Mil. R. Evid. 403." *See also United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011). The term "unfair prejudice" in the context of M.R.E. 403 speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009) (internal quotation marks and citations omitted). Mil. R. Evid. 403 addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness. *Id.*

Res Gestae Evidence

For purposes of Mil. R. Evid. 412, the term "'Sexual Behavior' includes any sexual behavior not encompassed by the alleged offense.'" Mil. R. Evid. 412(d). As such, "'[e]vidence 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, *11 (A. Ct. Crim. App. 2018) (mem. op.) (emphasis in original). Such inextricably intertwined behavior is part of the res gestae of the alleged offense. *Id.* (citation omitted). "It is undeniable that a defendant has a constitutional right to present a defense." *United States v. Bess*, 75

M.J. 70, 74 (C.A.A.F. 2016) (quoting *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001)). This right "has many aspects" and is rooted in multiple constitutional causes. *Id*. at 74-75 (citations omitted).

Prejudice

Where proffered evidence is constitutionally required, appellate courts test for prejudice by determining whether the error was harmless beyond a reasonable doubt. *Ellerbrock*, 70 M.J. at 318 (citations omitted). For example, erroneous restriction of cross-examination is "a constitutional error, which means [appellate courts] must test the error to see if it was harmless beyond a reasonable doubt . . ." *Id*. at 320 (citation omitted). In analyzing prejudice arising from nonconstitutional evidentiary errors, appellate courts weigh: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks and citations omitted).

Analysis

The military judge's exclusion of evidence that appellant and MC had a consensual sexual encounter in the same location (MC's barracks room) less than 48 hours prior to the charged sexual intercourse was erroneous and prejudicial. This evidence should have been admitted under both Mil. R. Evid. 412(b)(2) and 412(b)(3). The exclusion of this evidence hamstrung the defense argument that the

sexual intercourse in question had been consensual, deprived the fact finder of vital context, deprived appellant of his right to effectively confront his accuser, and limited appellant's ability to present a defense or testify in his own defense. Additionally, after a change of military judge, this erroneous Mil. R. Evid. 412 ruling was also used to excluded evidence of participation and consent during the res gestae of the charged encounter.

1. The Military Judge Misapplied Mil. R. Evid. 412(b)(2), Resulting in an Erroneous Minimization of the Evidence's Probative Value.

The prior sexual encounter between MC and appellant fell squarely within the Mil. R. Evid. 412(b)(2) exception. Appellant properly requested admission, specifically citing the exception multiple times, stating multiple times that admission of this evidence was relevant to consent, and arguing that one sexual encounter led to another. In short, this was textbook Mil. R. Evid. 412(b)(2) evidence of prior sexual activity between the complainant and appellant.

The military judge properly acknowledged that the evidence had some relevance as to consent. (JA 332) (sealed). However, the military judge erroneously found that the relevance was very low. *Id*. The military judge's *only* articulated rationale for this conclusion was the supposed dissimilarity between the two encounters. *Id*. He cited *Andreozzi* for the proposition that similarity between prior sexual behavior and the charged conduct is important to determining its probative value. *Id*. This conclusion was error.

First, contrary to the military judge's analysis, the two sexual encounters were actually remarkably similar. Both involved physical sexual conduct between MC and appellant; both took place in the same location (MC's barracks room); and both occurred close in time. Indeed, the only notable difference is that the first involved a physical sexual encounter short of sexual intercourse while the second involved sexual intercourse. Rather than an obstacle to its relevance, this escalation of sexual intimacy was simply the natural "continuation of consensual sexual interactions", or, as the defense similarly put it, one sexual encounter leading to another. *United States v. Thomas*, No. AMC 39315, 2019 CCA LEXIS 78 at *20 (A.F. Ct. Crim. App. Feb. 28, 2019).

