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RAZING HILLS: REPAIRING MILITARY RULE OF EVIDENCE 413 IN RESPONSE TO *UNITED STATES V. HILLS*

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I. Introduction

The investigation was going well, which is not at all how it started. It began with a morale barbeque during a foreign port call. The alcohol flowed freely. One of the sailors drank a lot—more than she ever had in her young life. As the evening progressed, her memory became spotty. She remembered drinking Fireball whiskey, being helped back to her hotel room, and vomiting on her floor. And she remembered the accused on top of her, penetrating her. The next morning, she woke with no clothes on, vomit on the floor, and the accused's wallet under the bed.

It was not until several months later that she sought out the command's victim advocate. She gathered the courage to come forward after attending

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a sexual assault prevention training. That is how the case landed on your desk.

Unfortunately, witnesses from the barbecue have not provided much in the way of corroboration. Although they remember the victim drinking, none remember any egregious signs of intoxication, and none saw her leave with the accused. When interviewed, the accused admitted to helping the victim to her hotel room, but denied seeing her vomit. He also said that she "was all over him," and, anyway, she "didn't seem that drunk."

Your talented and determined investigator has, however, turned up two other instances where the accused had sex with intoxicated women. One was two years ago at his previous unit; the other was four years ago when he was at "A" school. That is not all. Your suspect was accused of sexual assault during his sophomore year in college, almost eight years ago. None of the prior assaults were prosecuted or even charged because apparently none of the various investigating agencies were aware of the other alleged assaults.

It seems that there is finally enough evidence to prove that the accused sexually assaulted all four women. Your plan is to use evidence of each sexual assault to prove the others, as permitted by Military Rule of Evidence (MRE) 413. Specifically, MRE 413 allows introduction of evidence of "one or more offenses of sexual assault" for "any matter to which it is relevant."[1] With that understanding, you charge the three service-connected sexual assaults and prepare for trial.

Not so fast, says the Court of Appeals for the Armed Forces (CAAF). At the tail end of its 2016 term, in *United States v. Hills*,[2] the CAAF categorically prohibited the use of charged misconduct as MRE 413

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413(a) (2012) [hereinafter 2012 MCM]. The Military Rules of Evidence (MREs) were re-issued in 2013, and the language is slightly different: "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." Exec. Order No. 13,643, 78 Fed. Reg. 29,559, 29,577 (May 21, 2013) (amending MRE 413). The language was unchanged in the 2016 and 2019 Manuals for Courts-Martial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413(a) (2019) [hereinafter 2019 MCM]. Unless specifically noted, any citations to the 2019 MCM indicate identical language was present in the 2016 edition.

[2] United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016).

evidence.[3] The CAAF held that it was constitutional error to permit the use of charged misconduct—of which the accused is presumed innocent—to prove other charged misconduct. Having different standards of proof for the same conduct only compounded this error. As the CAAF noted, "The juxtaposition of the preponderance of the evidence standard with the proof beyond a reasonable doubt standard with respect to the elements of the same offenses would tax the brain of even a trained lawyer."[4]

However, the CAAF erred in holding that charged misconduct is categorically barred from use as MRE 413 evidence. It did so by construing the incorrect version of the rule, ignoring the plain text of the statutory language, and judicially inserting words into the legislatively enacted language of MRE 413. Even so, the CAAF correctly identified a substantial constitutional error where the trial judge permitted the *Hills* panel to use charged misconduct as MRE 413 evidence, diluting the presumption of innocence, and thus violating the accused's due process rights.

Restoring proper understanding of MRE 413 will require the concerted efforts of multiple actors. *Hills* raises two distinct issues. First is the CAAF's incorrect interpretation of abrogated statutory language. In response, MRE 413 should be amended to clarify that charged misconduct may be used as MRE 413 evidence. The second issue is preserving the accused's presumption of innocence. To ensure that it remains intact, the standard panel instructions should be amended to require that charged misconduct be established beyond a reasonable doubt before being employed as MRE 413 evidence. Only remedying both issues will allow the constitutional use of charged misconduct as MRE 413 evidence.

Comprehending the problems and providence of *Hills* requires an understanding of the history of MRE 413. Part II examines that history, and the history of MRE 413's antecedent, Federal Rule of Evidence (FRE) 413. Against this backdrop, Part III examines the CAAF's textual interpretation in *Hills*. While its interpretation left much to be desired, the CAAF's identification of a due process error was correct, as the analysis in Part IV confirms. Finally, Part V proposes solutions to both the Rule 413[5]

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[3] *Id.* at 354.

[4] *Id.* at 358.

[5] When referring to language or concepts common to FRE 413, MRE 413, or the state analogue, this article will refer to the evidentiary rule as "Rule 413." When a distinction is necessary, a reference to the specific evidentiary code will be provided. Additionally,

interpretation problem as well as the constitutional problem. Proposed statutory language and panel instructions are included as appendices.

II. Climbing the Hills: The Path from Enactment to Constraint

A. Enacting a Federal Rule for Evidence in Sexual Assault Cases

Before Rule 413 authorized the rule-based admission of "other sexual offenses," admission was governed by an inconsistent patchwork of common law. In some cases, courts shoehorned the evidence through Rule 404(b)'s narrow opening, finding a basis other than character or propensity to justify admission. The Oregon Supreme Court, for example, upheld the admission of evidence of prior sexual assaults on the same victim "to demonstrate the sexual predisposition this [accused] had for this particular victim, . . . not that he had a character trait or propensity to engage in sexual misconduct generally."[6] Wyoming's Supreme Court went further by characterizing prior sexual offenses as "motive," one of the traditional categories of prior bad acts enumerated in Rule 404(b).[7] Still, other courts have permitted introduction of other sexual offenses when the accused disputed whether the victim consented,[8] implicitly applying the doctrine of chances.[9]

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although the *Hills* court focused on MRE 413, its reasoning is equally applicable to MRE 414. United States v. James, 63 M.J. 217, 220 (C.A.A.F. 2006) ("In light of the common history and similar purpose of M.R.E. 413 and M.R.E. 414, there is no need to distinguish the two rules . . . .").

[6] State v. McKay, 787 P.2d 479, 480 (Or. 1990).

[7] Elliott v. State, 600 P.2d 1044, 1048 (Wyo. 1979). In *Elliott*, the court considered "the admissibility . . . of testimony of an older sister of the victim concerning prior attempts of a similar nature involving her as a victim." *Id.* at 1045. The court also mused that perhaps this prior act evidence was potentially admissible as evidence of a "common design or plan," another one of the enumerated 404(b) exceptions, but decided that "[i]n this particular instance, however, we conclude that admissibility of the evidence is justified as proof of motive." *Id.* at 1048.

[8] *See, e.g.*, Rubio v. State, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980) ("We hold that when a defendant in a prosecution for rape raises the defensive theory of consent, he places his intent in issue. The State may then offer extraneous offenses which are relevant to that contested issue.").

[9] United States v. Tyndale, 56 M.J. 209, 213 (C.A.A.F. 2001). The doctrine of chances "posits that it is unlikely a defendant would be repeatedly, innocently involved in similar, suspicious circumstances." *Id. See also* EDWARD J. IMWINKELRIED, 1 UNCHARGED MISCONDUCT EVIDENCE § 5:6 (2020) ("The doctrine [of chances] teaches us that the more often the defendant performs the actus reus, the smaller is the likelihood that the defendant

However, this patchwork pattern of admissibility was not universal. Other courts, hewing closer to the prohibition on character evidence, overturned convictions supported by other sexual offenses. For example, the Delaware Supreme Court overturned a charge of child rape, noting that sexual gratification was not an element of the charged crime, so any "motive" was irrelevant.[10] A California court rejected other sexual offense evidence outright, noting that the use of prior acts to credit a victim's testimony "does not comport with the applicable statutory and decisional law."[11] A New York court, in a case involving charges of rape and murder, held that "[g]unpoint threats and theft or attempted theft of jewelry are hardly 'unique' or 'uncommon' in rape cases,"[12] and thus did not meet the legal definition of *modus operandi*. Admission of prior sexual offenses was uncertain, and with this uncertainty came a sense that sexual offenders were escaping conviction because of a restrictive rule of evidence.[13]

Against this unsettled backdrop, Representative Susan Molinari and Senator Bob Dole proposed amendments to the FREs in 1991.[14] Although

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acted with an innocent state of mind. The recurrence or repetition of the act increases the likelihood of a mens rea or mind at fault." (citations omitted)).

[10] Getz v. State, 538 A.2d 726, 733 (Del. 1988) ("To the extent that sexual gratification may be equated, for example, with motivation such evidence bears upon an issue which is not an element of the offense and concerning which the State has no burden."). The *Getz* court also rejected the theory that the proffered evidence (consisting of prior acts of child molestation with the victim) fit into a "common scheme or plan." *Id.* at 734. *See also* People v. Lewis, 506 N.E.2d 915, 918 (N.Y. 1987).

[11] People v. Key, 153 Cal. App. 3d 888, 898 (Ct. App. 1984).

[12] People v. Sanza, 121 A.D.2d 89, 96 (N.Y. App. Div. 1986).

[13] *See, e.g.*, 140 CONG. REC. 23602 (1994) (statement of Rep. Susan Molinari) ("The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system's tools for bringing the perpetrators of these atrocious crimes to justice.").

[14] Women's Equal Opportunity Act, S. 472, 102d Cong. § 231 (1991). *See also* 140 CONG. REC. 24799 (1994) (statement of Sen. Dole) ("Congresswoman Susan Molinari and I initially proposed this reform in February 1991 in the Women's Equal Opportunity Act, and we later reintroduced it in . . . the 102d and 103d Congresses."). In this floor speech, Senator Dole noted several sources which would aid in giving effect to the new rules. *Id.* First, he noted the analysis of the previous iterations of the rules which were substantively identical to those enacted. *Id. See also* 137 CONG. REC. 6030–34 (1991) (providing previous analysis of the rules). Second, he urged that the address of Mr. David Karp, a Department of Justice Senior Counsel, to the Association of American Law Schools be "considered an authoritative part of [the rules'] legislative history." 140 CONG. REC. 24799 (1994) (statement of Sen. Dole). See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994), for the prepared statement that Mr. Karp presented. These sources were also cited by the

initially unsuccessful, they secured passage of the amendments in 1994, with overwhelming support in both Houses of Congress.[15]

The Rule was adopted for several reasons. First, it facilitated probabilistic or "doctrine of chances" evidence.[16] This type of evidence can be very powerful in the murky world of sexual offense prosecutions, where the criminal can be confused with the conjugal.[17] Combined with other evidence of the commission of the charged offense, "knowledge of the [accused's] past behavior may foreclose reasonable doubt as to guilt in a case that would otherwise be inconclusive."[18]

Additionally, the Rule permitted an inference that prior acts of sexual misconduct demonstrated a propensity to commit other sexual offenses.[19] Thus, a panel member could conclude that the accused "has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him."[20] If the evidence shows that the accused has these predilections and, more importantly, has acted on

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House sponsor of the bill, Representative Susan Molinari. 140 CONG. REC. 23602 (1994) (statement of Rep. Molinari).

[15] The amendments passed the House by a vote of 348 to 62, and the Senate by a vote of 75 to 19. 140 CONG. REC. 24799 (1994) (statement of Sen. Dole).

[16] Karp, *supra* note 14, at 20 ("It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type."). *See also* 137 CONG. REC. 6032 (1991) ("The rationale commonly given for this exception is the probative value such evidence has on account of the inherent improbability that a person will innocently or inadvertently engage in similar, potentially criminal conduct on a number of different occasions."); 140 CONG. REC. 24799 (1994) (statement of Sen. Dole) ("This includes . . . [an] assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.").

[17] Karp, *supra* note 14, at 21 ("In violent crimes other than sexual assaults, there is rarely any colorable defense that the defendant's conduct was not criminal because of consent by the victim. The accused mugger does not claim that the victim freely handed over his wallet as a gift.").

[18] *Id.* at 20.

[19] Except through Rule 413, evidence of a criminal predisposition is not admissible. 2019 MCM, *supra* note 1, MIL. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

[20] Karp, *supra* note 14, at 20.

them on another occasion, then "a charge of sexual assault has far greater plausibility than if there were no evidence of such a disposition . . . ."[21]

Finally, because these crimes often depend on the testimony of a single witness—assuming one comes forward at all—"there is a compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense."[22] After requesting and receiving comments from the Judicial Conference of the United States on the proposed rules, the rules went into effect on 9 July 1995.[23] The military rule came into effect shortly thereafter.

B. The Military Gets into the Act: The Enactment of MRE 413

The military version of the Rule, MRE 413, took effect in January 1996.[24] Its constitutionality was challenged not long after in *United States*

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[21] 137 CONG. REC. 6032 (1991). This assertion of a predisposition to commit a sexual offense was (and is) controversial. *Id*. *See also* Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994); Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795 (2013); United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000) ("The scientific community is divided on the question of recidivism for sexual offenders. Some have found a rate of recidivism is very high for sexual offenders while some have found the rate lower for rapists than for burglars, drug offenders, or robbers." (citations omitted)). Solving (or at least rejoining) the debate about the desirability of Rule 413 is beyond the scope of this article. However, it is important to note and acknowledge that the legislature had a rational basis to prescribe the rules, and, unless the rules are unconstitutional, a court is duty-bound to give them their desired effect. *Wright*, 53 M.J. at 481 ("Congress enacted the Rules. Thus, unless these Rules are unconstitutional, we are bound by the Rules.").

[22] 140 CONG. REC. 27499 (1994) (statement of Sen. Dole). *See also* Karp, *supra* note 14, at 20.

[23] JUDICIAL CONF. OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51–57 (1995). The Judicial Conference opposed the amendments, and its opposition was nearly unanimous, with only the representative of the Department of Justice in favor of the amendments. *Id.* at 53. However, even in face of this "highly unusual unanimity," *id.*, Congress did not modify the proposed rules. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(d)(2), 108 Stat. 1796, 2137 (providing the amendments be enacted 150 days after receiving a report in opposition from the Judicial Conference "unless otherwise provided by law").

[24] At the time, an amendment to the FREs applied in courts-martial 180 days after the amendment's effective date. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (1995). Military Rules of Evidence 413 and 414 were later explicitly adopted by Executive Order in May 1998. Exec. Order No. 13,086, 3 C.F.R. 155 (1999). There is no substantive difference between the Federal Rule and the Military Rule. *Wright*, 53 M.J. at

v. Wright.[25] At trial, Senior Airman Wright pled guilty to one sexual assault but contested a separate sexual assault allegation. The Government used evidence of the former as MRE 413 evidence in its prosecution of latter. After he was convicted of both assaults, Senior Airman Wright appealed to the CAAF, claiming that MRE 413 violated the Due Process Clause of the Fifth Amendment by introducing evidence that violated "fundamental conceptions of justice."[26] The CAAF rejected this argument, noting that MRE 413 did not, on its face, undermine the presumption of innocence.[27] Instead, it found the Rule constitutional, both facially and as applied.[28] The court further held that judges must apply a Rule 403 balancing test when considering the admissibility of evidence under MRE 413, in addition to ensuring the evidence meets certain threshold requirements. The CAAF listed nine non-exclusive factors judges must consider as part of that balancing, which later became known as the *Wright* factors.[29] In the sixteen years between *Wright* and *Hills*, the CAAF only heard twelve cases addressing the application of MRE 413 or 414.[30]

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480 n.4. Military Rule of Evidence 413 (along with the rest of the MREs) were re-issued in their entirety in 2013. Exec. Order No. 13,643, 3 C.F.R. 246 (2014). This re-issue enacted the stylistic changes to the FREs which came into force on 1 December 2011. *See* H.R. DOC. NO. 112-28, at 1, 2, 95 (2011) (reprinting the transmission from the Chief Justice of the Supreme Court to Congress per the Rules Enabling Act), https://www.gpo.gov/fdsys/pkg/CDOC-112hdoc28/pdf/CDOC-112hdoc28.pdf.

[25] *Wright*, 53 M.J. 476.

[26] *Id.* at 481 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

[27] *Id.*

[28] *Id.* at 483.

[29] *Id.* at 482–83. The *Wright* balancing factors are constitutionally required, providing a bulwark against admittance of evidence that would otherwise violate the Due Process clause of the Constitution. United States v. Dewrell, 55 M.J. 131, 138 (C.A.A.F. 2001). The non-exclusive *Wright* factors are: strength of proof of prior act, probative weight of evidence, potential for less prejudicial evidence, distraction of factfinder, time needed for proof of prior conduct, temporal proximity, frequency of the acts, presence or lack of intervening circumstances, and relationship between the parties. *Wright*, 53 M.J. at 482.

[30] United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2013); United States v. Yammine, 69 M.J. 70 (C.A.A.F. 2010); United States v. Ediger, 68 M.J. 243 (C.A.A.F. 2010); United States v. Burton, 67 M.J. 150 (C.A.A.F. 2009); United States v. Schroder, 65 M.J. 49 (C.A.A.F. 2007); United States v. Bare, 65 M.J. 35 (C.A.A.F. 2007); United States v. Tanner, 63 M.J. 445 (C.A.A.F. 2006); United States v. Washington, 63 M.J. 418 (C.A.A.F. 2006); United States v. James, 63 M.J. 217 (C.A.A.F. 2006); United States v. Berry, 61 M.J. 91 (C.A.A.F. 2005); United States v. Bailey, 55 M.J. 38 (C.A.A.F. 2001); United States v. Dewrell, 55 M.J. 131 (C.A.A.F. 2001).

C. The Courts of Criminal Appeal Are Unanimous: Charged Misconduct May Be Used as MRE 413 Evidence

In the years that followed *Wright*, three of the four service courts of criminal appeals (CCAs) confronted the issue of using charged misconduct as MRE 413 evidence.[31] Each arrived at the same conclusion: that such use was legally permissible.

The Army Court of Criminal Appeals (ACCA) was the first to consider the issue in *United States v. Barnes*.[32] Because the trial judge did not conduct a thorough MRE 403 balancing on the record, the ACCA spent much of its decision weighing the various *Wright* factors.[33] It ultimately affirmed Staff Sergeant Barnes's conviction, finding "no prohibition against or reason to preclude the use of evidence of similar crimes in sexual assault cases in accordance with [MRE] 413 due to the fact that the 'similar crime' is also a charged offense."[34]

In *United States v. Bass*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) likewise squarely addressed the use of charged misconduct as MRE 413 evidence.[35] First, the NMCCA looked to the plain language of the Rule, noting that it permitted evidence of "any other sexual offense." The NMCCA concluded that this language "is broad and betrays no exception for charged misconduct."[36] Next, the court highlighted the illogic of excluding charged offenses (with sufficient evidentiary strength to merit a trial) as MRE 413 evidence while permitting evidence of outdated offenses.[37] Finally, the NMCCA rejected Petty Officer Bass's

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[31] The Coast Guard Court of Criminal Appeals is the only service appellate court that did not consider the issue.

[32] United States v. Barnes, 74 M.J. 692 (A. Ct. Crim. App. 2015), *review denied*, 75 M.J. 27 (C.A.A.F. 2015). In *Barnes*, the accused was charged with raping two separate victims, with one rape occurring in 2006 and the other in 2009. *Id.* at 694–95.

[33] *Id.* at 699–701.

[34] *Id.* at 697–98.

[35] United States v. Bass, 74 M.J. 806, 815 (N-M. Ct. Crim. App. 2015), *review granted*, (C.A.A.F. Nov. 30, 2015), *pet. withdrawn*, No. 16-0162, 2016 CAAF LEXIS 42 (Jan. 5, 2016). In *Bass*, two separate victims alleged sexual assault and abusive contact over a period of approximately six months. *Id.* at 810–11.

[36] *Id.* at 815. The NMCCA also observed that the it is "not a rulemaking body and, even were [it] inclined to find such an exception prudent, [it is] bound to apply the Rule as written, not as may be desired, unless it is unconstitutional." *Id.* (citing United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000)).

[37] *Id.*

as-applied constitutional challenge, remarking that the CAAF had affirmed the use of charged misconduct in *United States v. Wright*.[38]

Finally, the Air Force Court of Criminal Appeals (AFCCA) addressed the issue of charged misconduct as MRE 413 evidence in their unpublished decision *United States v. Maliwat*.[39] The AFCCA did not analyze whether MRE 413 permitted the admittance and use of charged misconduct because the Government did not request an MRE 413 instruction until the close of trial.[40] Thus, much of the opinion examined whether the procedural protections of MRE 413 applied and whether the MRE 413 evidence was properly admitted in the first instance.[41] The AFCCA noted that the trial court had properly instructed the members as to the use of the propensity evidence, and thus did not prejudice the accused.[42] Finding no prejudice, and conducting no inquiry into the propriety of using charged misconduct as MRE 413 evidence, the AFCCA affirmed.

Although not unified in their reasoning, each CCA to consider the use of charged misconduct as MRE 413 evidence allowed such use. That all changed when the CAAF took up the case of Sergeant (SGT) Kendall Hills, U.S. Army.

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[38] *Id.* at 816. However, the NMCCA failed to recognize a crucial difference between *Bass* and *Wright*. At the time of Senior Airman Wright's trial, he had pled guilty to one of the specifications and was contesting only one of the charges, *Wright*, 53 M.J. at 479–80, while Petty Officer Bass contested all of the charges before the court-martial, *Bass*, 74 M.J. at 815. Even so, the NMCCA's other bases for affirmance—the plain reading of the statutory text and the purposive analysis—were still likely sufficient to affirm the trial court, assuming there were no defects in the instructions.

[39] United States v. Maliwat, ACM 38579, 2015 WL 6655541 (A.F. Ct. Crim. App. Oct. 19, 2015), *vacated*, 76 M.J. 128 (C.A.A.F 2017), *aff'd on reh'g*, 2017 WL 4003928 (A.F. Ct. Crim. App. Aug. 30, 2017). In *Maliwat*, the accused was charged with rape of one victim and abusive sexual contact of another. *Id.* at *1.

[40] *Id.* at *3–4.

[41] *Id.* at *4–5.

[42] *Id.* at *4. The AFCCA contrasted *Maliwat* with the CAAF case *United States v. Burton*, 67 M.J. 150 (C.A.A.F. 2009), where no such propensity instruction was given at trial. However, in its analysis of the procedural protections, the AFCCA foreshadowed the CAAF's own error in viewing MRE 413 solely as a rule of admission divorced from the use of the evidence. *See* discussion *infra* Section III.A.3.a.

D. The CAAF Joins the Battle

Unlike in the cases considered by the CCAs, all of the offenses in *Hills* involved the same victim, and all occurred within a two-hour window.[43] In its analysis, the CAAF first examined the language and history of MRE 413, concluding that "charged offenses are not properly admitted under M.R.E. 413 to prove a propensity to commit [other] charged offenses."[44] The CAAF also found that the use of charged misconduct as MRE 413 evidence raised "serious constitutional concerns" by eroding the accused's presumption of innocence.[45]

1. A New Rule: Charged Misconduct May Not Be Used as MRE 413 Evidence

While the CAAF began its analysis by re-affirming MRE 413's constitutionality, it quickly noted that it had not previously addressed whether charged misconduct may be used as MRE 413 evidence.[46] Just as quickly, the CAAF held that it may not.[47] The CAAF observed that neither it nor any federal circuit court had permitted the use of charged misconduct as Rule 413 evidence.[48] The court then distinguished both *Wright* and another case involving charged sexual offenses, *United States v. Burton*. In *Wright*, the accused pled guilty to the specification that was later used as MRE 413 evidence; in *Burton*, the trial court never admitted the charged offenses as propensity evidence under MRE 413.[49]

Next, the CAAF dissected the Rule to support its holding. It started by asserting that "the structure of the rule suggests that it was aimed at conduct other than charged offenses."[50] The *Hills* court noted that MRE 413 required disclosure of evidence at least five days before trial, which,

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[43] United States v. Hills, 75 M.J. 350, 352 (C.A.A.F. 2016). Unlike its previous *Barnes* opinion, the ACCA conducted a thorough analysis of the language and history of MRE 413. United States, v. Hills, ARMY 20130833, 2015 WL 3940965, at *6 (A. Ct. Crim. App. June 25, 2015), *rev'd*, 75 M.J. 350 (C.A.A.F. 2016).
[44] *Hills*, 75 M.J. at 357.
[45] *Id.* at 355–56.
[46] *Id.* at 354.
[47] *Id.*
[48] *Id. But see* United States v. Guardado, 75 M.J. 889, 894–95 (A. Ct. Crim. App. 2016) (listing several federal cases preceding *Hills* that appeared to permit Rule 413 evidence between charged offenses), *rev'd in part*, 76 M.J. 90 (C.A.A.F. 2017).
[49] *Hills*, 75 M.J. at 354.
[50] *Id.* at 355.

according to the court, "implies that only evidence of uncharged offenses (of which the accused would not otherwise be aware absent disclosure) are contemplated by the rule."[51] Next, because evidence of charged misconduct was already admissible to prove the underlying offense, no special rule of admission was necessary.[52] The CAAF also looked to select statements within the Rule's legislative history to suggest that the Rule was aimed solely at uncharged misconduct.[53] Finally, the court acknowledged that, while the Rule permitted bolstering victim credibility, "there [was] no indication that M.R.E. 413 was intended to bolster the credibility of the named victim through inferences drawn from the same allegations of the same named victim."[54] This reasoning suggests that *Hills*'s factual background played a major role in the legal outcome. The CAAF concluded that the trial court abused its discretion by admitting evidence of other charged offenses under MRE 413.[55] Although this error alone was likely sufficient to reverse SGT Hills's conviction, the CAAF went further and examined the constitutionality of the use of charged misconduct as MRE 413 evidence.