Additionally, case law from the service courts of appeals shows that Mil. R. Evid. 412(b)(2) evidence need not be similar to the charged conduct. To the contrary, the service courts of criminal appeals have repeatedly ruled the exclusion of evidence of prior sexual activity between the complainant and accused an abuse of discretion when the prior sexual activity differed significantly from the charged acts (certainly much more significantly than in the present case). *See Zak*, 65 M.J. 786 (exclusion of evidence of prior "sexual massage" was error when appellant was charged with nonconsensual sexual intercourse); *Thomas*, 2019 CCA LEXIS 78 (exclusion of evidence of prior sexual text messages was error when appellant was charged with nonconsensual sexual intercourse); *United States v. Rankin*, No.

AMC 39486, 2019 CCA LEXIS 486 (A.F. Ct. Crim. App. Dec. 9, 2019) (unpub. op.) (exclusion of evidence of "playful" "flirting" during a previous overnight camping trip was error when appellant was charged with nonconsensual digital penetration while victim was asleep); *United States v. Harrington*, ACM 39223, 2018 CCA LEXIS 456 (A.F. Ct. Crim. App. Sep. 25, 2018) (unpub. op.) (exclusion of evidence of prior sexual "body shots" was error when appellant was charged with nonconsensual sexual intercourse); *United States v. Lopez*, ARMY 20100457, 2013 CCA LEXIS 603 (A. Ct. Crim. App. Jul. 30, 2013) (mem. op.) (exclusion of evidence of prior kissing and digital penetration was error when appellant was charged with nonconsensual sexual intercourse); and *United States v. Gordon*, NMCCA 200600942, 2007 CCA LEXIS 415 (N.M. Ct. Crim. App. Sep. 27, 2007) (unpub. op.) (exclusion of evidence of prior sexual intercourse on the basis of military judge's conclusion that "there were significant differences between the two incidents" was error).

Andreozzi, by contrast, involved a particularly bizarre set of facts in which similarity of prior sexual activity was of unique significance. 60 M.J. at 734-37. In *Andreozzi,* the accused was charged with entering the house of his estranged wife without permission, brandishing a pistol, biting her to the point of bleeding, threatening to kill her, proposing a "game" in which she had to answer his questions and obey his orders, and then forcing her into various sexual acts to

include sodomy and masturbation. *Id.* at 734-37. As such, in *Andreozzi*, the relevant question was not simply whether the victim would be willing to consent to sexual conduct with *Andreozzi*, but whether she would be willing to consent to the uniquely distinctive type of sexual conduct at issue with *Andreozzi*. Because the nature of the sexual conduct itself in *Andreozzi* was so unique, the similarity or dissimilarity of prior conduct was uniquely relevant. It is also notable that the individuals involved in *Andreozzi* were married, and therefore the fact that they had a sexual history, in itself, was obvious. Additionally, in *Andreozzi*, there had been a concrete change in the relationship between the prior sexual activity and the charged sexual activity: appellant had moved out of their shared residence and the victim had changed the locks. None of the factors which made the similarities between the past conduct and the charged conduct uniquely relevant in *Andreozzi* are present here.[5]

In the present case, the fact that the two encounters did not involve the same specific act (i.e. sexual intercourse) was unimportant. None of the unique factors from *Andreozzi* were present. Additionally, unlike in *Andreozzi*, where the

[5] Notwithstanding these factors, the Army Court in *Andreozzi* specifically disagreed with the military judge's conclusion that the evidence in question was not relevant to show consent. 60 M.J. at 739. Ultimately, the court found that the evidence was excludable not because it had no relevance—it did—but because the violence and coercion involved in the charged acts were highly dissimilar from the prior consensual acts, reducing the relevance and tipping the balancing tests of Mil. R. Evid. 412(c)(3) and Mil. R. Evid. 403 against admission. *Id.* at 739–40.

individuals involved were married (and therefore had an obvious sexual history), the present case involves people who had only met a few days prior to the charged sexual intercourse. As such, it was vital to place May 5, 2018, encounter into context of the rapidly developing sexual relationship between them.

The military judge's erroneous Mil. R. Evid. 412(b)(2) analysis, fueled by his misapplication of *Andreozzi*, was itself an abuse of discretion. Additionally, as Mil. R. Evid. 403 inherently involves a balancing of the probative value of evidence, the military judge's erroneous minimization of the evidence's probative value contributed to the ultimate error of excluding it under Mil R. Evid. 403.