2. The Use of Charged Misconduct as MRE 413 Evidence Eroded the Accused's Presumption of Innocence

The CAAF also found constitutional error in the final instructions to the panel. It concluded that the judge's instructions on the use of charged misconduct violated the accused's presumption of innocence, and thus the Due Process clause of the Fifth Amendment.

At trial, the judge instructed that the each charged sexual offense "may have a bearing on your deliberations in relation to the other charged sexual assault offenses . . . only under the circumstances I am about to describe . . . ."[56] The judge then instructed the panel to determine by a preponderance of the evidence if the other sexual assaults (i.e., not the

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[51] *Id.* Of course, this reading ignores the provisions directing the use of such admitted information. *See* 2019 MCM, *supra* note 1, MIL. R. EVID. 413(a) ("The evidence may be considered *on any matter* to which it is relevant." (emphasis added)). *See also* discussion *infra* Section III.A.3.a.

[52] *Hills*, 75 M.J. at 355.

[53] *Id.*

[54] *Id.*

[55] *Id.* In its opinion, the CAAF also noted that the Article 32 officer had recommended against going to trial, another indication of the CAAF's concern about the *Hills* facts. *Id.* at 352.

[56] *Id.* at 356.

charged offense under deliberation) occurred.[57] If so, then "*even if you are not convinced beyond a reasonable doubt* that the accused is guilty of one or more of those offenses, you may nonetheless consider the evidence of such offenses, or its bearing on any matter to which it is relevant in relation to the other sexual assault offenses . . . ."[58]

This juxtaposition of differing standards of proof highlighted the constitutional conundrum. The accused had the right to have every element of every offense proved beyond a reasonable doubt.[59] He had pled not guilty to all charges and, therefore, enjoyed the presumption of innocence as to those offenses.[60] As CAAF noted, "It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent."[61]

The CAAF examined the panel instructions in light of these constitutional principles. It observed that the instructions "provided the members with directly contradictory statements about the bearing that one charged offense could have on another, one of which required the members to discard the accused's presumption of innocence, and with two different burdens of proof—preponderance of the evidence and beyond a reasonable doubt."[62] Not surprisingly, the court held that "the instructions in this case invited the members to bootstrap their ultimate determination of the accused's guilt with respect to one offense using the preponderance of the evidence burden of proof with respect to another offense."[63] It further concluded that the error was not harmless beyond a reasonable doubt, and reversed the lower court's ruling.[64]

III. The CAAF Erred in Its Interpretation of MRE 413

While the CAAF correctly analyzed the panel instructions' constitutional shortcomings, it gravely erred in several respects in its statutory interpretation of MRE 413. First, it ignored the basic canons of

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[57] *Id.*
[58] *Id.* (emphasis added).
[59] *Id.* (citing *In re* Winship, 397 U.S. 358, 364 (1970)).
[60] *Id.* Here, the CAAF distinguished *Wright*, in which the accused contested only one of the charges. *Id.* (citing United States v. Wright, 53 M.J. 476, 479 (C.A.A.F. 2000)).
[61] *Id.*
[62] *Id.* at 357.
[63] *Id.*
[64] *Id.* at 358.

statutory construction. Second, its recourse to the legislative history was both unnecessary and unsound. Third, its textual interpretation undercut the purpose of Rule 413, ignoring the standard textual/purposive interpretative framework used by other courts (including the CAAF itself) in interpreting Rule 413. Finally, its interpretation would lead to irrational results.

A. The Court Failed to Apply Standard Canons of Statutory Construction

In its *Hills* decision, the CAAF abandoned the standard canons of statutory construction. To begin, it was not construing the correct version of MRE 413, instead using an outdated version not applicable to the charged misconduct. The CAAF also ignored the plain meaning rule, failing to even examine the text of the outdated rule it applied. Finally, the CAAF failed to read MRE 413 in context, violating another basic canon of construction. Any one of these violations would be fatal to the court's analysis; taken as a whole, they severely undermine the CAAF's interpretation of MRE 413 in *Hills*.

1. The CAAF Analyzed Outdated Statutory Text

Although not specifically listed as a canon of statutory construction, it is axiomatic that the reviewing court should use the text of the statute in force at the time of trial. Even if the trial court incorrectly used an outdated statute, the reviewing court is obliged to correct the error. In *Hills*, the CAAF failed to do so, and instead focused its interpretation on superseded language. It thereby diminished the integrity of its statutory interpretation and limited the prospective effect of its decision.

As with many MREs, the language of MRE 413 closely tracks the corresponding FRE. The FREs, including FRE 413, were updated in 2011;[65] the MREs followed suit via Executive Order in May 2013, largely adopting the restyled Federal rules for application in military courts-martial.[66] The President directed these changes to take effect immediately.[67]

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[65] H.R. DOC. NO. 112-28 (2011), https://www.gpo.gov/fdsys/pkg/CDOC-112hdoc28/pdf/CDOC-112hdoc28.pdf. The FREs were updated to "adopt clear and consistent style conventions for all of the rules." *Id.* at 99–100.

[66] Exec. Order No. 13,643, 3 C.F.R.246 (2014).

[67] *Id.* § 2. However, this section also stated that these amendments should not be construed as expanding criminal liability for acts committed prior to the effective date, and neither should it be construed as invalidating any action commenced prior to the effective date. *Id.* For procedural rules, such as those governing admission of evidence, the evidence rules in

Sergeant Hills should have been tried under the amended MRE 413. The charges against SGT Hills were referred to a general court-martial on 11 June 2013, he was arraigned on 18 July 2013, and he was tried 23 to 25 September 2013—all after the revised MRE 413's implementation.[68] However, the trial court interpreted the outdated language.[69] The CAAF failed to notice or correct this error, instead compounding the trial court's mistake by also analyzing the superseded text.

2. The Hills *Court Did Not Apply the Ordinary Meaning of MRE 413's Text*

"[T]he beginning point [of statutory construction] must be the language of the statute [itself] . . . ."[70] If the language is unambiguous and "the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."[71] Judges universally apply[72] this "basic and unexceptional" principle.[73] The

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place at the time of trial govern. *Cf.* Hopt v. People, 110 U.S. 574, 587–88 (1884) (holding the changes in rules governing the competency of felons to testify did not violate the *ex post facto* clause).

[68] Joint Appendix at 18, 22, United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016) (No. 15-0767/AR).

[69] *Id.* The court may have done so because the Government cited the 2008 *Manual for Courts-Martial* as authority for its MRE 413 motion. *Id.* at 282.

[70] Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

[71] Caminetti v. United States, 242 U.S. 470, 485 (1917) (citations omitted). *See also* Estate of Cowart, 505 U.S. at 475 ("[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

[72] Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (Rehnquist, C.J.) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." (citations omitted)); Burlington N. R.R. Co. v. Okla. Tax Comm'n, 481 U.S. 454, 461 (1987) (Marshall, J.) ("Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'" (alteration in original) (citation omitted)).

[73] Estate of Cowart, 505 U.S. at 476.

only exceptions to the plain meaning canon are when the text creates an absurd result[74] or suggests a drafting error.[75]

A closely related canon directs using the ordinary meaning of the text within the statute.[76] The ordinary-meaning rule, which has been called "the most fundamental semantic rule of interpretation,"[77] simply states that in the absence of a legislatively provided definition, courts will construe the "statutory term in accordance with its ordinary or natural meaning."[78] Courts will use a variety of approaches to discern the ordinary meaning of a term, including context, operation, or other laws passed contemporaneously with the passage under consideration.[79] Courts will also use "standard, recognized dictionaries [as] a valuable source to understand a word's approved, common meaning."[80]

Even though the CAAF interpreted outdated language, it is nonetheless a meaningful starting point for analysis. Differences between the current language and the language analyzed by the CAAF provide a basis to amend MRE 413 to explicitly permit charged misconduct to be used as 413 evidence.[81]

Prior to May 2013, MRE 413(a) provided that "[i]n a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which

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[74] United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012) ("Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." (citation omitted)). However, the absurd results doctrine is rarely invoked. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 459 (2002).

[75] Bohac v. Dep't of Agric., 239 F.3d 1334, 1338 (Fed. Cir. 2001).

[76] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–76 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)).

[77] SCALIA & GARNER, *supra* note 70, at 69.

[78] FDIC v. Meyer, 510 U.S. 471, 476 (1994) (citation omitted).

[79] 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:28 (7th ed. 2019).

[80] *Id.* (citations omitted). Of course, a dictionary definition can be misused, especially if a single dictionary produces a contrary (but interpretatively desirable) result. *Id.* Nonetheless, "dictionaries can provide a useful starting point to determine a term's meaning, at least in the abstract, by suggesting what a legislature could have meant by using a particular term." *Id.*

[81] *See* discussion *infra* Section V.A.1.

it is relevant."[82] Two phrases merit closer examination: the phrase identifying the subject of the charge ("an offense of sexual assault") and the phrase describing the other admissible evidence ("one or more offenses of sexual assault").

The noun phrase "offense of sexual assault" is modified by the indefinite article "an." As the indefinite article, "an" is "[u]sed . . . before most singular nouns . . . when the individual in question is undetermined . . . esp. when the individual is being first mentioned or called to notice . . . ."[83] While the subject of the charge is identified individually, the Rule describes the evidence of other sexual misconduct as "one or more offenses of sexual assault." Thus, "one or more" can reach any other sexual misconduct committed by the accused (including charged misconduct), as the text does not contain any limiting principle. However, the phrase "one or more" does not define the outer limits of the corpus of admissible evidence. It is, therefore, at least susceptible to judicial limitation.[84]

The current text of Rule 413 is even more straightforward: "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense."[85] As with the previous language, the identification of the subject of the charge focuses solely on the charge. However, the phrase of admission widens the universe of sexual offenses to any other sexual offense committed by the accused. The word "any" denotes "the maximum or whole of a number or quantity,"[86] while "other" refers to "[e]xisting besides, or distinct from,

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[82] 2012 MCM, *supra* note 1, MIL. R. EVID. 413(a). The rule defined "offenses of sexual assault" as including crimes that involved "any sexual act or sexual contact, without consent . . . ." *Id.* at MIL. R. EVID. 413(d)(1).

[83] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1 (1976) [hereinafter WEBSTER'S DICTIONARY]. *Accord* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1 (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed. 1987) [hereinafter RANDOM HOUSE DICTIONARY] ("[N]ot any particular or certain one of a class or group: *a man; a chemical; a house*.").

[84] *See, e.g.*, United States v. Hills, 75 M.J. 350, 354 (C.A.A.F. 2016).

[85] 2019 MCM, *supra* note 1, MIL. R. EVID. 413(a).

[86] WEBSTER'S DICTIONARY, *supra* note 83, at 97 (using "give me [any] letters you find" and "he needs [any] help he can get" as examples). *Accord* THE OXFORD ENGLISH DICTIONARY 539 (2d ed. 1989) [hereinafter OED] ("In affirmative sentences it asserts concerning a being or thing of the sort named, without limitation as to which, and thus constructively of *every* one of them, since every one may in turn may be taken as a representative . . . ."); RANDOM HOUSE DICTIONARY, *supra* note 83, at 96 ("[E]very; all: *Any schoolboy would know that. Read any books you find on the subject*.").

that already mentioned or implied."[87] Thus, the phrase "the accused committed any other sexual offense" casts a wide net. The only textual exclusion is the charged offense itself, which is excepted out by the word "other." As with the previous rule, this version does not prescribe any other limitations. However, with the current language, the outer limits of the corpus of admissible evidence are well-defined: it is any offense other than the charged offense.[88]

This singular/universal dichotomy (present in both versions of the text) contrasts the one (the subject of the charge) against the many (the other sexual misconduct). This distinction is sharpened when juxtaposed against the backdrop of the spillover instruction. In nearly every court-martial involving "unrelated but similar offenses," the military judge instructs that "[a]n accused may be convicted based only on evidence before the court (not on evidence of a (general) criminal disposition). Each offense must stand on its own and you must keep the evidence of each offense separate."[89] Thus, when the accused is charged with several sexual offenses, MRE 413 contemplates addressing each offense individually ("a sexual offense") while still permitting the other charged offenses to be a part of the universe of evidence considered relating to any other sexual offenses committed by the accused.[90]

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[87] OED, *supra* note 86, at 981. *Accord* WEBSTER'S DICTIONARY, *supra* note 83, at 1598 ("[N]ot being the one (as of two or more) first mentioned . . . ."). *See also* RANDOM HOUSE DICTIONARY, *supra* note 83, at 1371 ("[B]eing the remaining ones of a number: *the other men, some other countries*.").

[88] Put another way, the previous language started narrow ("one") and then expanded ("or more"), whereas the present language is as expansive as possible ("any") limited only by the eliminating the subject of the charge ("other").

[89] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ¶ 7-17 (1 Sept. 2014) [hereinafter BENCHBOOK]. Although many of the references to the Benchbook are identical between the 2014 edition and the most current version, the instructions concerning MRE 413 were changed in response to *Hills*. *See also* United States v. Hogan, 20 M.J. 71, 73 (C.M.A. 1985) (noting that "spillover" from one offense to the next "would violate one of the most basic precepts of American jurisprudence: that an accused must be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition." (citing United States v. Lotsch, 102 F.2d 35, 36 (2d Cir. 1939))).

[90] When used with charged misconduct, MRE 413 departs from the spillover mandate, although it is important to note that Rule 413 was passed well after *Hogan* and *Lotsch*. This is not unique to Rule 413: The Benchbook specifically contemplates the use of charged misconduct as MRE 404(b) evidence. BENCHBOOK, *supra* note 89, ¶ 7-17, Note 2 ("Notwithstanding the [spillover] instruction . . . there are circumstances under MRE 404(b) when evidence relating to one charged offense may be relevant to a similar, but unrelated charged offense."). Military Rule of Evidence 404(b) permits the use of other

Of course, the evidence of other charged sexual offenses would already be before the court-martial because such evidence would be relevant as to those charges. In our hypothetical case, the evidence of prior sexual offenses at "A" school and at the accused's previous unit would be admissible to prove those charges. However, the "spillover" instruction, read in isolation, would prevent panel members from considering evidence of those assaults in their deliberations on the most recent assault. It instead directs panel members to keep the evidence of each offense separate.[91] This issue brings us to the next canon of statutory construction: the whole-text canon.

3. The CAAF Failed to Construe MRE 413 in Context

The whole-text canon is a "fundamental principle of statutory construction (and, indeed, of language itself) that [states that] the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[92] Context is critically important because it "is a primary determinant of meaning."[93] When applied to either version of MRE 413, the context reveals that MRE 413 applies equally to charged and uncharged misconduct because the Rule specifies the permissible *uses* of the evidence. However, much of the CAAF's analysis of MRE 413 rests upon an incorrect assumption that MRE 413 merely regulates the *admission* of otherwise inadmissible evidence.[94]

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crimes, wrongs, or acts to prove anything except the character of the accused, including motive, opportunity, or absence of mistake. 2019 MCM, *supra* note 1, MIL. R. EVID. 404(b).

[91] BENCHBOOK, *supra* note 89, ¶ 7-17.

[92] Deal v. United States, 508 U.S. 129, 132 (1993), *cited with approval in* Yates v. United States, 574 U.S. 528, 537 (2015).

[93] SCALIA & GARNER, *supra* note 70, at 167. *See also* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . ." (citation omitted)).

[94] *See, e.g.*, United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016) (discussing the notice provisions as logically implying that "only evidence of uncharged offenses (of which the accused would not otherwise be aware absent disclosure) are contemplated by the rule"). "Charged misconduct is already admissible at trial under M.R.E. 401 and 402, and it is not subject to exclusion under M.R.E. 404(b)." *Id.*

a. With Charged Misconduct, Every Rule of Evidence Governing Admission of Evidence is a Rule of Admission and Use

When an accused is charged with unrelated but similar offenses, a rule of admission necessarily governs use as well.[95] Thus, in this context there is no bifurcation between admission and use, and for evidence to be admitted over an objection, it must be offered for a specific purpose. The purpose may be broad, such as making a fact "more or less probable than it would be without the evidence,"[96] or it can be narrow, such as when offered to prove the accused's motive, opportunity, or intent.[97] Put another way, in this context a finding that a piece of evidence is admissible is shorthand for that piece of evidence being admissible for a particular purpose.[98]

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[95] As noted previously, the standard spillover instruction operates in the background of any trial where there are multiple "similar, but unrelated" charges. *See supra* notes 89–90 and accompanying text. Even without objection, evidence of one crime may not be admitted as to another (unless relevant to both). Hearkening back to the opening hypothetical, evidence of each of the separate assaults could *only* be used as to that specific charge. *See* United States v. Burton, 67 M.J. 150, 152 (C.A.A.F. 2009) ("The Government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as M.R.E. 404 or 413.").

[96] 2019 MCM, *supra* note 1, MIL. R. EVID. 401. Of course, it is not just any fact, but a fact that is "of consequence in determining the action." *Id.*

[97] *Id.* at MIL. R. EVID. 404(b).

[98] Once viewed in this way, using MRE 403 to exclude charged evidence from being used as MRE 413 evidence is doctrinally consistent. MRE 403 provides that a judge may exclude (i.e., not admit it for certain purposes) otherwise relevant evidence if the probative value is substantially outweighed by certain factors. *Id.* at MIL. R. EVID. 403. In the MRE 413 context, the MRE 403 analysis is informed by the factors detailed in *United States v. Wright*. 53 M.J. 476, 482 (C.A.A.F. 2000). A piece of evidence could be admitted to prove one of the charged acts while still being excluded from being used as MRE 413 evidence. The *Hills* case provides a paradigmatic case where evidence of charged misconduct, otherwise before the court-martial as evidence of charged misconduct, should have been excluded from admission as MRE 413 evidence. *See, e.g.*, United States v. Hills, ARMY 20130833, 2015 WL 3940965, at *9 (A. Ct. Crim. App. June 25, 2015) (finding that the trial judge abused his discretion by admitting charged misconduct as MRE 413 evidence in violation of MRE 403), *rev'd*, 75 M.J. 350 (C.A.A.F. 2016). *See also* People v. Villatoro, 281 P.3d 390, 409 (Cal. 2012) ("Even where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote or unconnected to each other, that the trial court could apply the criteria of [Rule 403] and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses.").Because the panel has already heard evidence of the charged misconduct, the practical effect of excluding charged misconduct as MRE 413 evidence is one of instructions. Yet courts should maintain the doctrinal dividing line between admitting evidence for one purpose (to prove a charged offense)

Thus, if purpose is required for admission, even the admission of a piece of evidence for one purpose does not mean it can be used for all purposes.[99] For example, a witness's prior inconsistent statement usually cannot be considered as evidence of its own truth, but it can be used to evaluate the witness's credibility.[100] Similarly, if the accused testifies, a prior conviction for a crime of moral turpitude may only be used for "its tendency, if any, to weaken the credibility of the accused as a witness."[101] If there are purposes for which the evidence may not be used, MRE 105 requires a judge to instruct the members to restrict their use of the evidence to its proper scope.

This concept of limited admissibility applies to evidence of similar but unrelated charges. Here, as noted above, the military judge instructs the members that they may not use evidence of one offense to convict for

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while excluding it for another (to be used as propensity evidence, notwithstanding Rule 413). Not all courts maintain fidelity to this distinction. *See, e.g.*, United States v. Williams, 75 M.J. 621, 626 (A. Ct. Crim. App. 2016) ("In a case where the application of M.R.E. 413 involves only charged misconduct, we agree with the military judge that this is not a matter of admissibility, but is rather one of instructions."), *vacated*, 75 M.J. 430 (C.A.A.F. 2016); *see also* United States v. Henry, 75 M.J. 595, 607 (A.F. Ct. Crim. App. 2017) ("Admissibility of charged (contested) conduct: Evidence of charged conduct is already independently admissible and thus does not require a separate rule to authorize its admission. Therefore, cases interpreting and applying Mil. R. Evid. 413 are not relevant to the admissibility of charged conduct.").

[99] 2019 MCM, *supra* note 1, MIL. R. EVID. 105 ("If the military judge admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the military judge, on timely request, must restrict the evidence to its proper scope and instruct the members accordingly."). *Cf.* United States v. Abel, 469 U.S. 45, 56 (1984) ("[T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case.").

[100] 2019 MCM, *supra* note 1, MIL. R. EVID. 801(c) (defining hearsay as an out-of-court statement offered for the truth of the matter asserted). *See also* BENCHBOOK, *supra* note 89, ¶ 7-11-1 ("[Panel members] may not consider the earlier [inconsistent] statement(s) as evidence of the truth of the matters contained in the prior statement(s). In other words, you may only use [them] as one way of evaluating the witness's testimony here in court. You cannot use [them] as proof of anything else."). However, if the prior inconsistent statement was given under "penalty of perjury at a trial, hearing, or other proceeding or in a deposition," the statement may be used substantively. 2019 MCM, *supra* note 1, MIL. R. EVID. 801(d)(1)(A).

[101] BENCHBOOK, *supra* note 89, ¶ 7-13-2. The instruction further admonishes that the panel "may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (he) (she), therefore, committed the offense(s) charged." *Id. See also* 2019 MCM, supra note 1, MIL. R. EVID. 609(a)(2).

another.[102] Thus, the fact that evidence has been put before the court-martial for the purpose of proving one charge is wholly irrelevant as to whether that evidence may be used (via Rule 413) to prove another. Placing the evidence before the court-martial is merely the first hurdle in the evidentiary steeplechase—the permitted uses of the evidence must also be resolved. Military Rule of Evidence 413 does exactly that.

b. Rule 413 Specifically Addresses the Permitted Uses of MRE 413 Evidence

Rule 413 explicitly reminds us of this purposive prerequisite to admission. Had the CAAF adhered to the whole-text canon and read the phrase of admission in conjunction with the clause directing the proper use of this evidence, they may have avoided their erroneous statutory interpretation.

In addition to regulating admission, MRE 413 also provides that "[t]he evidence may be considered on any matter to which it is relevant."[103] Without Rule 413, evidence of charged misconduct could not be used to prove a separate sexual offense specification.[104] Rule 413, however, permits the use of this evidence to prove another sexual offense. The mere fact that the other offense appears on the charge sheet does not limit its further admission as Rule 413 evidence because the purpose of proving an additional sexual offense is entirely distinct from proving the primary charged offense.

Unfortunately, in *Hills* the CAAF departed from this principle. First, the court stated that the "structure of the rule suggests that it was aimed at conduct other than charged offenses," observing that MRE 413's notice period would be superfluous for such offenses.[105] Yet it is not only the evidence that is important, but also the Government's desire to put that evidence to a particular use that triggers the notice provision. Even if the evidence is otherwise being presented, the notice provision permits the

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[102] BENCHBOOK, *supra* note 89, ¶ 7-17.

[103] 2019 MCM, *supra* note 1, MIL. R. EVID. 413(a). The abrogated language contains a similar provision, permitting the evidence to "be considered for its bearing on any matter to which it is relevant." 2012 MCM, *supra* note 1, MIL. R. EVID. 413(a).

[104] *See* United States v. Burton, 67 M.J. 150, 152 (C.A.A.F. 2009) ("The Government may not introduce similarities between a charged offense and prior conduct, *whether charged or uncharged*, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as M.R.E. 404 or 413." (emphasis added)).