2. The Military Judge Failed to Conduct a Meaningful Analysis Under Mil. R. Evid. 412(b)(3).

The military judge further by failing to conduct a meaningful Mil. R. Evid. 412(b)(3) analysis. Indeed, the military judge never directly stated whether he found the evidence implicated the Mil. R. Evid. 412(b)(3) exception or not, although the implication of his ruling was that it did not.

The defense raised multiple Mil. R. Evid. 412(b)(3) concerns in its motion, citing the confrontation, cross examination, impeachment (particularly in regard to MC's anticipated denial of the prior sexual behavior with appellant), motives to

fabricate, providing context to the court members, explaining the nature of the relationship, and appellant's ability to present a defense. (JA 299-311) (sealed).[6]

Unfortunately, the military judge's ruling did not address the majority of these Mil. R. Evid. 412(b)(3) issues at all. The only analysis the military judge provided related to mistake of fact as to consent and motive to fabricate.

With respect to mistake of fact as to consent, the military judge stated that there was no evidence before the court that appellant held a mistake of fact as to consent based on the prior sexual conduct the day before. This was error. As the Army Court has previously held, a sexual history between individuals is constitutionally required to preserve the right to present a credible mistake of fact as to consent defense. *Zak*, 65 M.J. at 793 ("Moreover, appellant's defense of mistake of fact as to consent certainly is much less credible absent any evidence that SPC C felt comfortable stripping down to her panties and allowing appellant to massage her mostly-nude body. The military judge's exclusion of this evidence, therefore, violated appellant's Constitutional right to present a defense."). It is somewhat unclear what the military judge meant when he said there was no evidence before the Court. The defense met its procedural burden of raising and briefing the issue of mistake of fact as to consent. To the extent the military judge

[6] Appellant cited the Fifth, Sixth, and Fourteenth Amendments, military due process, and applicable case law. (JA 299-309) (sealed).

believed direct evidence as to appellant's mistake of fact was required at the Mil. R. Evid. 412 hearing, he cited no authority for such a proposition and appellant is not aware of any such authority.[7] *See United States v. Leonhardt*, 76 M.J. 821, 826 (A.F. Ct. Crim. App. 2017) (military judge erred by describing defense proffer at Mil. R. Evid. 412 hearing as a mere assertion).

Additionally, the military judge discussed motive to fabricate, but only as it related to MC's preexisting relationship with another male. (JA 331-332) (sealed).[8]

The military judge's ruling, inexplicably, did not analyze, or even mention, the raised Mil. R. Evid. 412(b)(3) concerns of confrontation, cross examination, impeachment, providing context, explaining the nature of the relationship, and

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[7] Presumably the only way the defense could present such evidence would be through appellant either testifying or submitting an affidavit to the effect that (1) the charged sexual intercourse occurred, (2) he believed it was consensual, and (3) his belief was informed by his sexual history with MC. Certainty the defense is not obligated to provide this degree of evidence at a Mil. R. Eivd. 412 hearing on as straight-forward an issue as this (that a sexual history is relevant to a mistake of fact as to consent defense). Such an evidentiary standard would require an accused to make substantial admissions (i.e. that the charged conduct occurred) at an early procedural stage.

[8] Army Court precedent specifically excludes the mere existence of a preexisting romantic relationship with a third party from the scope of Mil. R. Evid 412. *United States v. Alston*, 75 M.J. 875, 878 (A. Ct. Crim. App. 2016) (finding error in the exclusion of victim's preexisting romantic relationship) ("We hold the existence of a romantic relationship is not 'sexual behavior' or 'predisposition' under Mil. R. Evid. 412."). As such, appellant's position is that this evidence did not fall under the rubric of Mil. R. Evid. 412 at all. However, the resolution of this issue is likely unnecessary to the disposal of this case.

appellant's ability to present a defense. (JA 327-333) (sealed). The military judge's ruling should be given minimal deference as it fails to address or analyze these critical issues. *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014) ("If the military judge fails to place his findings and analysis on the record, less deference will be accorded.").

When a proper Mil. R. Evid. 412(b)(3) analysis is conducted, it is clear that appellant was constitutionally entitled to present evidence of the sexual history between himself and MC. First, there is substantial overlap with the Mil. R. Evid. 412(b)(2) analysis above. *See Harrington*, 2018 CCA LEXIS 456 (Evidence of prior sexual "body shots" was constitutionally required "on the critical disputed issue of whether SrA FC consented to sexual intercourse with Appellant".).

Second, as raised at length by the defense, but not addressed at all by the military judge, appellant was constitutionally entitled to confront, cross-examine, and impeach MC on the sexual history between her and appellant.[9] During the pendency of the Mil. R. Evid. 412 litigation, the government provided the defense

[9] Appellant specifically emphasized the necessity of impeaching MC if she denied the prior encounter at trial. (JA 304) (sealed). The impeachment value of this line of questioning would have been high (confronting MC about a lie directly about sexual conduct with appellant), especially given the significant evidence the defense had to corroborate that the encounter had, in fact, occurred. Of note, the fact that a witness may deny questions on cross-examination in no way limits the right to ask them. *See Leonhardt*, 76 M.J. at 828–29.

with *Brady* disclosures that MC acknowledged several aspects of the defense proffer, none of which she had disclosed until directly questioned by the government. (JA 323-325) (sealed). These are major credibility issues that appellant was constitutionally entitled to explore on cross examination for the purpose of challenging her credibility. A reasonable panel "might have received a significantly different impression" of MC's credibility had defense counsel been permitted to pursue this line of questioning. *See Gaddis*, 70 M.J. at 256 (internal quotation marks and citations omitted). Similarly, the defense was entitled to cross-examining MC about the context of their relationship leading up to May 5, 2018. Third, the military judge's ruling precluded appellant's ability to present a defense, to include providing context to the members, explaining the nature of the relationship, and testifying in his own defense. The defense was not able to explain why appellant entered MC's barracks room on the night in question without the context provided by their previous sexual history, in that same room, from less than 48 hours prior.[10]

[10] Additionally, the government took advantage of this artificial lack of context to bolster their theory of the case. In opening, knowing the judge had excluded evidence of the May 3, 2018 sexual encounter, the government immediately emphasized that MC had just recently arrived at the unit and had limited history with appellant. (JA 023-24). Similarly, the government capitalized on this lack of context to have MC testify that appellant had come to her room, and it was "weird." (JA 042). Trial counsel made this interaction seem sinister and even asked whether MC had reported it, knowing all along that the panel was being artificially deprived of vital context. (JA 042). The government's offensive use of

Applying minimal deference due to the lack of analysis, this Court should find an abuse of discretion because the military judge excluded evidence that clearly fell within the ambit of Mil. R. Evid. 412(b)(3).

3. The Military Judge Abused His Discretion by Using a Mil. R. Evid. 403 Concern Relevant to One Piece of Evidence to Exclude a Different Piece of Evidence.

Finally, though perhaps most significantly, the military judge erred in his application of the Mil. R. Evid. 403 balancing test. While the military judge stated Mil. R. Evid. concerns "abound," he only cited one such concern: namely, that the fact finder would likely unfairly interpret the evidence as an invitation for sexual abuse. (JA 332) (sealed).[11] Although the military judge did not specify which evidence he was referring to, the only logical conclusion is that he was referring to MC's statement about her sexual preferences (which related to enjoyment of an arguably "abusive" sexual practice).[12] This may have been a valid Mil. R. Evid. 403 concern as applied to the statement made by MC in connection with the

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missing context resulting from excluded Mil. R. Evid. 412 evidence is a relevant factor on appellate review. *See Zak*, 65 M.J. at 793.

[11] The military judge did not discuss the availability of limiting instructions to guide the court member's deliberations with respect to this evidence. See *Harrington*, 2018 CCA LEXIS at *6 (Holding that limiting instructions are a valid consideration when applying Mil. R. Evid. 403 to Mil. R. Evid. 412 evidence.).