[105] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016).

accused to marshal arguments to exclude the charged misconduct as MRE 413 evidence.[106]

Next, the CAAF held, "Charged misconduct is already admissible at trial under M.R.E. 401 and 402, and it is not subject to exclusion under M.R.E. 404(b). Thus, as a matter of logic, it does not fall under M.R.E. 413, which serves as an exception to M.R.E. 404(b)."[107] Again, the CAAF ignores the purposive dimension of admitting evidence, conflating placing the evidence before the court-martial with admitting the evidence for all purposes. Further, MRE 413 does serve as an exception to MRE 404(b); however, it excepts the permissible *uses* of the evidence, not its *admission* or exclusion.[108]

Other parts of MRE 413 highlight the dichotomy between the admission of evidence and its subsequent use by the panel in their deliberations. The rule specifically states that it "does not limit the admission or consideration of evidence under any other rule."[109] Had the CAAF considered the entirety of MRE 413, it would have been reminded that admission of evidence involves an analysis of the use of that evidence. In doing so, it should have concluded that MRE 413 permits the use of both charged and uncharged misconduct.

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[106] *See supra* note 98.

[107] *Hills*, 75 M.J. at 355 (citations omitted). The CAAF quoted Representative Susan Molinari in support of this proposition. *Id.* ("The new rules will supersede in sex offense cases the restrictive aspects of Federal [R]ule of [E]vidence 404(b)." (alteration in original) (quoting 140 CONG. REC. 23603 (1994) (statement of Rep. Susan Molinari)). However, Representative Molinari went on to say that in "contrast to rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing 'on any matter to which it is relevant,'" clarifying that the exception to Rule 404(b) was on the *use* of the evidence. 140 CONG. REC. 23603 (1994) (statement of Rep. Susan Molinari).

[108] Military Rule Evidence 404(b) prohibits "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." 2019 MCM, *supra* note 1, MIL. R. EVID. 404(b)(1). However, such evidence can be used for *any other* purpose, including proving intent, opportunity, or motive. *Id.* at MIL. R. EVID. 404(b)(2). The proponent must identify the specific purpose of the evidence, and the use of the evidence is restricted to that stated purpose. United States v. Smith, 52 M.J. 337, 342 (C.A.A.F. 2000); *see also* BENCHBOOK, *supra* note 89, ¶ 7-13-1 (providing instructions for MRE 404(b) evidence). In contrast, MRE 413 is not restrictive in its prescribed uses of the evidence. 2019 MCM, *supra* note 1, MIL. R. EVID. 413(a). Thus, MRE 404(b) places a restriction on the *use* of the evidence, while MRE 413 provides an exception to that restrictive use.

[109] 2019 MCM, *supra* note 1, MIL. R. EVID. 413(c).

Although the plain-text and whole-text canons are not the only textual canons offended by the CAAF's interpretation,[110] the CAAF's discounting of these basic principles caused the court to look beyond the unambiguous text to other less authoritative sources to reach its interpretative ends.

B. The Examination of MRE 413's Legislative History is Unnecessary, Lacks Context, and is Unduly Narrow

The CAAF not only examined the structure of MRE 413, but also its legislative history. However, as noted previously, if the statutory text is unambiguous, then recourse to the legislative history is unnecessary.[111] Moreover, the CAAF's brief examination of MRE 413's legislative history focused solely on those parts of the history that discuss uncharged misconduct. This singular focus failed to provide appropriate context and ignored parts of the history that address the purposes of the Rule.[112]

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[110] Courts are also prohibited from inserting language into the statutory text. As Justice Felix Frankfurter noted, "A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947). *See also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) ("Judicial interpolation of legislative gaps would be questionable even if judges could ascertain with certainty how the legislature would have acted . . . . The unaddressed problem is handled by a new legislature with new instructions from the voters."). The insertion of the word "uncharged" into MRE 413's text violates this principle. *But see* SINGER & SINGER, *supra* note 79, § 47:38 ("Although some courts are hesitant to supply or insert words, the better practice probably requires courts to enforce legislative intent or statutory meaning where it is clearly manifest. The judicial addition of words necessary for the clear expression of intent or meaning assists legislative authority.").

[111] *See supra* note 71 and accompanying text.

[112] The use of floor speeches, remarks, and committee reports as interpretative aids is not universally accepted. *See generally* SCALIA & GARNER, *supra* note 70, at 369–90 (detailing the historical pedigree of eschewing legislative history as aids in statutory construction). *But see* SINGER & SINGER, *supra* note 79, § 47:15 ("[C]ourts may use statements by a bill's sponsor as an interpretive aid . . . . In no event are contemporaneous sponsor remarks controlling to analyze legislative history."). However, to the extent they should be used at all, these legislative materials must be both contextual and complete. Courts, including the CAAF, have used these materials when examining the scope of Rule 413. *See, e.g.*, United States v. Wright, 53 M.J. 476, 480 (C.A.A.F. 2000); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998); United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

1. The References to Uncharged Misconduct Lack Context

In its brief examination of Rule 413's legislative history, the CAAF did not account for the differences between civilian criminal trials and courts-martial. It included only two statements from the history, both of which state that the Rule is designed for uncharged misconduct.[113] This is not surprising, as the legislative history is replete with references to uncharged misconduct. However, these statements were made in support of a rule for civilian courts. In contrast to courts-martial, these courts have jurisdictional and jurisprudential limitations which limit their ability to hear all known offenses in a single trial.

The jurisdiction of civilian courts, federal or state, is limited by the location of the crime. Generally, crimes within a state's boundaries are subject only to the law of that state.[114] As for federal crimes, not only must there be federal jurisdiction over the offense, but the Constitution directs that trials shall be "held in the state where the said crimes shall have been committed."[115] This jurisdictional issue was one of the reasons undergirding Rule 413's proposal.[116] In that context, "uncharged" simply means the court lacks jurisdiction to hear the case.

In contrast, court-martial jurisdiction relies upon the status of the offender instead of the location of the crime.[117] In our hypothetical, the most recent assault took place overseas, while the other two assaults took place stateside, albeit on different coasts. Yet none of this presents a problem: all could be joined in a single court-martial.

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[113] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016).

[114] CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 21–23 (2016) (noting that extraterritorial application of state law occurs "in only a limited set of circumstances and ordinarily only in cases where there is some clear nexus to the state").

[115] U.S. CONST. art. III, § 2, cl. 3. *See also id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."); FED. R. CRIM. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.").

[116] Karp, *supra* note 14, at 25 ("This occurs, for example, in the case of a rapist or child molester who commits crimes in a number of different states, or who commits some crimes in state jurisdiction and others in federal jurisdiction."). *See also* 137 CONG. REC. 6033–34 (1991).

[117] UCMJ art. 2(a) (1950); *see also* Solorio v. United States, 483 U.S. 435, 451 (1987) (holding that the military status of the accused is dispositive as to personal jurisdiction).

But it is not only the worldwide jurisdiction that separates courts-martial from civilian criminal trials; the standards for joinder and severance are also different. In a federal civilian trial, there are discrete reasons to join offenses.[118] In the military, "[o]rdinarily all known charges should be referred to a single court-martial."[119] In addition, the civilian standards for severance are much more expansive, providing for severance if joinder "appears to prejudice the defendant."[120] This prejudice includes the "possibility that the jury might use evidence of one crime to infer guilt on the other or that the jury might cumulate the evidence to find guilt on all crimes when it would not have found guilt if the crimes were considered separately."[121] In contrast, a military judge may sever offenses "only to prevent manifest injustice."[122] The drafters recognized that this provision "roughly parallels Fed. R. Crim. P. 14, but is much narrower because of the general policy in the military favoring trial of all known charges at a single court-martial."[123]

Although much of the legislative history for FRE 413 may apply to MRE 413, blindly applying it discounts the differences between the two systems. The military's offender-based jurisdiction ensures that many disparate crimes—potentially committed in a variety of civilian jurisdictions—will be joined in a single trial. There is a strong preference in the military system

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[118] The federal rules permit joinder when the offenses "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." FED. R. CRIM. P. 8(a). Although the standards for joinder are also narrower in federal court than in courts-martial, the federal rules still provide for joinder of offenses of "same or similar character," which would presumably permit joining disparate allegations of sexual offenses into a single trial. *See, e.g.*, United States v. Tyndall, 263 F.3d 848, 850 (8th Cir. 2001) (upholding joinder of two sexual assaults occurring within a year of each other). However, several states are even more restrictive, permitting joinder only when the offenses arise out of the same course of conduct. *See, e.g.*, FLA. R. CRIM. P. 3.150; PA. R. CRIM. P. 453; UTAH CODE ANN. § 77-8a-1 (West 1990); MASS. R. CRIM. P. 9. *See also* MASS. R. CRIM. P. 9, Reporter's Notes ("Rule 9 takes the position that the goal of judicial economy will rarely be paramount to affording the defendant a trial as free from prejudice as possible; therefore, joinder of unrelated offenses is prohibited except at the instance of the defendant or with his written consent.").

[119] 2019 MCM, *supra* note 1, R.C.M. 601(e)(2) Discussion.

[120] FED. R. CRIM. P. 14(a).

[121] United States v. Midkiff, 614 F.3d 431, 440 (8th Cir. 2010) (quoting United States v. Boyd, 180 F.3d 967, 981–82 (8th Cir.1999)).

[122] 2019 MCM, *supra* note 1, R.C.M. 906(b)(10).

[123] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 906(b)(10) Analysis, at A21-54 (2016). Severance "may still be appropriate in unusual cases." *Id.* The 2016 edition of the MCM is cited because the appendices were sharply abrogated in the 2019 edition.

for this practice.[124] The CAAF's failure to acknowledge this context contributed to its erroneous interpretation of MRE 413. Even disregarding this gloss of the differences between systems, the *Hills* court's examination of the legislative history remains thin and narrow.

2. Hills *Quoted Only a Small Subset of the Historical Materials*

Although there was ample material,[125] *Hills* only examined two statements from the legislative history.[126] This sparse consideration ignores statements discussing the proposed uses of this evidence—purposes which apply equally to both charged and uncharged misconduct. For example, Senator Dole noted the evidence of other sexual offenses may be used to demonstrate "the defendant's propensity to commit sexual assault or child molestation offenses."[127] Additionally, he noted that this evidence would aid the factfinder in assessing "the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense."[128] These types of justifications fill the legislative history,[129] but were ignored by the *Hills* court.

Thus, the CAAF's examination of the legislative history is both unnecessary and unsatisfactory. It is unnecessary because the statutory text is unambiguous and does not limit the consideration of other sexual offenses.[130] It is unsatisfactory because resorting to the legislative history does not clarify whatever ambiguity one might pretend to find. For example, the legislative history is full of references to uncharged misconduct; but it also contains references to jurisdictional challenges to bringing all charges in a single forum.[131] The history also addresses the different uses of the evidence, which apply to both charged and uncharged

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[124] *See* United States v. Simpson, 56 M.J. 462, 464 (C.A.A.F. 2002).
[125] *See supra* note 14.
[126] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016).
[127] 140 CONG. REC. 24799 (1994) (statement of Sen. Dole). *See also* 140 CONG. REC. 24603 (1994) (statement of Rep. Molinari).
[128] 140 CONG. REC. 24799 (1994) (statement of Sen. Dole). *See also* 140 CONG. REC. 24603 (1994) (statement of Rep. Molinari).
[129] *See, e.g.*, 137 CONG. REC. 6032–33 (1991) (discussing the use of other sexual offense evidence to show "motivation" and "improbability"); Karp, *supra* note 14, at 20–21 (discussing the same).
[130] Rubin v. United States, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete . . . ." (citation omitted)).
[131] *See supra* note 116.

misconduct. So, if any inquiry is appropriate, it must move beyond the words of the legislative history, and examine the purposes of the Rule.

C. *Hills*'s Interpretation of MRE 413 Undercuts Its Purpose

Discerning and giving effect to a statute's purpose is, of course, the aim of statutory interpretation. As noted above, the purpose is often found in the plain words of a statute.[132] If not apparent on the face of the statute, then "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[133]

As the *Hills* court realized, MRE 413 was enacted to account for the recidivist tendencies of sex offenders.[134] Yet the court narrowed MRE 413 to undercut this purpose. Recidivist tendencies need not be uncharged to be evident. Indeed, of the many cases involving charged misconduct as MRE 413 evidence,[135] the overwhelming majority deal with multiple victims whose assaults are separated by significant periods of time.[136] Far fewer cases feature multiple charged allegations by the same victim (albeit over a period of months or years),[137] and only five feature multiple charged

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[132] *See supra* notes 70–76 and accompanying text.