[12] This was not a rationale for exclusion articulated by the government in either their written filing or during oral argument. The military judge seems to have *sua sponte* raised the Mil. R. Evid. 403 concern regarding the supposed likelihood that the panel would interpret this evidence as an invitation for sexual abuse.

photograph.[13] However, rather than tailoring his ruling to exclude only this statement, and/or the corresponding photograph, the military judge excluded the entirety of the evidence, to include the physical kissing. (JA 327-333) (sealed). The military judge could easily have tailored his ruling to his analysis by merely excluding this statement under Mil. R. Evid. 403. It was error to exclude the entirety of the sexual encounter, to include the physical kissing (which had nothing to do abuse or violence towards MC), on these grounds.[14]

With respect to the physical kissing, the military judge articulated no Mil. R. Evid. 403 balancing whatsoever. (JA 327-333) (sealed). This court has stated that it "gives military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citations omitted). As the military judge conducted no Mil. R. Evid. 403 balancing on the

[13] Appellant does not concede that the military judge properly excluded the evidence of the statement and photograph. However, it is difficult to foresee a scenario where this Court would find it necessary to reach this issue. If this Court agrees that the exclusion of the physical encounter was reversable error, the exclusion off the statement and photograph are moot. If this Court disagrees that the exclusion of the physical encounter was reversable error, it is unlikely to reach a different conclusion with respect to the exclusion off the statement and photograph.

[14] The defense requested to introduce four pieces of evidence in their motion. (JA 299-309) (sealed). The statement and the photograph were listed as one of the four pieces of evidence. *Id*.

primary issue under consideration (the physical kissing), this Court should give no deference.

Exclusion of evidence under Mil. R. Evid. 403 that lacks "an articulated or supportable basis" is an abuse of discretion. *Collier*, 67 M.J. at 355. The exclusion of the physical kissing lacked an articulated basis (as the military judge did not articulate any Mil. R. Evid. 403 concerns applicable thereto). Additionally, when a proper analysis is performed, the exclusion of the physical kissing also lacks a supportable basis.

When a proper analysis is performed, there is little, if any, prejudice to the fact that MC, an independent unmarried young adult, engaged in consensual kissing with another independent unmarried young adult. No reasonable fact finder would hold such a common and vanilla fact against her, nor have an overly emotional reaction thereto. *See, e.g.*, *United States v. Saunders*, 736 F. Supp. 698, 703 (E.D. Va. 1990), aff'd, 943 F.2d 388 (4th Cir. 1991) ("Also, the danger of unfair prejudice seems slight, if any. In today's society, evidence of a prior relationship with defendant does not, by itself, carry with it the pejorative implications of promiscuity and easy virtue."). There was nothing embarrassing or prejudicial about the act itself; to the contrary, it involved no removal of clothes and no touching of private areas. This evidence was as unremarkable and unobjectionable under Mil. R. Evid. 403 as any Mil R. Evid. 412(b)(2) evidence

could be. If Mil. R. Evid. 403 could justify the exclusion of this evidence, then it could similarly justify the exclusion of practically *all* Mil. R. Evid. 412(b)(2) evidence.

4. A Different Military Judge Erred by Excluding Res Gestae Evidence in Contravention of the First Military Judge's Explicit Statement that such Evidence Fell Outside the Rubric of Mil. R. Evid. 412.

Finally, there can be no question that appellant was constitutionally entitled to present evidence that the alleged victim (whom the government portrayed as asleep and catatonic during the charged offense) had participated in the charged sexual act to such an extent that her participation left physical marks on appellant's neck and chest. The military judge who conducted the original Mil. R. Evid. 412 hearing explicitly stated on the record that such evidence would fall outside of the rubric of Mil. R. Evid. 412 and constitute the res gestae of the offense. (JA 346-347) (sealed). That is to say, such evidence would be admissible.

The defense was under no obligation to notice evidence of the res gestae of the offense, under Mil. R. Evid 412 or any other rule. That said, defense counsel specifically raised this issue at the Mil. R. Evid. 412 hearing and the military judge at that time specifically stated that it was res gestae evidence and fell outside Mil. R. Evid. 412. (JA 346-347) (sealed). Therefore, to the extent there was any obligation to raise this issue and obtain a ruling, defense counsel had already done so long before trial began. Despite the facts that this evidence was unquestionably

admissible, the defense had raised the issue long before trial, and the prior military judge had as much as stated on the record that it was admissible, it was still erroneously excluded.

The Article 39a session, held by a different military judge, in the midst of trial, is, frankly, somewhat difficult to decipher. (JA 355-359) (sealed). All sides, to include the defense counsel, could have been clearer in their statements. The main issue under discussion seems to have been how to differentiate between physical marks left on appellant's body on May 3, 2018 (which had been excluded by the prior Mil. R. Evid. 412 ruling) and physical marks left on appellant's body on May 5, 2018, less than 48 hours later (during the charged encounter). *Id*. The short answer, of course, was that there was no way to differentiate between the two. There was no indication that there was any difference in type or location between the physical marks from the two encounters, and no reason to believe that the very slight difference in the age of the marks (less than 48 hours difference) would make them visually distinguishable. Even were there some discernable distinction, there would be no expectation that the lay witnesses who saw the marks would be able to differentiate between them. In short, the military judge was asking the defense to do the impossible: to segregate evidence of physical marks left on appellant's body during the res gestae of the May 5, 2018, charged

offense from evidence of near identical marks left less than 48 hours prior. There was no possible way the defense could do this.

Similarly, the new military judge also appeared to criticize the defense for not providing an offer of proof that physical marks had been caused during the res gestae of the charged offense, seemingly as a pre-requisite to admissibility. There was no reason why defense should have been required to do this.

5. The Error Prejudiced Appellant.

Under either standard, appellant was prejudiced. All four *Kohlbek* factors heavily favor appellant.

A. The Government's Case had Substantial Weaknesses.

MC admitted to lying about the charged assault in *multiple* prior statements. (JA 123-24, 127, 203) (admitted lie about being pushed and held down); (JA 049, 127) (admitted lie about appellant spending night in room); (JA 046-47, 118) (admitted lie to CID about timeline).

MC was also directly contradicted on multiple points by other witnesses. (JA 046, 195, 197) (contradicting MC's account of trip to shoppette); (JA 055, 146, 193) (contradicting MC's account of sleeping on floor night after charged assault); (JA 057, 197-98) (contradicting MC's account of crying in car); (JA 200) (prior statement by MC that sex had been consensual).

MC's testimony was further impeached on collateral matters. MC testified that she was "excited to deploy" and denied stating she wanted to get out of the deployment until after the charged assault. (JA 157). When confronted with text messages on cross examination, however, she acknowledged telling her father that she wanted to get out of the deployment. (JA 157-59). Similarly, MC denied being excited about being discharged via a MEDBOARD. (JA 161). However, when confronted, she acknowledged sending a text message to a friend saying, "They are med boarding me, it's lit". (JA 162) ("lit" being a slang term of excitement).

MC acknowledged significant memory problems on the stand. (JA 105-09).

MC admitted to deleting or disposing of multiple pieces of critical supposed evidence. Perhaps most implausibly, MC claimed to have had text messages from appellant in which he admitted to assaulting her. (JA 164). However, she claimed she had deleted these messages. (JA 164). No such messages were recovered during a forensic examination of her phone. (JA 187). Similarly, MC claimed that she was wearing a tampon during the charged assault, but acknowledged she did not keep it or photograph it. (JA 135-36). MC further admitted to deleting the original photos depicting bruising on her legs. (JA 131). As such, she acknowledged that there was no way to determine the date the photos were originally taken. (JA 068).