[133] SCALIA & GARNER, *supra* note 70, at 63.

[134] United States v. Hills, 75 M.J. 350, 355 (2016) (recognizing that MRE 413 permits "bolstering the credibility of a victim because '[k]nowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of [the victim's] claims . . . .'" (quoting Karp, *supra* note 14, at 21 (alteration in original))). "M.R.E. 413 was intended to permit the members to consider the testimony of other victims with respect to an accused's past sexual offenses". *Id.* Regardless of the wisdom of this particular policy goal, the admission of other sexual offenses for this purpose represents the considered legislative judgment of Congress. *See supra* note 21.

[135] As of 12 July 2020, there are at least ninety-one cases (not including *Hills*) where the Government sought to use charged misconduct as MRE 413 evidence. The author conducted two Westlaw searches to identify these cases. The first search examined any case that cited *Hills*. The second search ("charge! /s (413 OR 414)") found instances predating *Hills* where the Government sought to use charged misconduct as MRE 413 evidence.

[136] Of the ninety-one cases, seventy-four dealt with different victims assaulted on different occasions. *See, e.g.*, United States v. Guardado, 75 M.J. 889, 892 (A. Ct. Crim. App. 2016) (at least four victims, assaults spanning several years), *rev'd in part*, 76 M.J. 90 (C.A.A.F. 2017); United States v. Claxton, ACM 38188, 2016 WL 6575036, at *2 (A.F. Ct. Crim. App. Oct. 31, 2016) (two victims, assaults separated by nine months), *aff'd*, 76 M.J. 356 (C.A.A.F. 2017); United States v. Ellis, No. 201500163, 2016 WL 4529601, at *1 (N-M. Ct. Crim. App. Aug. 30, 2016) (two victims, assaults separated by nine months).

[137] Only eleven (out of ninety-one) involved the same victim being assaulted over a long period of time. *See, e.g.*, United States v. Berger, NMCCA 201500024, 2016 WL 3141753, at *1 (N-M. Ct. Crim. App. May 26, 2016) (accused assaulted his wife over a period of at least thirteen months), *rev'd*, 76 M.J. 128 (C.A.A.F. 2014); United States v. Bonilla, ARMY

events in the same evening (albeit with different victims).[138] There are only four cases (*Hills* and three others) where MRE 413 was used for offenses against the *same* victim on the *same* occasion.[139]

The *Hills* case is an outlier, likely not contemplated by the drafters of Rule 413. The CAAF was correct in recognizing that the Rule's history did not support the use of evidence between charges that cover the same course of conduct.[140] Yet the CAAF's opinion not only encompasses situations raised by *Hills*, but also any situation involving charged misconduct.[141] In doing so, it undermined a key purpose of Rule 413: permitting the factfinder to use all available information about the accused's other

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20131084, 2016 WL 5682541, at *1 (A. Ct. Crim. App. Sept. 30, 2016) (accused assaulted his step-daughter over a period of eight years), *aff'd*, 76 M.J. 335 (C.A.A.F. 2017).

[138] *See, e.g.*, United States v. Williams, ARMY 20140924, 2016 WL 7416140, at *2 (A. Ct. Crim. App. Dec. 21, 2016) (accused assaulted two different women in a single evening), *aff'd*, 77 M.J. 64 (C.A.A.F. 2017); United States v. Reynolds, ARMY 20140856, 2017 WL 65548, at *1 (A. Ct. Crim. App. Jan. 5, 2017) (accused assaulted a Sergeant First Class and her daughter at the same family gathering), *vacated and remanded*, 76 M.J. 442 (C.A.A.F. 2017); United States v. Martin, NMCCA 201400315, 2015 WL 3793707, at *1 (N-M. Ct. Crim. App. June 18, 2015) (accused assaulted two different junior enlisted members at the same party). *Martin* preceded *Hills*, and the court summarily dismissed the MRE 413 issue in a footnote. *Martin*, 2015 WL 3793707, at *1 n.1. The CAAF granted review on an unrelated issue and affirmed. United States v. Martin, 75 M.J. 321, 322 (C.A.A.F. 2016).

[139] Three of these cases were reversed. *See, e.g.*, United States v. Duarte, ARMY 20140843, 2017 WL 413946, at *1 (A. Ct. Crim. App. Jan. 30, 2017) (per curiam). The only affirmance came in *United States v. Mark*, ARMY 20160101, 2017 WL 4842562 (A. Ct. Crim. App. Oct. 23, 2017) (per curiam), where the court found the accused had waived his objection to the MRE 413 instruction. *Id.* at *1.

[140] United States v. Hills, 75 M.J. 350 355 (2016) ("[T]here is no indication that M.R.E. 413 was intended to bolster the credibility of the named victim through inferences drawn from the same allegations of the same named victim."). Although the court drew the distinction between a single victim and multiple victims, both conditions (same victim *and* same allegations) must be true to be satisfied, as David Karp specifically addressed the need for this evidence when the allegations involve a single victim, presumably on multiple occasions. Karp, *supra* note 14, at 34 ("My final illustration concerns the class of cases in which the charged offense and the uncharged acts were committed against the same victim."). Same-victim evidence usually arises in cases of familial assaults, either on the spouse, *e.g.*, *Berger*, 2016 WL 3141753, at *1 (accused's wife), or the children, *e.g.*, *Bonilla*, 2016 WL 5682541, at *1 (accused's step-daughter).

[141] The CAAF reinforced this prohibition in *United States v. Hukill*. United States v. Hukill, 76 M.J. 219, 222 (C.A.A.F. 2017) ("We therefore clarify that under *Hills*, the use of evidence of charged conduct as M.R.E. 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected. Whether considered by members or a military judge, evidence of a charged and contested offense, of which an accused is presumed innocent, cannot be used as propensity evidence in support of a companion charged offense.").

sexual offenses in deciding whether to convict the accused.[142] The CAAF's analysis in *Hills* failed to hew to the standard textual/purposive analytical framework used by other courts interpreting Rule 413.

D. Courts Have Faithfully Employed the Textual and Purposive Analysis

The CAAF's errors are further highlighted when contrasted with other court opinions interpreting Rule 413. California's Supreme Court considered the admissibility of charged offenses under its version of MRE 413[143] in *People v. Villatoro*.[144] That court considered both the plain language[145] and the purpose of the Rule,[146] concluding that the Rule permitted the use of charged offenses.

The CAAF itself used this plain-language-focused, purpose-informed framework when it interpreted MRE 413 in *United States v. James*.[147] The *James* court examined whether the other sexual offenses needed to occur before the charged offense in order to be admissible.[148] Although MRE 413's legislative history speaks at length about "past" sexual offenses, the CAAF noted that the plain language of the Rule simply discussed "'one or more offenses' with absolutely no mention of when the offense(s) might have occurred."[149] The CAAF recognized the supremacy of the text, but looked to the Rule's purpose for support as well. After doing so, it could

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[142] *See* 137 CONG. REC. 6031 (1991) ("The willingness of the courts to admit similar crimes evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public's security against dangerous sex offenders.").

[143] The California rule of evidence governing other sexual offenses provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." CAL. EVID. CODE § 1108(a) (West 2019). Section 1101 generally prohibits character evidence, analogous to MRE 404(a), and Section 352 permits exclusion of otherwise admissible evidence, analogous to MRE 403. *Id.* §§ 352, 1101.

[144] People v. Villatoro, 281 P.3d 390 (Cal. 2012).

[145] *Id.* at 409 ("[W]e conclude nothing in the language of section 1108 restricts its application to uncharged offenses.").

[146] *Id.* ("[T]he clear purpose of section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses.").

[147] United States v. James, 63 M.J. 217, 221 (C.A.A.F. 2006).

[148] *Id.* at 217–18. Although *James* was an MRE 414 case, "[i]n light of the common history and similar purpose of M.R.E. 413 and M.R.E. 414, there is no need to distinguish the two rules for the purpose of our discussion of the granted issue." *Id.* at 220.

[149] *Id.* at 221.

"find no reason to conclude that prior misconduct is probative and subsequent misconduct is not."[150]

Had the CAAF followed a similar path in *Hills*, it might have avoided significant interpretative error. The *James* and *Villatoro* opinions demonstrate standard statutory interpretation: First examine the text, then, if necessary, consider the purpose of the rule. Analyzing MRE 413 using this interpretative framework reveals that there is no statutory bar to permitting use of charged misconduct as MRE 413 evidence.

E. Applying *Hills* Produces Incongruous and Incompatible Results

Using MRE 413 in a post-*Hills* world highlights how the CAAF's interpretive errors have undermined MRE 413's purpose. *Hills* forces the Government to choose between joining all known offenses in a single court-martial (and forgoing the evidentiary benefits of MRE 413) or instituting serial prosecutions, trying one assault after another. In addition, *Hills* arbitrarily excludes other sexual offense evidence. Both issues illustrate how *Hills* frustrates Rule 413's purpose: permitting the factfinder access to the accused's entire history of sexual misconduct.

While the military system strongly prefers to join all offenses in a single court-martial, *Hills* forces the Government to choose between two unpalatable courses of action: Either prosecute multiple offenses one at a time, requiring multiple trials with each of the victims testifying multiple times; or join all offenses in a single trial, forgoing the congressionally mandated evidentiary advantage.

Avoiding serial prosecutions serves several legitimate ends. The purpose of the military justice system is to quickly and fairly adjudicate offenses,[151] and multiple courts-martial works against this purpose. A court-martial is a significant expenditure of resources—not only for the lawyers involved, but also for panel members and witnesses.[152] Additionally, forcing victims of sexual assault to testify on multiple occasions

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[150] *Id.*

[151] *See* 2019 MCM, *supra* note 1, pt. I, ¶ 3 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[152] Prior to 1969, the *MCM* cautioned against joining minor and major offenses in a single court-martial. This requirement was found to be "too unwieldy to be effective, particularly in combat or deployment." *Id.*, R.C.M. 601(e) Analysis, at A21-29.

countermands the Government's significant interest in protecting victims, possibly even discouraging future sexual assault reports and full participation in the judicial process.[153] Congress has already recognized and addressed this problem as it related to victim testimony at Article 32 hearings; in 2012, it modified the UCMJ to avoid compelled victim testimony.[154] Mandating that a victim must testify at several proceedings frustrates strongly grounded policy.

Policy preferences are not the only things that illuminates the illogic of the CAAF's decision. *Hills* precludes the admission and use of contemporary sexual assaults while permitting evidence of assaults that are years or decades old. This admission of evidence rests not on considerations of relevance or prejudice, but only on whether the allegation appears on the charge sheet. Unlike other rules of evidence,[155] there is not a specific time bar for MRE 413 evidence.[156] Because memories fade, the quality of the evidence for older offenses is likely to be far lower than the evidence of more recent misconduct. Additionally, contemporary events provide a more accurate picture of the accused. Yet *Hills* provides for the admission and use of antiquated offenses while preventing the use of more contemporary evidence. This problem will only be exacerbated in the coming years with the elimination of the statute of limitations for sexual assault, which was previously five years.[157] So, for our hypothetical case, the accused's sexual assault in college (eight years old) could be used, while all of the

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[153] *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, NAT'L CRIME VICTIM L. INST., Sept. 2011, at 1 (detailing the trauma experienced by sexual assault victims during in-court testimony), http://www.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify.

[154] Lieutenant Colonel John Loran Kiel Jr., *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, ARMY LAW., July 2016, at 8, 10–11.

[155] *See, e.g.*, 2019 MCM, *supra* note 1, MIL. R. EVID. 609(b) (limiting the use of prior conviction evidence that is over ten years old).

[156] *See, e.g.*, United States v. Bailey, 55 M.J. 38, 40–41 (C.A.A.F. 2001) (holding MRE 413 evidence admissible when ten years elapsed between offense and trial); United States v. Larson, 112 F.3d 605, 605 (2d Cir. 1997) (holding FRE 413 evidence admissible when sixteen to twenty years had elapsed between offense and trial). *See also* 137 CONG. REC. 6034 (1991) ("[T]here is no justification for categorically excluding offenses that occurred before some arbitrarily specified temporal limit.").

[157] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1703, 127 Stat 672, 958 (2013) (amending Article 43, UCMJ).

more recent assaults (two and four years old) would have to stand on their own.

IV. The Panel Instructions Amplified Constitutional Error

Although the CAAF's statutory interpretation in *Hills* was seriously flawed, it correctly identified constitutional error in the way the MRE 413 evidence was used. The CAAF found two violations of the presumption of innocence: the use of differing standards of proof for charged misconduct, and the use of "presumed innocent" conduct to prove other offenses.[158]

A bedrock principle of American criminal law is that an accused is presumed innocent[159] until a judge or jury finds that every element of the charged offense is proved beyond a reasonable doubt.[160] A court violates the accused's Due Process rights by refusing to instruct on the presumption of innocence.[161] Additionally, judges must "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."[162] The dilution of this presumption can take many forms, such as forcing the accused to wear prison garb at trial,[163] the presence of a large number of uniformed police officers,[164] or confining the accused to a "prisoner's dock."[165] A prosecutor can also undermine the presumption, either through questioning a witness[166] or in argument.[167]

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[158] United States v. Hills, 75 M.J. 350, 356 (C.A.A.F. 2016). The instructions applied both the preponderance of evidence standard (for use as MRE 413 evidence) and the beyond a reasonable doubt standard (for conviction) to the same evidence in the same instruction. *See* discussion *supra* Section II.D.2.

[159] Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

[160] *In re* Winship, 397 U.S. 358, 364 (1970).

[161] *Coffin*, 156 U.S. at 461. *See also* Taylor v. Kentucky, 436 U.S. 478, 490 (1978).

[162] Estelle v. Williams, 425 U.S. 501, 503 (1976).

[163] *Id.* at 512.

[164] Johnson v. State, 406 S.W.3d 892, 914 (Mo. 2013).

[165] Walker v. Butterworth, 599 F.2d 1074, 1080 (1st Cir. 1979).

[166] United States v. Oshatz, 912 F.2d 534, 539 (2d Cir. 1990) (holding that a hypothetical question that assumes the accused's guilt is "prohibited because it creates too great a risk of impairing the presumption of innocence").

[167] Pagano v. Allard, 218 F. Supp. 2d 26, 36 (D. Mass. 2002) (referencing the accused's presumption of innocence as a "cloak that comes off" at the beginning of jury deliberations constituted a denial of due process).

A court can also dilute the accused's presumption of innocence by incorrectly instructing the panel. For example, this could be done by instructing the panel that the presumption of innocence is designed to protect the innocent and not the guilty.[168] Similarly, instructions that the panel must decide whether the accused is guilty or innocent ignore the bedrock presumption of innocence.[169] Incorrectly instructing on the use of circumstantial evidence can also degrade the accused's presumption of innocence and lower the Government's burden.[170] Even reminding the panel that the accused had a vested interest in the outcome of the trial presupposes the accused's guilt, and thus violates the accused's Due Process rights.[171]

More pertinently, if the panel must find a fact beyond a reasonable doubt, then instructing that it can find or infer the fact by a preponderance of the evidence is error. In *State v. Rodgers*, the Connecticut Supreme Court considered a jury instruction that permitted an inference established only by a preponderance of the evidence.[172] The court noted that the "the standard of proof as to inferred facts is no less than that applied to basic facts," and, thus, the instruction was constitutionally defective.[173]

A California appeals court confronted potential dilution of the presumption of innocence as it wrestled with the same issues presented by *Hills*. In *People v. Cruz*, a single defendant was accused of sexually assaulting three different girls on separate occasions.[174] The trial court

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[168] United States v. Doyle, 130 F.3d 523, 538 (2d Cir. 1997).

[169] United States v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995); United States v. Mendoza-Acevedo, 950 F.2d 1, 4 (1st Cir.1991).

[170] United States v. Dove, 916 F.2d 41, 46 (2d Cir. 1990) (finding that using a hypothetical inquiry into "whether Jack shot Mary," while instructing on the concept of circumstantial evidence, was impermissible because it assumed Jack's guilt).

[171] United States v. Brutus, 505 F.3d 80, 86 (2d Cir. 2007).

[172] State v. Rodgers, 198 Conn. 53, 56–57 (1985). The judge gave the following instruction: "Now, circumstantial evidence. . . . You may apply the rule of circumstantial evidence. This rule involves the offering of evidence of facts from which you are asked to infer the existence of another fact or set of facts. Such an inference may be made provided two elements in the application of the law are satisfied. One, that the fact from which you are asked to draw the inference has itself been proved beyond reasonable doubt. Two, that the inference that has to be drawn is not only logical and reasonable but is strong enough so that you can find that it is *more probable that the fact to be inferred is true*." *Id.* at 57. *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 496–97 (2000) (holding that any fact that enhances an accused's sentence must be found by the jury beyond a reasonable doubt).

[173] *Rodgers*, 198 Conn. at 58.

[174] People v. Cruz, 206 Cal. Rptr. 3d 835, 836–38 (Ct. App. 2016).

gave the standard propensity instruction, directing the jurors that they must first find that the offenses occurred by a preponderance before they could use those offenses to determine if the other offenses were committed (i.e., beyond a reasonable doubt).[175] This muddled instruction proved to be too much for the court. It reasoned:

> A robot or a computer program could be imagined capable of finding charged offenses true by a preponderance of the evidence, and then finding that this meant the defendant had a propensity to commit such offenses, while still saving for later a decision about whether, in light of all the evidence, the same offenses have been proven beyond a reasonable doubt. . . . We believe that, for practical purposes, the instruction lowered the standard of proof for the determination of guilt.[176]

Differing burdens in the instructions were not the only area that caused the CAAF constitutional concern. It rejected the notion that a panel may use an offense, of which the accused is presumed innocent, to determine guilt on a separate offense without ever overcoming that presumption.[177] Even if there were not a conflicting standard of proof, using one as-yet-unproven offense to prove another would still erode the accused's presumption of innocence, creating "the potential for circular findings of proof; a possible triple helix of evidence where the evidence of guilt of each offense helps establish the next, spiraling upward until the threshold of reasonable doubt is crossed."[178]

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[175] *Id.* at 838–39. The appellate court contrasted *Cruz* with *People v. Villatoro*, 281 P.3d 390 (Cal. 2012), noting that the *Villatoro* trial court required finding the offense committed beyond a reasonable doubt *before* being able to use it to determine propensity. *Cruz*, 206 Cal. Rptr. 3d at 839.

[176] *Cruz*, 206 Cal. Rptr. 3d at 840. The CAAF echoed this sentiment, noting that a similar instruction given in SGT Hills's court-martial "would tax the brain of even a trained lawyer." United States v. Hills, 75 M.J. 350, 358 (C.A.A.F. 2016).

[177] *Hills*, 75 M.J. at 356 ("It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent."). However, the CAAF favorably examined the *Villatoro* case, which required the presumption to be overcome before the jury could use the offense as "other act" evidence. *Id.* (citing *Villatoro*, 281 P.3d at 400).

[178] United States v. Guardado, 75 M.J. 889, 893 (A. Ct. Crim. App. 2016), *rev'd in part*, 76 M.J. 90 (C.A.A.F. 2017).

V. Fixing the Problem: Amendments and Instructions

Hills presents two separate but interrelated problems: one the court created and the other it ably identified. Both need to be fixed to restore MRE 413. First, MRE 413 must be amended to permit the use of charged misconduct as MRE 413 evidence. Second, the standard Benchbook instructions must be modified to protect the accused's presumption of innocence and recognize the interaction between the spillover instruction and the mandate of MRE 413.

A. Restoring MRE 413's Congressionally Mandated Framework

Hills categorically bars the use of charged misconduct as MRE 413 evidence,[179] and its categorical bar was reinforced in *United States v. Hukill*.[180] *Hills* must therefore be amended in order to allow such usage, thereby restoring MRE 413's congressionally-mandated construction. The CAAF's failure to interpret the correct (and current) version of MRE 413 supports MRE 413's amendment.

Either Congress[181] or the President[182] can prescribe a change to the MREs. The required changes would be modest. All that is needed to repair *Hills*'s damage is to insert "including other charged offenses" after the phrase "any other sexual offense."[183] Military Rule of Evidence 414 should be similarly amended.[184]

In addition to changes to the text of the Rule itself, a paragraph should be added to the appendix analyzing the MREs. This note would caution judges to carefully examine the probative value of offenses involving the same victim in a contemporaneous course of conduct.[185] Although the vast majority of cases involving charged misconduct as MRE 413 evidence involve either multiple victims or a long pattern of abuse,[186] there are a

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[179] *Hills*, 75 M.J. at 357 ("[W]e hold not only that charged offenses are not properly admitted under M.R.E. 413 to prove a propensity to commit the charged offenses . . . .").
[180] *United States v. Hukill*. 76 M.J. 219, 222 (C.A.A.F. 2017).
[181] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 535 (2014) (directing modification of MRE 404(a)).
[182] UCMJ art. 36 (1950) (delegating the power to modify "modes of proof" for courts-martial to the President).
[183] *See infra* app. A, ¶ 1.
[184] *See infra id.* ¶ 2.
[185] *See infra id.* ¶ 3.
[186] *See supra* notes 136–38.

few cases that involve the same victim assaulted in the same evening.[187] Such evidence should have been excluded by MRE 403,[188] and the analysis in the *Manual for Courts-Martial* should assist judges in arriving at the correct decision.

B. Properly Instructing the Panel on the Use of Charged Misconduct as MRE 413 Evidence

Permitting charged misconduct as MRE 413 evidence is not enough—military judges must properly instruct on the use of that evidence. What instruction should be given will depend on the type of MRE 413 evidence in the case.

Some have advocated for doing away with the panel instruction mandating that the MRE 413 evidence be established by a preponderance of the evidence.[189] There are several reasons to eliminate this mandate. Principally, it is not legally required. The only legal requirement for "other act" evidence is a judicial determination that a panel member *could* find by a preponderance of the evidence that the other act occurred.[190] Instructing the panel to make a preliminary determination about the other acts is unnecessary and invites confusion. After all, if a panel member does not believe that the other act occurred, then they will not consider it in their deliberations on the current charge. Moreover, only a small minority of jurisdictions that have a Rule 413 require the jury make this preliminary finding.[191]

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[187] *See, e.g.*, United States v. Hills, 75 M.J. 350, 353 (C.A.A.F. 2016); United States v. Duarte, ARMY 20140843, 2017 WL 413946, at *1 (A. Ct. Crim. App. Jan. 30, 2017).

[188] *See supra* note 98.

[189] United States v. Williams, 75 M.J. 621, 629 (A. Ct. Crim. App. 2016), *vacated*, 75 M.J. 430 (C.A.A.F. 2016).

[190] *Id.* (citing Huddleston v. United States, 485 U.S. 681 (1988)). As the logic of *Huddleston* goes, if *no* panel member could find that the other act occurred, it is not relevant, and is therefore inadmissible. *Huddleston*, 485 U.S. at 689.

[191] Only the Seventh and Eighth Circuits have promulgated pattern jury instructions that require a preliminary finding. THE COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR., PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 27 (2012); JUD. COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIR., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 41 (2017) (requiring unanimous finding by a preponderance before Rule 413 evidence can be used). Similarly, of all the states that permit Rule 413 evidence, only Arizona, California, and Georgia require this preliminary determination. CRIM. JURY INSTRUCTIONS COMM., STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS 25 (5th ed. 2019) (requiring clear and

While eliminating the different standards of proof from the panel instructions would reduce the confusion, it would not solve the ultimate problem. Panel members would still be using an offense of which the accused is presumed innocent to determine if the accused is guilty of another offense. This is improper. The offense should only be used once the presumption of innocence is overcome, and that may happen only once the panel finds beyond a reasonable doubt that the offense occurred.[192] Once the panel makes that finding, the presumption no longer attaches and the panel may use that evidence "for any matter to which it is relevant." Thus, an instruction modeled after the one given in *Villatoro* should be given when charged misconduct is used as MRE 413 evidence.[193]

But not every case involves only charged misconduct. There are three potential "other sexual offense" scenarios: all uncharged misconduct, all charged misconduct, or both charged and uncharged misconduct. The first is straightforward. *Hills* left in place the preponderance of evidence standard as applied to uncharged misconduct.[194] Thus, there is no need to change the existing instruction.[195] The second situation is similarly

convincing evidence that other act occurred); JUD. COUNCIL OF CAL. ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 968–73 (2020); 2 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS § 1.34.12 (4th ed. 2020). Other jurisdictions simply hand the evidence to the jury and let them consider it in the same manner as other evidence in the case. *See, e.g.*, United States v. McHorse, 179 F.3d 889, 903 (10th Cir. 1999).