Multiple motives to fabricate were presented at trial. On the first day of in-processing at Fort Sill, MC learned she was scheduled to deploy and texted her father that she thought she could get out of the unwanted deployment. (JA 157-58). As discussed above, MC's testimony on the topic of wanting to get out of the deployment was impeached on the stand. A witness testified that MC directly told him that she was worried about her reputation after having consensual sex with Appellant. (JA 200). MC underwent a MEDBOARD and received a 70 percent disability rating paycheck every month. (JA 161-62). She texted her friend on 21 September 2018 "they are med boarding me, it's lit". (JA 162). MC engaged in underage drinking immediately upon her arrival to Fort Sill and, apparently, continued to do so thereafter, culminating in her arrest for, *inter alia*, underage drinking on 2 July 2018. (JA 100-01, 190). Two days after her arrest, MC reached out to CID SA CD to participate in the investigation. (JA 101). MC did not disclose to SA CD that she was arrested less than two days prior. (JA 181). MC received an Article 15 for this incident. (JA 192). MC also failed the Army Physical Fitness Test (APFT) (apparently multiple times) and there was consideration of chaptering her for APFT failure. (JA 037-38, 084).

Finally, MC engaged in conduct wildly inconsistent with her accusations. (JA 050-51, 138) (out of town trip with appellant directly after charged assault); (JA 055, 193) (sleeping on motel bed with appellant night after charged assault and

lying about it); (JA 059, 075-76, 151-52, 176) (additional post-assault contact with appellant).

For purposes of considering prejudice, the inescapable conclusion is that the government's case was weak.

B. The Defense Case was Correspondingly Strong.

Appellant also put on a strong defense. For example, the defense called a witness who testified to witness MC sleeping in the same bed as appellant the very night after the charged assault, directly contradicting MC's testimony that she did not sleep in the same bed on that night. (JA 193). Additionally, and perhaps most notably, the defense called a witness who testified that, the day after the charged sexual encounter, MC told him that there had been a consensual sexual encounter between herself and appellant, that she regretted it, and that she was concerned about her reputation. (JA 200).

C. The Excluded Evidence was Material.

Absent the ability to explore the history of intimacy between these two individuals, the defense was placed in the position of arguing that appellant had entered the barracks room of a female soldier whom he had only met a few days prior, in the middle of the night, and simply spontaneously began having consensual sex with her. The defense had no way to explain the context of this late-night rendezvous between these two people who had recently met. Nor could

the defense explain the contextual significance of MC giving appellant the key to her barracks room on the night in question. Absent this crucial evidence, the defense was left to present an inherently unbelievable theory of spontaneous consent. Unsurprisingly, the panel did not believe it, and appellant was convicted.

The excluded evidence would have completely altered the landscape of the defense's theory of consent. With the benefit of this evidence, the defense would have a unified and logical story to tell: On May 3, 2018, they had an initial sexual encounter in MC's barracks room. Late in the evening of May 4, 2018, MC gave appellant a copy of the key card to that same barracks room. Then, shortly thereafter, appellant used that key card to enter her barracks room and they took their physical intimacy to the next level. With this background, the defense narrative would have been transformed from farfetched to perfectly natural.

In addition to the affirmative value of the evidence to the defense's case, it was material to attacking the government's case via, *inter alia*, confrontation, cross-examination, and impeachment.

D. The Quality of the Evidence Was Strong.

The defense had significant corroborating evidence of the May 3, 2018 sexual encounter in question. They stood ready to call two witnesses to corroborate the encounter by testifying to the physical marks it left on appellant's body. (JA 310) (sealed). One of these witnesses would testify that she assisted

appellant in hiding these marks from public view by applying makeup (concealer). *Id*. Assistant trial counsel acknowledged that government witness interviews had confirmed that witness(es) would testify to this effect. (JA 355) (sealed). Furthermore, the government provided defense with Brady disclosures that MC acknowledged several aspects of the defense proffer, none of which she had disclosed until directly questioned by the government. (JA 323-326) (sealed). As such, the quality of the evidence in question was strong.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilt for the Specification of Charge I and the sentence.

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I certify that a copy of the forgoing in the case of United States v. St. Jean, Crim App. Dkt. No. 20190663, USCA Dkt. No. 22-0129/AR was electronically filed with the Court and Government Appellate Division on June 13, 2022.

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