[192] In this way, MRE 413 is analytically distinct from MRE 404(b). Generally, the accused's other sexual offense requires the offense be complete (i.e., all elements met) before admission. 2019 MCM, *supra* note 1, MIL. R. EVID. 413(d). In contrast, a fact which may be primary evidence of a separate charge may also be relevant *for a limited purpose* and may not require all elements to be met for the evidence to be relevant under MRE 404(b).

[193] People v. Villatoro, 281 P.3d 390, 400 (2012). *See also* JUD. COUNCIL OF CAL ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, *supra* note 191, at 972–73 (providing instructions on using charged offenses as propensity evidence).

[194] United States v. Hills, 75 M.J. 350, 356 **(**C.A.A.F. 2016) ("We continue to hold that proper M.R.E. 413 evidence is not fundamentally unfair; is admissible on any matter to which it is relevant; and that, subject to M.R.E. 403, the presumption is in favor of admissibility." (citing United States v. Wright, 53 M.J. 476, 483 (C.A.A.F. 2000))).

[195] *See infra* app. B, ¶¶ 1–2. This proposed instruction also simplifies the instruction by removing the preliminary determination that the other misconduct be proved by a preponderance of the evidence, echoing the instruction cited with approval in United States v. Schroder, 65 M.J. 49, 56 (C.A.A.F. 2007) (quoting *McHorse*, 179 F.3d at 903).

straightforward, except that instead of a preponderance of the evidence standard, the standard is beyond a reasonable doubt.[196]

The third scenario involves the hybrid situation where there are multiple sexual offenses on the charge sheet in addition to uncharged misconduct. In this case, the Government should have a choice: Elect to use only the uncharged misconduct as MRE 413 evidence and receive the instruction without a specific burden of proof,[197] or elect to use all the sexual misconduct in the case (charged and uncharged) and have all of the misconduct be proved beyond a reasonable doubt.[198] While the uncharged misconduct need not necessarily be proved beyond a reasonable doubt,[199] applying differing standards of proof to different pieces of MRE 413 evidence invites confusion, and thus potentially undermines the accused's presumption of innocence. Moreover, if these rules are known at the beginning of trial (as opposed to being discovered while the case is appealed), the Government could elect a different charging strategy, if appropriate.[200]

Finally, if charged misconduct is used as MRE 413 evidence, the standard spillover instruction must be modified. The revamped spillover instruction should clarify the uses of the MRE 413 evidence, reiterate the standard of proof required before that evidence may be used, and delineate the charges where the MRE 413 evidence may be employed.[201]

VI. Conclusion

When the CAAF categorically barred the use of charged misconduct as MRE 413 evidence, it committed a serious error. In doing so, it upset the state of the law as it had been developing and cast doubt on the Government's ability to prosecute sexual assaults. Unfortunately, the

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196 *See infra* app. B, ¶¶ 1, 3.
197 *See id.* ¶ 2.
198 *See id.* ¶ 3.
199 *See Hills*, 75 M.J. at 356 n.3 ("The fact that no presumption of innocence attaches to uncharged conduct is why the use of charged conduct as propensity evidence is analytically distinct from uncharged conduct.").
200 Although serial prosecutions would seem to be disfavored for a variety of policy reasons, *see* discussion *supra* Section III.D, there may be cases where it is appropriate. The difference between the Government electing serial prosecutions and having them mandated by an incorrect interpretation of the MREs is that it *permits* the decision by an accountable department while providing the full benefit of the Congressionally mandated evidentiary rules.
201 *See infra* app. B, ¶ 4.

CAAF's reasoning departed from the plain text of the Rule and otherwise undercut the Rule's purpose of fully informing the panel about the breadth of the accused's conduct to aid them in their determination.

However, the CAAF was absolutely correct when it identified constitutional error in the manner in which charged misconduct was being used as MRE 413 evidence. The court correctly identified the instructions as confusing and highlighted the troubling prospect of one charged offense (being proved only by a preponderance) being used to prove another beyond a reasonable doubt.

Fortunately, the path forward is clear. Because the CAAF interpreted outdated language, MRE 413 should be amended to encompass charged misconduct. At the same time, the courts should use updated instructions to protect the accused's presumption of innocence.

Appendix A

Proposed Changes to Military Rules of Evidence 413 and 414

1. Amend Military Rule of Evidence 413(a) to read as follows (additions in italics):

In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense, *including other charged offenses*. The evidence may be considered on any matter to which it is relevant.

2. Amend Military Rule of Evidence 414(a) to read as follows (additions in italics):

In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation, *including other charged offenses*. The evidence may be considered on any matter to which it is relevant.

3. Insert the following in the Analysis of Military Rules of Evidence 413 and 414:

When admitting evidence involving the same victim in a contemporaneous course of conduct, judges should carefully examine the probative value of the evidence in determining whether to admit the evidence under MRE 413 / 414. Applying the non-exclusive factors outlined in *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000), the fact that the alleged offenses occurred within a short period of time against the same victim undercuts the temporal proximity and frequency factors. *See* United States, v. Hills, ARMY 20130833, 2015 WL 3940965, at *8 (A. Ct. Crim. App. June 25, 2015), *rev'd*, 75 M.J. 350 (C.A.A.F. 2016).

Appendix B

Proposed Benchbook Instructions for Military Rule of Evidence 413 and 414 Evidence

The following changes should be made to paragraph 7-13-1 of the Military Judges' Benchbook:

1. Amend Note 3.2 to read (deletions are indicated by strikethroughs, additions with italics):

NOTE 3.2: Sexual offense and child molestation cases – MRE 413 or 414 evidence.

In cases in which the accused is charged with a sexual offense or an act of child molestation, MRE 413 and 414 permit the prosecution to offer, and the court to admit, evidence of the accused's commission of other ~~uncharged~~ sexual offenses or acts of child molestation, on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered, at least 5 days prior to entry of pleas, or at such later time as the military judge may find for good cause.

In order to admit evidence of other ~~uncharged~~ sexual offenses or acts of child molestation, the military judge must make findings that (1) the accused is charged with a sexual offense/act of child molestation as defined by MRE 413/414; (2) the evidence proffered is evidence of the accused's commission of another sexual offense/child molestation offense; and (3) the evidence is relevant under MRE 401 and 402. The military judge must also conduct a prejudice analysis under MRE 403. (*See* U.S. v. Wright 53 MJ 476 (C.A.A.F. 2000) for factors to consider in applying MRE 403 balance test).

In determining whether the proffered evidence of an ~~uncharged~~ act qualifies as an "other sexual offense" or "other offense of child molestation," the military judge applies a two-part test: (1) whether the conduct constituted a punishable offense under the UCMJ, federal law, or state law when the conduct occurred, and (2) whether the conduct is encompassed within one of the specific categories of "sexual offense" or "child molestation" set

forth in the version of MRE 413(d) or 414(d)(2) in effect at the time of trial. When evidence of the accused's commission of other uncharged sexual offenses under MRE 413, or of other uncharged offenses of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the MJ must give the *appropriate instruction in Note 3.3 or 3.4, depending on the type of evidence in the case*. ~~following appropriately tailored instruction based on the evidence admitted. Evidence of other charged sexual offenses or acts of child molestation is not admissible under MRE 413/414 unless the accused has pled guilty to these other charged offenses.~~

~~You have heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offenses(s). [The military judge may list/identify the evidence admitted pursuant to MRE 413/414, if appropriate]. The accused is not charged with (this) (these) offense(s). You may consider the evidence of (this) (these) other offense(s) for its bearing on any matter to which it is relevant, to include its tendency, if any, to show the accused's propensity to engage in (sexual) (child molestation) offenses.~~

~~However, evidence of another (sexual) (child molestation) offense, on its own, is not sufficient to prove the accused guilty of a charged offense. You may not convict the accused solely because you believe (he) (she) committed another (sexual) (child molestation) offense or offenses or solely because you believe the accused has a propensity to engage in (sexual) (child molestation) offenses. Bear in mind that the government has the burden to prove that the accused committed each of the elements of each charged offense.~~

2. Add Note 3.3 to read:

NOTE 3.3: Use this instruction when the MRE 413/414 evidence consists solely of uncharged misconduct.

You heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offense(s). The accused is not charged with (this) (these) other offense(s). You may consider evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (list the specification(s) for which the members may consider the evidence).

(You may consider the evidence of such other (sexual) (child molestation) offense(s) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual) (child molestation) offenses(, as well as its tendency, if any, to:
(identify the accused as the person who committed the offense(s) alleged in _____)
(prove a plan or design of the accused to _____)
(prove knowledge on the part of the accused that _____)
(prove that the accused intended to _____)
(show the accused's awareness of (his) (her) guilt of the offense(s) charged)
(determine whether the accused had a motive to commit the offense(s))
(show that the accused had the opportunity to commit the offense(s))
(rebut the contention of the accused that (his/her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))
(rebut the issue of _____ raised by the defense); (and)
(_____).

You may not, however, convict the accused solely because you believe (he) (she) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual) (child molestation) offenses. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (However, by pleading guilty to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that lesser offense). I remind you that the accused is not on trial for any act, conduct, or offense not on the charge sheet.

3. Add Note 3.4 to read:

NOTE 3.4: Use this instruction when the MRE 413/414 evidence consists of at least one act of charged misconduct.

(The accused is charged with multiple (sexual) (child molestation) offenses.)
(In addition,) (you heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offense(s). (The accused is not charged with (this) (these) other offense(s).)
If you find that the accused has committed (one of these) (the) other offense(s) beyond a reasonable doubt, then—and only then—may you

consider this evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (list the specification(s) for which the members may consider the evidence).

(You may consider the evidence of such other (sexual) (child molestation) offense(s) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual) (child molestation) offenses (, as well as its tendency, if any, to:
(identify the accused as the person who committed the offense(s) alleged in _____)
(prove a plan or design of the accused to _____)
(prove knowledge on the part of the accused that _____)
(prove that the accused intended to _____)
(show the accused's awareness of (his) (her) guilt of the offense(s) charged)
(determine whether the accused had a motive to commit the offense(s))
(show that the accused had the opportunity to commit the offense(s))
(rebut the contention of the accused that (his/her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))
(rebut the issue of _____ raised by the defense); (and)
(_____).

If you conclude beyond a reasonable doubt that the accused committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. You may not convict the accused solely because you believe (he) (she) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual) (child molestation) offenses. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (However, by pleading guilty to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that lesser offense).

The following changes to paragraph 7-17 of the Military Judges' Benchbook should be made:

4. Add Note 2.1 to read:

NOTE 2.1: Notwithstanding the instruction at NOTE 1 that proof of one offense may not be considered with respect to another and carries no

inference of guilt of another offense, there are circumstances under MRE 413 or 414 when evidence relating to one charged offense of sexual misconduct or child molestation may be relevant to a similar, but unrelated charged offense of sexual misconduct or child molestation.

The following instruction should be used in conjunction with the instruction following NOTE 1, and may be used in lieu of Instruction 7-13-1 when the MRE 413 or 414 evidence consists of at least one act of charged misconduct.

I just instructed you that you may not infer the accused is guilty of one offense because (his) (her) guilt may have been proven on another offense, and that you must keep the evidence with respect to each offense separate. However, there has been some evidence presented with respect to (state the offense) (as alleged in (The) Specification (__) of (The) (Additional) Charge (__) that, in certain circumstances, may be considered with respect to (state the other offense) (as alleged in (The) Specification (__) of (The) (Additional) Charge (__)).

If—and only if—this other evidence has been proved beyond a reasonable doubt, then you may consider this evidence on any matter to which it is relevant. However, you may only consider as between (The) Specification (__) of (The) (Additional) Charge (__) and (The) Specification (__) of (The) (Additional) Charge (__) (and (The) Specification (__) of (The) (Additional) Charge (__)).

However, the prosecution must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge.