Rules of Evidence 413 and 414: Where Do We Go from Here?

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Introduction

On 13 September 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (Crime Control Act).[1] In addition to providing billions of dollars to put more law enforcement officers on the streets and at our nation's borders, it amended the Federal Rules of Evidence (FRE).[2] The FRE amendments added three new rules, Rules 413, 414, and 415. Rule 413 makes evidence of an accused's prior sexual offenses admissible in a later trial for unrelated sexual offenses.[3] Rule 414 makes evidence of prior acts of child molestation admissible in a later trial for unrelated acts of child molestation.[4] Rule 415 makes both Rules 413 and 414 applicable to civil trials where the plaintiff seeks damages for either a sexual offense or child molestation.[5] Since Congress passed the Crime Control Act, these new rules have generated substantial criticism from scholars and practitioners.[6]

The controversial history of these rules of evidence has been well documented.[7] This article addresses the highlights of that history, and reviews some of the trends in how the federal and military courts have interpreted and applied these rules. This article also details the particular issues that are the focus of litigation in the courts. Specifically, it analyzes Rules 413 and 414 in context with Rule 404(b),[8] and its strict prohibition against admitting character evidence to show propensity. It also analyzes the applicability of Rule 403[9] to evidence offered under either Rule 413 or Rule 414.[10] Finally, the article pro-

1. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

2. *Id.*

3. FED. R. EVID. 413. Rule 413(a) provides: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

4. FED. R. EVID. 414. Rule 414(a) provides: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

5. FED. R. EVID. 415. Rule 415(a) provides:

> In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of the party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

Rule 415 has no applicability to military cases.

6. *See* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285 (1995) [hereinafter Imwinkelried, *Undertaking the Task*]; David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995); Edward J. Imwinkelried, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994); Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 CLEV. ST. L. REV. 169 (1996).

7. *See* David J. Karp, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994); Anne Elsberry Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659 (1995); Erik D. Ojala, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947 (1999).

8. FED. R. EVID. 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

9. FED. R. EVID. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

10. This article will not argue either for or against the constitutionality of these rules, because that topic has received ample coverage in other articles. *See* Livnah, *supra* note 6; Department of Justice, Office of Legal Policy, *'Truth in Criminal Justice' Series Office of Legal Policy: The Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REFORM 707 (1989); Ojala, *supra* note 7. It does, however, discuss the pertinent cases addressing the constitutionality of the rules.

vides practical tips to assist the military practitioner with these rules of evidence at trial.

Rules 413 and 414 undermine years of evidence law that strictly limited the introduction of propensity and character evidence against the accused.[11] The FRE effectively codified this traditional view in Rule 404(b).[12] However, the new rules lower the threshold of admissibility created by Rule 404(b), and permit evidence offered under Rules 413 and 414 "for its bearing on any matter to which it is relevant."[13] This minimal threshold for admitting evidence of prior acts eliminates the traditional protections afforded the accused by Rule 404(b), and will substantially increase use of this potentially misleading evidence. Thus, to protect the accused from unfair consideration of such evidence by the fact finder, greater scrutiny must be applied to evidence offered under Rules 413 and 414.

The Rules and Historical Highlights

The Crime Control Act experienced several delays during the legislative process.[14] In a last minute effort to gain bipartisan support for the Act, the legislative committee agreed to add the FRE amendments, including Rules 413, 414, and 415, as proposed by Representative Susan Molinari.[15] However, the hasty addition of these amendments allowed Congress to bypass the normal six-phase process for proposing and passing new rules of evidence.[16] In doing so, Congress skirted the Rules Enabling Act.[17] After merely twenty minutes of debate on the FRE amendments, and without the benefit of critical analysis from the legal community, the Crime Control Act passed.[18]

While the amendments to the FRE accomplish the objectives of their proponents in Congress—mainly the liberal admission of propensity evidence in sexual assault and child molestation cases— they are a significant departure from centuries of evidence law.[19] From the earliest days of legal history, courts prohibited the use of character evidence to prove someone guilty of a particular crime by showing that he was a bad person or had demonstrated a propensity to behave in a particular manner. "A cardinal tenet of Anglo-Saxon criminal jurisprudence is that the prosecution must prove that the accused committed a specific crime, not merely that he is dangerous or wicked."[20] Rules 413 and 414 undermine this historical prohibition, which served as

11. *See* Imwinkelreid, *Undertaking the Task*, *supra* note 6.

12. *See generally* Ellis, *supra* note 6; Kyl, *supra* note 7.

13. FED. R. EVID. 413 and 414. *See supra* notes 3-4 and accompanying text.

14. *See* Kyl, *supra* note 7, at 660 n.10. Senator Robert Dole and Representative Susan Molinari originally proposed these amendments as part of the Women's Equal Opportunity Act in February 1991. The amendments were later introduced in the Sexual Assault Prevention Act of the 102d and 103d Congresses. The amendments were also added to the Violent Crime Bill supported by President George Bush. These proposals were unsuccessful. Republican members of the House, attempting to have the amendments included in the Crime Control Act of 1994, prevented the entire Act from being brought to the floor for consideration. As a result, the Democratic leadership agreed to negotiate to add the proposed amendments. Ellis, *supra* note 6, at 969-71 and footnotes cited therein.

15. *See* Ellis, *supra* note 6; Joelle Anne Moreno, *Whoever Fights Monsters Should See to it That in the Process He Does Not Become a Monster: Hunting the Sexual Predator With Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart—Kansas v. Hendricks*, 49 FLA. L. REV. 505 (1997); Livnah, *supra* note 6. Since its inception, the Crime Control Act was intended to be pervasive legislation to get tough on crime. However, the proposed amendments to the Rules of Evidence were not part of the original package; they were an afterthought. Livnah argues that Representative Molinari saw an opportunity to appeal to the perceived public outrage with sexual violence that resulted from two criminal cases that created a public perception that our legal system was fundamentally flawed. Livnah also argues that members of Congress relied upon their mistaken belief that sexual offenders have a higher rate of recidivism. Although Representative Molinari wanted to stop the cycle of repeat offenders and protect women and children, there is little evidence to support this belief. In 1989, the Department of Justice, Bureau of Justice Statistics, conducted a study of 100,000 released prisoners over a three year period to determine rates of recidivism. The study demonstrated that only 7.7% of rapists were rearrested for rape, and that rapists had one of the lowest recidivism rates of any crime, second lowest only to homicide. Consequently, carving out a specific exception that allows propensity evidence in this specific class of cases is without foundation. *Id.*

16. 140 CONG. REC. H8968, H8990 (Aug. 21, 1994) (statement of Rep. William Hughes).

17. 28 U.S.C. §§ 2071-2077 (1994). The Rules Enabling Act provides that a Judicial Reviewing Conference can review legislation proposed by Congress to determine the possible effects of its enactment. It was designed to promote a cooperative effort between the judiciary and Congress. However, in this case, Congress specifically exempted the Crime Control Act from the strictures of the Rules Enabling Act. Instead, Congress stated it would reconsider the legislation if the Judicial Reviewing Conference made a timely objection. Congress requested that the Judicial Conference submit its report within 150 days of enactment of the Rules. If the Judicial Conference favored the Rules, then the Rules would become effective 30 days after Congress received the report. On the other hand, if the Judicial Conference opposed the Rules, they would nonetheless, become effective 150 days after Congress received the report. Notwithstanding the additional time to review the Conference Report prior to final enactment, Congress took no action to amend or repeal the Rules. *See* Ellis, *supra* note 6; Moreno, *supra* note 15; Livnah, *supra* note 6; Ojala, *supra* note 7, at 17, stating:

> The Act calls for an Advisory Committee made up of scholars, judges, and lawyers in the relevant field to draft a proposal for any amendment or addition to the existing rules. The proposal is then subjected to a period of public comment, reviewed by a subcommittee of the United States Judicial Conference (whose members are chosen by the Chief Justice of the Supreme Court), and finally subjected to Congressional review.

18. 140 CONG. REC. H8968, H8990 (Aug. 21, 1994) (statement of Rep. William Hughes).

19. *See* Imwinkelreid, *Undertaking the Task*, *supra* note 6; Ojala, *supra* note 7.

the justification for enacting Rule 404(b). Under Rule 404(b), prior bad acts may be admissible for specific reasons, but they are never admissible to show propensity.[21]

The proponents of Rules 413 and 414 fully intended that evidence should be admitted and considered to determine the defendant's propensity to commit sexual assaults or engage in child molestation.[22] Both Representative Molinari and Senator Robert Dole repeatedly referred to the recidivism of sexual offenders as an indicator that such people were more likely to commit similar offenses in the future.[23] Rules 413 and 414 specifically state that such propensity evidence "may by considered for its bearing on any matter to which it is relevant."[24] The proponents of the rules intended them to be an exception to the general prohibition against admitting propensity evidence found in Rule 404(b),[25] and the courts have clearly upheld this congressional intent to supersede the restrictive aspects of Rule 404(b).[26]

In its review of the proposed rules, the Judicial Conference recognized ambiguities that resulted from creating a separate "exception" to Rule 404(b).[27] The conference found that Congress's concerns embodied in the proposed rules were already adequately addressed in the existing rules of evidence, particularly by Rule 404(b).[28] The conference also found that the new rules were not adequately integrated with the existing rules, and that the accepted standards pertaining to the existing rules would not be uniformly applied if the proposed rules were adopted.[29] Therefore, the Judicial Conference recommended that Congress pass amendments to existing Rule 404, rather than adopting the proposed rules.[30] Despite this recommendation, Congress took no action to amend Rule 404 or to repeal Rules 413 and 414.[31]

After Congress passed the Crime Control Act creating FRE 413 and 414, Military Rules of Evidence (MRE)[32] 413 and 414 were adopted on 6 January 1996.[33] Although MRE 1102[34] provided that the new FRE would be adopted by operation of law, the Department of Defense still published the proposed changes in the Federal Register and solicited comments from the public.[35] Nevertheless, there were few substantive changes between the FRE and the MRE. The period in which the government must give notice to the defense of its intent to use propensity evidence was reduced from fifteen days under the FRE to five days under the MRE.[36] The time was reduced because it "is better suited to military discovery practice."[37] In addition, references to FRE 415 were deleted because there is no analogous process in the military system.[38] These were the only significant differences between the FRE and the corresponding MRE.

The Cases

Since FRE 413 and 414 were adopted, several federal and military courts have decided cases interpreting these rules. Although it is extremely difficult to discern any trends in the courts' decisions, it is apparent that FRE 413 and 414, and the corresponding MRE 413 and MRE 414, are here to stay. Therefore, it is important for practitioners to examine carefully these

20. David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529 (1994).

21. FED. R. EVID. 404(b). *See supra* note 8 and accompanying text.

22.

> The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b). 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.' This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

140 CONG. REC. H8991 (Aug. 21, 1994) (statement of Rep. Susan Molinari); 140 CONG. REC. S12990 (Sept. 20, 1994) (statement of Sen. Robert Dole)

23. 140 CONG. REC. H8991 (statement of Rep. Susan Molinari); 140 CONG. REC. S12990 (statement of Sen. Robert Dole).

24. FED. R. EVID. 413, 414. *See supra* notes 3-4 and accompanying text.

25. 140 CONG. REC. H8991 (statement of Rep. Susan Molinari); 140 CONG. REC. S12990 (statement of Sen. Robert Dole).

26. United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1998) (stating that it was Congress's intent that the new rules supersede the restrictive aspects of Rule 404(b) in sex cases); United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998) (holding that Rule 413 supersedes Rule 404(b)'s restrictions allowing the government to offer evidence of the accused's prior conduct to show propensity to commit the charged offense); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (stating that Congress lowered the obstacle to admitting propensity evidence in a defined class of cases); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (holding that the new rules supersede the restrictive aspects of Rule 404(b)).

27. *See* STAFF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 103D CONG., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (Comm. Print 1995).

28. *Id*.

29. *Id*.

cases to understand these evidentiary rules that will likely see increased application in future courts-martial.

This section provides an overview of the issues that have emerged from cases addressing the admissibility of evidence under FRE 413 and FRE 414.[39] These issues can be grouped into four primary categories: the constitutionality of the rules, the admission of propensity evidence under the rules, the applicability of FRE 403 to the rules, and the burden of proof required by the rules to show prior offenses.

Constitutionality of the Rules

The central constitutional assertion that emerges from the federal cases is that FRE 413 and FRE 414 violate a defendant's rights to equal protection and due process.[40] In *United States v. Enjady*, the 10th Circuit Court of Appeals held that the defendant's constitutional rights to equal protection and due process were not violated by the district court's admission of testimony concerning a prior rape by the defendant.[41]

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30. The Report of the Judicial Conference recommended the following version of Rule 404:

> (4) Character in sexual misconduct cases. Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.
>
> (A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:
> (i) proximity in time to the charged or predicate misconduct;
> (ii) similarity to the charged or predicate misconduct;
> (iii) frequency of the other acts;
> (iv) surrounding circumstances;
> (v) relevant intervening events; and
> (vi) other relevant similarities or differences.
>
> (B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.
>
> (C)For purposes of this subdivision,
> (i) "sexual assault" means conduct – or an attempt or conspiracy to engage in conduct – of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim – regardless of whether that conduct would have subjected the actor to federal jurisdiction.
> (ii) "child molestation" means conduct – or an attempt or conspiracy to engage in conduct – of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person – regardless of whether that conduct would have subjected the actor to federal jurisdiction.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order show action in conformity therewith except as provided in subdivision (a) . . . .

31. *See* Ellis, *supra* note 6; Moreno, *supra* note 15; Livnah, *supra* note 6; Ojala, *supra* note 7.

32. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 22, at A22-1 (1998) [hereinafter MCM]. By Executive Order 12,198 of March 12, 1980, President Jimmy Carter prescribed a new evidentiary code for military practice. While the code substantially mirrored the Federal Rules of Evidence, it allowed for the necessities of a world-wide criminal practice. *See generally* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (4th ed. 1997) (discussing the origin of the Military Rules of Evidence).

33. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (1995) (explaining that, under the rules then in effect, amendments to the Federal Rules of Evidence were not applicable to the Military Rules of Evidence for 180 days).

34. MCM, *supra* note 32, MIL. R. EVID. 1102 (1998) (explaining that, under the present rules, amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President).

35. 60 Fed. Reg. 51,988 (1995).

36. MCM, *supra* note 32, MIL. R. EVID. 413, 414.

37. *Id.* MIL. R. EVID. 413 analysis, app. 22, at A22-36.

38. *Id*.

39. Although FRE 415 was passed at the same time as Rules 413 and 414, this article does not address Rule 415 because very few cases have applied that rule. Moreover, as Rule 415 simply applies Rules 413 and 414 to civil litigation, it has virtually no impact on courts-martial.

40. *See* United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998).

Enjady argued that admission of such testimony under FRE 413 denied him a fair trial, because it denied him due process.[42] Enjady asserted that the admission of propensity evidence under the rule "created the danger of convicting a defendant because he is a 'bad person,' thus denying him a fair opportunity to defend against the charged crime."[43] He further argued that admitting this type of evidence diminished the presumption of innocence and reduced the government's burden to prove the crimes beyond a reasonable doubt.[44]

The 10th Circuit Court of Appeals agreed "that Rule 413 raises a serious constitutional due process issue."[45] However, the court held that Rule 413 was neither unconstitutional on its face, nor did it violate the Due Process Clause. The court reasoned that, for Enjady to show a due process violation, he had to show that Rule 413 failed a fundamental fairness test and "violate[d] those fundamental conceptions of justice which lie at the base of our civil and political institutions."[46] Enjady responded that the historical prohibition on prior bad acts and propensity evidence satisfied this narrow definition of fundamental fairness.[47] The court, however, focused on the legislative history of Rule 413 to support its analysis. The court stated: "Congress believed it necessary to lower the obstacles to admission of propensity evidence in a defined class of cases."[48] The court further reviewed the application of Rule 403 to evidence offered under Rule 413, because the legislative history and prior court rulings indicated that the admissibility of evidence under Rule 413 was subject to the constraints of the Rule 403 balancing test.[49]

The court detailed several of the procedural safeguards inherent in using the Rule 403 balancing test to admit propensity evidence. The balancing test itself provided a safeguard, reasoned the court, because Rule 403 balancing, in the sexual assault context, required that a court consider:

> (1) how clearly the prior act has been proved; (2) how probative the evidence is of the material fact it is admitted to prove; (3) how seriously disputed the material fact is; and (4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: (1) how likely is it such evidence will contribute to an improperly-based jury verdict; (2) the extent to which such evidence will distract the jury from the central issues of the trial; and (3) how time consuming it will be to prove the prior conduct.[50]

Another Rule 403 procedural safeguard noted by the court was the threshold of evidence required to prove that a previous offense occurred. Relying on the work of Mr. David Karp, one of the original drafters of Rules 413 and 414,[51] the court determined that "the district court must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the 'other act' occurred."[52] An additional safeguard considered by the court was the basic notice requirement written into Rule 413, which "protects against surprise and allows

41. *Enjady*, 134 F.3d at 1427. The case arose from the District of New Mexico. After trial, a jury convicted Enjady of one count of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(a)(1), and 2245(2)(A). Enjady, his victim, A, and several others had been drinking at A's house during the late morning and early afternoon on the day of the incident. After drinking, A either passed out or fell asleep, at which time everyone left her home. However, Enjady returned later, and A awoke to find Enjady raping her. Enjady was later arrested on other charges, but questioned about the rape. He initially denied returning to A's home, but when confronted with DNA evidence, he admitted to having consensual sex with A. At trial, the government gave notice that it intended to admit testimony from witness B who alleged that Enjady had raped her about two years prior to the charged rape. The government offered B's testimony under Rule 413 "to show defendant's propensity to rape." *Id.* The court withheld ruling on the motion until the government introduced testimony from Investigator Mark Chino. Investigator Chino had initially taken Enjady's written statement, in which Enjady denied the act, stating that he "wouldn't ever do something like this to anyone." *Id.* The district court then applied a Rule 403 balancing test and concluded that B's testimony about the prior rape was relevant and admissible under Rule 413. Specifically, under the Rule 403 balancing test, the district court "considered the testimony's value both to show propensity and to rebut defendant's statement to Chino." *Id.*

42. *Id*. at 1430.

43. *Id*.

44. *Id*.

45. *Id*.

46. *Id*.

47. *Id*. at 1430.

48. *Id*. at 1431.

49. *Id*. (citing United States v. Sumner, 119 F.3d 658 (8th Cir. 1997); United States v. Larson, 112 F.3d 600 (2d Cir. 1997)).

50. *Id*. at 1433.

51. *Id*. *See* 140 CONG. REC. H8991 (Aug. 21, 1994) (statement of Rep. Susan Molinari). Mr. Karp, Senior Counsel, Office of Policy Development, United States Department of Justice, was one of the original drafters of the proposed rules.

52. *Enjady*, 134 F.3d at 1433.

the defendant to investigate and prepare cross-examination. It permits the defendant to counter uncharged crimes evidence with rebuttal evidence and full assistance of counsel."[53] Finally, the court considered the specific use of the proffered Rule 413 evidence as a type of rebuttal evidence to the defense of consent. The court concluded that, when these procedural safeguards are taken together, admission of Rule 413 evidence was not unconstitutional.[54]

Enjady further argued that Rule 413 violated his right to equal protection, because it allowed "unequal treatment of similarly situated defendants concerning a fundamental right."[55] In a relatively brief section of its opinion that lacked in-depth analysis, the court applied the rational basis test to this equal protection question. The court reasoned that use of the rational basis test was appropriate, because Rule 413 "neither burdens a fundamental right nor targets a suspect class."[56] Therefore, the court held, "Congress's objective of enhancing effective prosecutions for sexual assaults is a legitimate interest" that satisfied the rational basis test.[57]

In *United States v. Castillo*, another 10th Circuit Court of Appeals case, the defendant raised similar constitutional arguments concerning propensity evidence admitted against him under Rule 414.[58] Like Enjady, Castillo was unsuccessful in challenging the admission of evidence on the constitutional bases of equal protection and due process. However, Castillo asserted a third constitutional argument, maintaining that Rule 414 violated his Eighth Amendment right to be free from cruel and unusual punishment. The court quickly dismissed this novel argument and found no such violation when it held: "[Rule 414] does not impose criminal punishment at all; it is merely an evidentiary rule."[59]

In *United States v. Wright*, the Air Force Court of Criminal Appeals first addressed the use of propensity evidence at courts-martial.[60] Senior Airman Wright alleged that admission of evidence under MRE 413 denied him a fair trial in violation of his constitutional rights to due process and equal protection. As to the due process argument, the Air Force court applied the rationale followed by the *Enjady* and *Castillo* courts, and held that the accused had failed to show an "overriding fundamental concept of justice"[61] that would limit the use of MRE 413 evidence. Concerning Wright's equal protection argument, the Air Force court again deferred to the 10th Circuit Court of Appeals, and applied the rational basis test to MRE 413. The Air Force court reasoned: "We again concur with that court's finding that the congressional intent to provide a means by which evidence of patterns of abuse and similar crimes could be admitted into evidence provides such a [rational] basis."[62] The court concluded: "[T]rial counsel may use evidence admitted under [MRE 413] to demonstrate an accused's propensity to commit the charged sexual assault."[63] Later cases decided by the Air

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*. at 1434.

58. United States v. Castillo, 140 F.3d 874 (10th Cir. 1998). A jury in the District of New Mexico convicted Castillo of four counts of sexual abuse in violation of 18 U.S.C. § 2242(1) and four counts of sexual abuse of a minor in violation of 18 U.S.C. § 2243(a). The offenses occurred on the Navajo Reservation at Crownpoint, New Mexico. The charges arose from three acts alleged by Castillo's daughter, N.C., and one act alleged by his daughter, C.C. Each allegation led to a separate count of sexual abuse and sexual abuse of a minor. At trial, the district court allowed N.C. to testify about a fourth uncharged incident, and allowed C.C. to testify about two additional uncharged incidents. Unlike *Enjady*, which decided the constitutionality of Rule 413, the court in *Castillo* analyzed the constitutionality of Rule 414. However, the analysis applied by the court was similar. The court specifically enumerated three reasons why the application of Rule 414 did not violate the Due Process Clause. First, the court looked to the historical practice regarding the general prohibition of propensity evidence in criminal trials. Notwithstanding the general prohibition, the court looked to the "ambiguous" history of the use of propensity evidence in sex offense cases when the defendant's sexual character is an issue. Second, the court also considered that other codified rules of evidence have been found constitutional even though they present the same risks that Rule 414 evidence presents. Third, the court analyzed the procedural safeguards of Rules 402 and 403. Since Rule 402 requires all evidence to be relevant, and the Rule 403 balancing test requires exclusion of unfairly prejudicial evidence even if it is relevant, the court reasoned that any overly prejudicial evidence would be excluded, thereby ensuring constitutional fairness. "Thus, application of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414." *Id*. at 883. Like *Enjady*, Castillo's equal protection argument was quickly addressed. Using the same analysis employed in *Enjady*, the court concluded that "enhancing effective prosecution of sexual assaults is a legitimate interest." *Id*. "The government has a particular need for corroborating evidence in cases of sexual abuse of a child because of the highly secretive nature of these sex crimes and because often the only available proof is the child's testimony." *Id*.

59. *Id*. at 884.

60. United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

61. *Id*. at 900.

62. *Id*. at 901.

63. *Id*. at 900.

Force court have relied on *Wright* to summarily dismiss constitutional challenges to MRE 413 and MRE 414.[64]

In light of these three cases, it appears that constitutional attacks on FRE 413 and FRE 414, or on the corresponding MRE 413 and MRE 414, will fail. Thus far, defendants have been unsuccessful in showing that admitting evidence under either Rule 413 or 414 denies them due process or violates their right to equal protection. Moreover, both federal and military courts apparently regard the prerequisites to admitting Rule 413 or 414 evidence as adequate procedural safeguards to protect defendants' constitutional rights.

Admission of Propensity Evidence

There have been a number of cases, in both the federal and military courts, which have addressed the admissibility of evidence under Rules 413 and 414. The most perplexing issue facing the courts in relation to these rules is the circumstances under which a court will admit evidence of an accused's propensity to commit sexual offenses or child molestation. Rule 404(b) delineates specifically the reasons for which prior bad act evidence may be admitted, including to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[65] Rules 413 and 414 remove these limitations in sexual assault and child molestation cases. These rules state that such evidence is admissible "for its bearing on any matter to which it is relevant."[66] Contrary to Rule 404(b), a prosecutor now may use evidence of an accused's prior bad acts to show that the accused had a propensity to commit the crime charged. The prosecutor need not show any other purpose in offering the evidence.

Recent cases demonstrate that courts believe that Rules 413 and 414 supersede the stringent admissibility requirements of Rule 404(b).[67] It is less clear, however, exactly how courts read the new rules in conjunction with the admissibility standards of Rule 403. The initial question was whether the balancing test required by Rule 403 applied to Rules 413 and 414. The plain language of the rules suggested that such evidence was admissible without regard to Rule 403. However, a review of the legislative history of the rules reveals that Congress intended the new rules to be viewed in conjunction with existing rules.[68] Therefore, the courts applied the Rule 403 balancing test[69] to evidence offered under Rules 413 and 414.[70] This approach has evolved into a specialized balancing test for propensity evidence.

Analysis Under Rule 403

Federal courts have wrestled with the applicability of Rule 403 to the new rules. In their analyses, the federal courts have uniformly applied a balancing test under Rule 403[71] to determine the admissibility of evidence under either Rule 413 or 414. Generally, the courts have reasoned that, because the Rule 403 balancing test applies to all rules where admissibility of

64. *See* United States v. Bailey, 52 M.J. 786 (A.F. Ct. Crim. App. 1999); United States v. Dewrell, 52 M.J. 601 (A.F. Ct. Crim. App. 1999).

65. FED. R. EVID. 404(b).

66. FED. R. EVID. 413, 414. *See supra* notes 3-4 and accompanying text.

67. United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1998) (stating that it was Congress's intent that the new rules supersede the restrictive aspects of Rule 404(b) in sex cases); United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998) (holding that Rule 413 supersedes Rule 404(b)'s restrictions allowing the government to offer evidence of the accused's prior conduct to show propensity to commit the charged offense); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (holding that the new rules supersede the restrictive aspects of Rule 404(b)).

68. "In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 140 CONG. REC. 8991 (statement of Rep. Susan Molinari).

69. Federal Rule of Evidence 403 requires the court to balance the probative value of the evidence against the harm likely to result from its admission.

70. *LeCompte*, 131 F.3d at 769 (stating that evidence offered under Rule 414 is still subject to the requirements of Rule 403). *See* United States v. Mann, 193 F.3d 1172, 1173 (10th Cir. 1999) (stating that courts cannot ignore the balancing requirement of Rule 403); United States v. Lawrence, 187 F.3d 638 (6th Cir. 1999) (holding that Rule 403 is applicable to Rule 414 evidence); United States v. Castillo, 140 F.3d 874, 882-83 (10th Cir. 1998) (applying the Rule 403 balancing test to evidence offered under Rule 414, and holding that such application protects the accused's constitutional right to due process); United States v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (stating that under both Rules 413 and 414, the court must conduct a Rule 403 balancing test); United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998) (holding that the Rule 403 balancing test applies to Rule 413 evidence); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (applying the Rule 403 balancing test to evidence offered under Rule 413, and stating that the Rule 403 balancing test is necessary to ensure constitutionality of the rule); United States v. Peters, 133 F.3d 933 (10th Cir. 1998) (holding that the Rule 403 balancing test applies to Rule 413); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (stating that a Rule 403 balancing test is still required for evidence offered under Rule 414); United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997) (stating that Rule 403 balancing test is consistent with Congress's intent); United States v. Bailey, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (adopting *Dewrell* test for Rule 403 balancing); United States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999) (making definitive test for applying Rule 403 balancing to Rule 413 and Rule 414 evidence); United States v. Green, 50 M.J. 835, 839 (Army Ct. Crim. App. 1999) (holding that, in the Army, the military judge is required to conduct Rule 403 balancing test before admitting evidence under either Rule 413 or Rule 414); United States v. Wright, 48 M.J. 896, 899 (A.F. Ct. Crim. App. 1998) (finding that military judge properly balanced Rule 413 evidence using Rule 403); United States v. Henley, 48 M.J. 864, 871 (A.F. Ct. Crim. App 1998) (applying Rule 403 balancing test to Rule 414 evidence); United States v. Hughes, 48 M.J. 700, 717 (A.F. Ct. Crim. App. 1998) (holding that Rule 414 evidence must still comply with the Rule 403 balancing test).

evidence is discretionary, Rule 403 should also apply to Rules 413 and 414. These courts have noted that the Rule 403 balancing test should be applied to give the new rules their intended effect,[72] even though there is a preference in favor of admitting evidence under these rules.[73] Therefore, federal courts generally apply the Rule 403 balancing test with a view toward admitting the evidence under either Rule 413 or Rule 414.[74] Moreover, several federal courts have added requirements to the standard Rule 403 balancing test. For example, the 10th Circuit Curt of Appeals stated that "a court must perform the same 403 analysis that it does in any other context, but with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413."[75] The court further stated that "the trial court must make a reasoned, recorded finding"[76] concerning its Rule 403 balancing test, after a full evaluation of the proffered evidence.

The military's response to these rules was not much different. Initially, the military courts struggled with whether any balancing test was required.[77] In *United States v. Hughes*, the Air Force court stated that, in examining the admissibility of evidence under MRE 414, the evidence must still withstand the MRE 403 balancing test.[78] The Air Force court reaffirmed this view in two later cases.[79]

The Army Court of Criminal Appeals also confronted the issue of whether the MRE 403 balancing test was required. In *United States v. Green*,[80] the military judge admitted evidence of a prior alleged sexual assault by the accused against a different victim. The alleged sexual assault occurred several months prior to the charged offenses, and the military judge stated that MRE 413's plain language made this type of evidence admissible.[81] The military judge therefore admitted the evidence without any balancing test. The Army court held that the military judge erred as a matter of law, because the MRE 403 balancing test was required prior to admission of evidence under either MRE 413 or MRE 414.[82]

Although the Air Force court in *Hughes* took an approach similar to the Army court in *Green*, the Air Force court has recently adopted a different standard for applying the MRE 403 balancing test to evidence offered under MRE 414.[83] In *United States v. Dewrell*, a general court-martial convicted the accused, an Air Force master sergeant, of committing an indecent act upon the body of a female less than sixteen years of age. The charges arose from an incident that occurred on 1 October 1995, when the accused fondled ADK's[84] chest under her shirt and placed her hands on his exposed penis. The trial counsel gave timely notice of the government's intent to offer the testimony of two witnesses, Specialist C[85] and Ms. P,[86] under MRE 404(b) and 414.

Specialist C testified about events that allegedly occurred between 1987 and 1989 when she was between eleven and thirteen years old. The first incident occurred while she was at the accused's home to babysit. The accused was wearing short

71. FED. R. EVID. 403. *See supra* note 9 and accompanying text.

72. *Mound*, 149 F.3d at 800; *LeCompte*, 131 F.3d at 769; *Meacham*, 115 F.3d at 1492.

73. *Larson*, 112 F.3d at 604; *Mound*, 149 F.3d at 800; *Enjady*, 134 F.3d at 1431; *LeCompte*, 131 F.3d at 769; United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997); *Meacham*, 115 F.3d at 1492.

74. *Mound*, 149 F.3d at 800; *LeCompte*, 131 F.3d at 769; *Meacham*, 115 F.3d at 1492.

75. *Guardia*, 135 F.3d at 1330.

76. *Id*. at 1332.

77. *See* United States v. Green, 50 M.J. 835 (Army Ct. Crim. App. 1999); United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998); United States v. Henley, 48 M.J. 864 (A.F. Ct. Crim. App 1998); United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998).

78. *Hughes*, 48 M.J. at 716. The court analogized the admissibility of evidence under MRE 414 to the admissibility of evidence of prior misconduct under MRE 404(b). The court stated that evidence offered under MRE 404(b) must meet a three-pronged test. First, the evidence must tend to prove that the accused committed the uncharged misconduct. Second, the evidence must make some fact of consequence more or less probable. Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice or confusion. The court applied a similar test to the evidence offered under MRE 414.

79. Unites States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999); *Henley*, 48 M.J. at 871.

80. 50 M.J. 835 (Army Ct. Crim. App. 1999).

81. *Green*, 50 M.J. at 837-8.

82. *Id*. at 839. The court relied heavily on legislative history and prior federal court cases, holding that the "constitutional concerns with Rules 413 and 414 are satisfied by a proper application of the Rule 403 balancing test by the trial judge." *Id*. The court specifically looked at the drafters' analysis provided in the *MCM* wherein it states that courts will apply the Rule 403 balancing test to evidence offered under Rules 413 and 414. *See* MCM, *supra* note 32, app. 22, at A22-36.

83. *Dewrell*, 52 M.J. at 609.

84. ADK is a pseudonym. It is unclear from the case what relationship, if any, ADK had with the accused.

pants and she observed that the accused had an erection. The accused then pulled his penis from his shorts, placed her hands on it, and made her masturbate him. The second incident allegedly occurred when the accused forced Specialist C into a bathroom, locked the door, cornered her, and made her rub his penis. She also testified that on this occasion, the accused put his hand in her vagina and roughly rubbed her until he ejaculated. Specialist C also testified that on a third occasion the accused showed her pornographic materials.[87]

The government also charged the accused with raping Ms. P when she was fifteen years old.[88] Ms. P testified that on several occasions prior to the charged rape, the accused forced her hand onto his penis, forced her to masturbate him, fondled her breasts, and digitally penetrated her vagina. All of these incidents occurred in the accused's automobile while he was driving Ms. P home after babysitting.[89]

The military judge admitted a portion of Specialist C's testimony concerning the accused grabbing her, putting her hand on his penis, and forcing her to masturbate him.[90] The judge admitted the evidence under MRE 404(b) and 414. However, the military judge excluded the testimony concerning the incidents in the bathroom, because they were too dissimilar to the charged offenses and, therefore, the prejudicial effect of the evidence would substantially outweigh its probative value.[91] The judge admitted Ms. P's testimony under MRE 413 because she was over the age of fourteen at the time of the prior rape.[92]

The accused appealed, arguing that the military judge improperly admitted Specialist C's and Ms. P's testimony and, in so doing, violated the Due Process and Equal Protection Clauses of the Constitution.[93] The first issue that the Air Force court discussed was the military judge's admission of the evidence under MRE 404(b), 413, and 414. The Air Force court found that, for three reasons, it was inappropriate to apply the MRE 404(b) analysis to evidence offered under MRE 413 and MRE 414. First, neither the trial counsel nor the military judge articulated a specific reason under MRE 404(b) as to why the evidence was admissible. Second, the MRE 403 balancing which the military judge performed "was not in accord with that normally done" for MRE 404(b) evidence.[94] Third, the limiting instruction[95] given by the military judge was not a MRE 404(b) instruction. As a result, the Air Force court found that the lower court erred in applying the MRE 404(b) analysis to evidence offered under MRE 414. Instead, the Air Force court found that applying a modified MRE 403 balancing test was appropriate in such cases.[96]

Chief Judge Snyder, writing for the Air Force court, focused on the applicability of the MRE 403 balancing test to evidence offered under either MRE 413 or MRE 414.[97] The court first considered the federal courts' views that Rule 403 should be

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85. Specialist C was a family friend of the accused. She used to live across the street from the accused when both families were stationed in Oklahoma City, Oklahoma. Specialist C was a baby-sitter for the accused's children when they were neighbors. It is unclear from the case how the authorities became aware of any misconduct relating to Specialist C.

86. Ms. P was a second victim. Ms. P was a baby-sitter for the accused's children.

87. *Dewrell*, 52 M.J. at 605-06.

88. The panel found the accused not guilty of this offense. *Id*. at 606 n.1.

89. *Id*.

90. *Id*.

91. *Id*.

92. *Id*. at 607. The version of MRE 414 in effect at the time of the accused's trial, defined "child" as "any person below the age of fourteen." However, the 1998 amendments raised the age to sixteen. MCM, *supra* note 32, MIL. R. EVID. 414.

93. *Dewrell*, 52 M.J. at 608.

94. *Id*.

95. The military judge gave the following limiting instruction:

> Each offense must stand on its own and you must keep the evidence of each offense separate. The burden in on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of any other offense. However, you may consider any similarities in the testimony of Ms. [P, ADK], and Spec C concerning masturbation with regard to the Specification of Charge II.

Id. at 606.

96. *Id*.

97. *Id*.

applied "in a broad manner which favors admission."[98] Specifically, the Air Force court critiqued the 10th Circuit's application of the balancing test, stating that the 10th Circuit's approach was too restrictive.[99] Chief Judge Snyder stated that, if Rule 403 was applied to Rules 413 and 414 in the same manner as other rules, then the effects of Rules 413 and 414 "have been neutralized if not eviscerated."[100] Consequently, the Air Force court opted "for an approach which we believe accomplishes the purposes of the rules."[101] The court stated:

> We hold that when applying the Rule 403 balancing test to Rule 413 and 414 evidence, the military judge will test for whether the prior acts evidence will have a substantial tendency to cause the members to fail to hold the prosecution to its burden of proof beyond a reasonable doubt with respect to the charged offenses. It is only when the prior acts evidence is deemed to meet this test that its prejudicial value will be deemed to *substantially* outweigh the probative value of the prior acts evidence in issue and thereby render exclusion of the evidence appropriate.[102]

The court further elicited the primary factors for the military judge to consider:

> (1) whether the evidence will contribute to the members arriving at a verdict on an improper basis;
> (2) the potential for the prior acts evidence to cause the members to be distracted from the charged offenses; and,
> (3) how time consuming it will be to prove the prior acts.[103]

As a result, the Air Force court promulgated a rule that deviates from the norm established by the federal courts. Notwithstanding the different approaches of the 8th Circuit and the 10th Circuit,[104] it is clear that the federal courts required application of the Rule 403 balancing test to determine the admissibility of evidence under Rules 413 and 414.[105] As discussed above, Chief Judge Snyder critiqued the 10th Circuit *Guardia* holding that the Rule 403 balancing should be applied to Rule 413 evidence in the same manner it is applied to other types of evidence. However, Chief Judge Snyder's interpretation of the *Guardia* holding was flawed. Moreover, the analysis used by the 10th Circuit in *Guardia* demonstrated a superior understanding of the underlying evidentiary issues.[106]

The *Guardia* court stated: "Rule 413 marks a sea change in the federal rules' approach to character evidence, a fact which could lead to at least two different misapplications of the 403 balancing test."[107] First, a court might be tempted to exclude Rule 413 evidence because of the traditional view that such evidence is always too prejudicial.[108] Second, a court might liberally allow the evidence under "the belief that Rule 413 embodies a legislative judgment that propensity evidence regarding sexual assaults is never too prejudicial or confusing and generally should be admitted."[109]

The 10th Circuit found that both of these potential misapplications of the Rule 403 balancing test would be "illogical."[110] Under the first approach, such a strict interpretation would never allow admission of Rule 413 evidence.[111] Because Congress intended to partially repeal the admission limitations of

98. *Id*. at 609. The Air Force court termed the 8th Circuit's approach to this issue "broad," and accused the 10th Circuit of trying to "stake out a middle ground between a restrictive application and the Eighth Circuit's approach . . . ." *Id*. *See, e.g.*, United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (stating that Rule 403 must be applied to allow Rule 414 its intended effect); *accord* United States v. Mound, 149 F.3d 799, 800 (8th Cir. 1998) (stating that trial court must apply 413, 414, and 415 in a way sufficient to accomplish the effect intended by Congress); United States v. Larson, 112 F.3d 600, 605 (2d Cir. 1997).

99. *Dewrell*, 52 M.J. at 609 (citing United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998)). The Air Force court summarized the 10th Circuit approach by stating: "Rule 403 would be applied to Rule 413 and 414 evidence in the same fashion as evidence offered under other rules which favor admission." *Id*.

100. *Id*.

101. *Id*.

102. *Id*. (emphasis in original; citation omitted)

103. *Id*.

104. *See supra* note 70.

105. United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998); United States v. Larson, 112 F.3d 600 (2d Cir. 1997).

106. *See* United States v. Guardia, 135 F.3d 1326, 1328-32 (10th Cir. 1998).

107. *Id*. at 1330.

108. *Id*.

109. *Id*.

Rule 404(b), the 10th Circuit reasoned, "Rule 413 only has effect if we interpret it in a way that leaves open the possibility of admission."[112] With regard to the second approach, the 10th Circuit said simply that Rule 413 "contains no language that supports an especially lenient application of Rule 403."[113] Therefore, the 10th Circuit found that the Rule 403 balancing test should be applied to Rule 413 evidence in the same manner as it would be applied to any other type of evidence.[114]

Contrary to Chief Judge Snyder's comments in *Dewrell*, the 10th Circuit court recognized the extremely sensitive nature of the balancing required for Rule 413 evidence. However, the court also appreciated that "propensity evidence . . . has indisputable probative value."[115] Because the risk of prejudice would be present to varying degrees each time Rule 413 evidence was offered, the 10th Circuit concluded that courts must consistently apply the Rule 403 balancing test in the same manner as it is applied to other types of evidence.[116] Thus, the 10th Circuit's interpretation was not overly restrictive, as Chief Judge Snyder asserted in *Dewrell*, but was instead a reasoned application of current law, which ensured fairness to the accused, and the exclusion of evidence where its probative value would be substantially outweighed by its prejudicial effect.

For the military practitioner, a conflict now exists where the Air Force court asserts an analytical approach to MRE 403 that differs from the approach articulated by the Army court and the federal courts. This conflict will only be resolved when the Court of Appeals for the Armed Forces articulates the appropriate application of the MRE 403 balancing test to evidence offered under MRE 413 or MRE 414. Although the Air Force court offered a modified standard in *Dewrell*, it is not the standard that should be applied in courts-martial. While the decision in *Dewrell* purportedly "accomplishes the purpose of the rules,"[117] the 10th Circuit's approach to the issue is superior. The 10th Circuit's approach provides for the normal application of Rule 403 to Rules 413 and 414, in the same manner that Rule 403 would be applied to other rules of admissibility. This allows for a consistent evidentiary approach, regardless of the basis for admission.

Prior Offenses—What Are They and What is Needed to Prove Them?

In addition to the varying approaches to the Rule 403 balancing test, propensity evidence raises several other concerns. For example, what types of prior bad acts are admissible at trial against the defendant? Rules 413 and 414 allow admission of, respectively, evidence of prior offenses of sexual assault and offenses of child molestation. While the term "offense" is specifically defined in the rules,[118] there is no guidance as to the prosecutor's burden to demonstrate a prior offense. Moreover, there is little guidance concerning when a prior offense becomes inadmissible due to time limitations. This section discusses these issues.

110. *Id*.

111. *Id*.

112. *Guardia*, 135 F.3d at 1330.

113. *Id*. at 1331.

114. *Id*.

115. *Id*.

116. An example of the dangers of an especially lenient application of the Rule 403 balancing test may be found in *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999). In *Charley*, a jury convicted the defendant of seven counts of sexual abuse of a child and sentenced him to life imprisonment. *Id*. at 1255. One issue raised on appeal was the admission of a prior conviction for sexual molestation offered by the government under FRE 414. *Id*. at 1259-60. The defendant alleged that admitting the prior conviction under FRE 414 denied him his constitutional due process right to a fair trial. *Id*. at 1259. In evaluating this issue, the court determined that it must conduct a "case-specific inquiry" into the trial judge's decision to admit the Rule 414 evidence under Rule 403. *Id.* The following excerpt details the trial judge's decision.

> For the record, I have made a balancing test under 403 and 41[4], and I find the testimony of the previous sexual activity by the defendant to outweigh any harm to come to him under 403. Specifically, under relevancy, in the discussions under Rule 413 it says, the proposed reform is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases it will affect. In child molestation cases, for example, *a history of similar acts tends to be exceptionally probative* because it shows an unusual disposition of defendant - a sexual or sadosexual interest in children - that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked *in the absence of substantial corroboration*. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense. So I have conducted that balancing test. As I previously stated to you I found it was more probative than not under 4[0]3.

Id. at 1260 (emphasis provided) (citations omitted). The 10th Circuit found that "invoking the stated general reasons for the Rule's enactment" was a sufficient balancing test under Rule 403. *Id*. However, it is obvious that the trial judge did little more that read the legislative history of Rule 414 contained in the advisory committee's note to the rule.

117. *Dewrell*, 52 M.J. at 606.

Burden of Proof to Show a Prior Offense

Neither the FRE nor the MRE make any reference to the level of proof required to show a prior sexual or child molestation offense. They simply state: "evidence of the defendant's commission of one or more offense or offenses of sexual assault is admissible . . . ."[119] However, the legislative history behind FRE 413 and FRE 414 provides some assistance.

David Karp, one of the original drafters of the proposed evidentiary rules, outlined his opinions concerning the burden of proof issue in an address presented to the Evidence Section of the Association of American Law Schools on 9 January 1993.[120] Representative Molinari later incorporated Mr. Karp's address into her House speech on the Crime Control Act.[121] These remarks provide a starting point for exploring the standard of proof issue.

Mr. Karp stated, "the standard of proof with respect to uncharged offenses under the new rules would be governed by the Supreme Court's decision in *Huddleston v. United States*."[122] While *Huddleston* addressed proof requirements under Rule 404(b), Mr. Karp asserted that the same requirements would apply to evidence offered under Rules 413 and 414. In *Huddleston*, the Court listed four procedural safeguards to the admission of evidence under Rule 404(b).[123] The Court stated:

> We think, however, that the protection against such unfair prejudice emanates not

118. FED. R. EVID. 413(d). In pertinent part: FRE 413(d) provides:

> For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved
> (1) any conduct proscribed by chapter 109A of title 18, United States Code;
> (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
> (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
> (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

MCM, *supra* note 32, MIL. R. EVID. 413. In pertinent part, MRE 413 provides:

> For purposes of this rule, "offense of sexual assault" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved
> (1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;
> (2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;
> (3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;
> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
> (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

FED. R. EVID. 414. In pertinent part, FRE 414 provides:

> For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved
> (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
> (2) any conduct proscribed by chapter 110 of title 18, United States Code;
> (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
> (4) contact between the genitals or anus of the defendant and any part of the body of a child;
> (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
> (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

MCM, *supra* note 32, MIL. R. EVID. 414. In pertinent part, MRE 414 provides:

> For purposes of this rule, "child" means a person below the age of sixteen, and "offense of child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved
> (1) any sexual act or sexual contact with a child, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;
> (2) any sexually explicit conduct with child proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;
> (3) contact between any part of the accused's body, or an object controlled or held by the accused, and the genitals or anus of a child;
> (4) contact between the genitals or anus of the accused and any part of the body of a child;
> (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
> (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

119. FED. R. EVID 413, 414. *See supra* notes 3-4 and accompanying text.

120. Karp, *supra* note 7, at 19.

121. 140 CONG. REC. H8991 (Aug. 21, 1994) (statement of Rep. Susan Molinari).

122. Karp, *supra* note 7, at 19.

> from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirements of Rule 402 as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[124]

The Court in *Huddleston* concluded: "such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed that similar act."[125] Mr. Karp went on to say that the jury should be able to "reasonably conclude by a preponderance [of the evidence] that the offense occurred."[126]

While federal courts have uniformly applied the *Huddleston* criteria[127] as envisioned by Mr. Karp, the military courts have taken a slightly different approach. In *United States v. Hughes*,[128] the Air Force court departed from *Huddleston* and created a unique standard to determine the admissibility of prior offense evidence under MRE 404(b). First, the court found that the military judge was not required to make a finding that the government had proved the acts by a preponderance of the evidence.[129] Here, the court relied on the "sufficient to support a finding by the jury," language from *Huddleston*.[130] Even though this is the same standard applied in *Huddleston*, the court deviated from the *Huddleston* four-prong test and created its own three-part test to review the admissibility of prior offense evidence in courts-martial under MRE 404(b).[131] The test asks: "Does the evidence reasonably support a finding that the appellant committed the prior acts?; what fact of consequence is made more or less probable by the existence of this evidence?; and is the probative value substantially outweighed by the danger of unfair prejudice?"[132] Finally, the Air Force court added: "we conclude a similar framework may be used for evidence offered under [MRE] 414."[133]

Because of the differing approaches of the Air Force court and the Circuit Courts of Appeal, the standard of proof required for admitting evidence under Rules 413 and 414 remains unclear. While the *Huddleston* preponderance standard makes sense, the question remains whether it should be used in Rule 413 or Rule 414 cases. The preponderance standard comes from Rule 404(b), which allows admission of character evidence if it falls within one of the listed exceptions, but never to show propensity. Apparently, Congress intended to eliminate this obstacle to admit evidence of prior acts in sexual assault and child molestation cases. This implies that a lower burden should also be used. However, fairness to the accused is of paramount importance in the evidentiary rules. Such a lower burden would open the door to the dangers of punishing an accused because of prior bad acts, or because the panel believes that the accused is a bad person.

Despite the legislative history and the Supreme Court's holding in *Huddleston*, a higher standard of proof should be used in determining the admissibility of evidence under Rules 413 and 414. Because Rules 413 and 414 allow evidence to be admitted to show propensity and to be considered on any matter for which it is relevant, there is a greater need to protect the

123. Huddleston v. United States, 485 U.S. 681 (1988).

124. *Id.* at 691-92 (citations omitted).

125. *Id.* at 685.

126. Karp, *supra* note 7, at 19.

127. *See* United States v. Mann, 193 F.3d 1172 (10th Cir. 1999); United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998); United States v. Roberts, 88 F.3d 872 (10th Cir. 1996). *But see* United States v. Sumner, 119 F.3d 658 (8th Cir. 1997). The 8th Circuit in *Sumner* used a slightly different standard. "To be admissible as Rule 404(b) evidence, the evidence must be '(1) relevant to a material issue; (2) proved by a preponderance of the evidence; (3) higher in probative value than in prejudicial effect; and (4) similar in kind and close in time to the crime charged.'" *Id.* at 660. Thus, the 8th Circuit added the requirements that the proffered evidence be similar to the charged offense and not too old.

128. United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998).

129. *Id.* at 715.

130. *Id.*

131. *See* United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

132. *Hughes*, 48 M.J. at 715.

133. *Id.* at 716.

accused from unfair consideration of the evidence by the fact finder. *Huddleston* reduced the threshold for admitting character evidence under Rule 404(b) from clear and convincing to a preponderance, because of the clear exceptions listed in Rule 404(b).[134] The Court in *Huddleston* found that the legislature had already balanced the probative value of this type of evidence against the danger of unfair prejudice. However, the Court was also careful to reiterate Rule 404(b)'s strict prohibition against the use of such evidence to show the accused's propensity to commit a particular offense.[135]

Like the federal courts, the burden of proof required to show a prior offense in the military courts is too low. While the Air Force court relied on the "sufficient to support a finding by the jury" language of *Huddleston*, it lowered this standard when it devised the three-part test in *Hughes*.[136] The first prong of the test simply asked: "Does the evidence reasonably support a finding that the appellant committed the prior act?"[137] Evidence sufficient to reasonably support a finding is well below a preponderance standard. The Air Force court further lowered the standard in *Dewrell*.[138] While the Air Force court did not specifically address the burden of proof required, its adoption of the MRE 403 balancing test had the practical effect of reducing the burden from the preponderance standard. The court, in *Dewrell*, focused on the government's burden of proving the charged offenses beyond a reasonable doubt. Essentially, under the *Dewrell* standard, any level of evidence that does not have a substantial tendency to detract from the government's burden to prove the charged offense will be admitted.

A clear and convincing standard should be applied to evidence offered under Rules 413 and 414. The broader use of evidence authorized under Rules 413 and 414 warrants a higher standard of proof to show prior acts. A higher standard would also establish a clearer nexus to the charged crimes. If there is more proof that the accused committed a prior act, then the government has better established the accused's propensity to engage in similar acts. Also, if the prior act is shown more clearly, then the court can better ensure fairness to the accused. Finally, the *Huddleston* case addressed evidence offered under Rule 404(b), not Rules 413 and 414. Rules 413 and 414 should be analyzed differently, and with greater scrutiny, because evidence admitted under either rule "may be considered for its bearing on any matter to which it is relevant."[139]

Time Limitation—How Old is Too Old?

As with the burden of proof to show a prior offense under Rules 413 and 414, the rules provide no guidance on when a prior offense becomes inadmissible due to time limitations. Senator Dole argued during debates on these rules that even very old evidence would still have great probative value when it comes to propensity to commit sexual assaults or child molestation.[140] "No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses."[141] Therefore, the legislative history reveals that no time limit was intended to apply.

Although the courts have given great deference to the congressional intent in passing the rules, the courts have also critically examined the age of proffered evidence while conducting their Rule 403 balancing tests. Two federal cases illustrate this point: *United States v. Larson*[142] and *United States v. Meacham*.[143]

In *Larson*, a jury convicted the defendant, David A. Larson, of interstate transportation of a minor with intent to engage in criminal sexual conduct in violation of 18 U.S.C. § 2423(a).[144] Prior to trial, the government gave timely notice of its intent to offer the testimony of three witnesses who alleged that they had

134. *Huddleston*, 485 U.S. at 681, n.2.

135. *Id*. at 685.

136. *Hughes*, 48 M.J. at 715.

137. *Id*.

138. United States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999).

139. FED. R. EVID. 413, 414; MCM, *supra* note 32, MIL. R. EVID. 413, 414.

140. 140 CONG. REC. S12990 (Sept. 20, 1994) (statement of Sen. Robert Dole).

141. *Id*.

142. United States v. Larson, 112 F.3d 600 (2d Cir. 1997).

143. United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997).

144. The indictment charged that Larson had transported a 13 year-old boy from Connecticut to Massachusetts to engage in sex. Larson had a cabin in Otis, Massachusetts, to which he took the boy under the pretense that the boy would work around the cabin, go water skiing, and go swimming. However, once there, Larson served the boy alcohol and then engaged in sexual acts with him. *Larson*, 112 F.3d at 602.

been sexually molested by Larson when they were minors. While the case does not state which provisions the government relied on, the district court analyzed the admissibility of the proffered evidence under both Rules 404(b) and 414.[145] The court considered testimony from two witnesses, Stevens and Walsh, concerning the defendant's prior crimes.[146] Stevens testified about acts that occurred sixteen to twenty years before trial and Walsh testified about acts that occurred twenty-one to twenty-three years before trial.[147] The district court allowed Stevens's testimony, but excluded Walsh's.[148]

On appeal to the Second Circuit Court of Appeals, Larson argued that it was prejudicial error for the trial judge to admit Stevens's testimony under Rules 414 and 404(b), because the acts about which he testified occurred years before trial.[149] The court agreed that the more remote a prior act is, the less reliable and less relevant it may become.[150] However, the court went on to say that there is no "bright-line rule as to how old is too old."[151] In finding that the district court had not abused its discretion in admitting Stevens's testimony, the Second Circuit stated that the similarity between Stevens's testimony and the charged offense made his testimony relevant.[152] Further, both the "traumatic nature of the events and their repetition over a span of four years," were strong indicators of Stevens's reliability as a witness.[153] The lower court was upheld.

In *Meacham*, a jury in the District of Utah convicted Henry Lee Meacham of one count of transporting a minor in interstate commerce with the intent that she engage in sexual activity in violation of 18 U.S.C. § 2423.[154] The victim, a twelve year-old, female relative of Meacham, alleged that on two occasions she accompanied Meacham hauling freight between Utah and California. On those occasions, Meacham engaged in criminal sexual activity with her.[155] Meacham testified and denied any sexual contact with the victim.[156] On cross-examination, he also denied fondling his stepdaughters when they were under the age of fourteen.[157] In rebuttal to this statement, the government called Meacham's two stepdaughters.[158] Each testified that Meacham had molested them more than thirty years prior to trial.[159] The court reviewed the legislative history of Rules 413 and 414, and determined that such testimony was admissible.[160]

These cases demonstrate that a clear time limit should be imposed on the admissibility of prior offenses. In other rules of evidence, clear time limits on admissibility ensure the reliability and relevance of the proffered evidence. For example, in

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145. *Id*. at 604.

146. *Id*. at 602. Stevens alleged that the defendant engaged in similar conduct with him occurring 16 to 20 years before trial. The court admitted his testimony. Walsh alleged also that the defendant had engaged in similar conduct with him occurring 21 to 23 years before trial. The court excluded his testimony. The third witness, Deland, was not discussed by the court, leaving it unclear whether the district court admitted or excluded his testimony.

147. *Id*.

148. *Id*. at 602-03. The court reasoned that the events to which Walsh would testify were too remote in time. Therefore, in applying the Rule 403 balancing test, the court concluded that the probative value of Walsh's testimony was substantially outweighed by the danger of unfair prejudice to the defendant. On the other hand, the court concluded that the events to which Stevens testified were "not so remote in time so as to constitute unfair prejudice to the defendant." *Id*. at 602. The court further found that Stevens's testimony "goes to the presence of a common scheme or plan on the part of the defendant and also is relevant to the defendant's intent and motive in the commission of the charged offense." *Id*. at 603.

149. *Id*. at 605.

150. *Larson*, 112 F.3d at 605.

151. *Id*.

152. *Id*.

153. *Id*.

154. United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997).

155. *Id.* at 1491.

156. *Id*.

157. *Id*.

158. *Id*.

159. *Id*.

160. *Id.* at 1495. The court reasoned that, since no time limit is imposed on the uncharged offenses that may be used under Rule 414, testimony concerning events which occurred 30 years ago would be admitted.

Rule 609, there is a 10-year limitation on the use of a prior conviction to impeach a witness. Without such limitation, the accused is exposed to the use of prior acts from his entire life. The older the act, the more difficult it would be for the accused to investigate or defend against the allegation. Moreover, prior bad acts from the distant past may cause the fact finder to lose focus from the charged offense. It is even possible that evidence of a prior crime could be offered after the statute of limitations for the crime has run. If evidence of this crime was admitted, an accused could be punished for an offense where the government has otherwise lost the ability to prosecute him due to the statue of limitations. Finally, time limits should be imposed because the reliability of the proffered evidence would decrease commensurate with the age of the prior offense**.**

A Practical Guide for Military Practitioners

The prohibition against admitting character evidence to show an accused's propensity to commit certain offenses is well entrenched in today's practice. This theory finds its origin in the earliest annals of English jurisprudence.[161] However, MRE 413 and MRE 414 have crumbled much of the historic wall between the panel and evidence of an accused's propensity to commit an offense. As a result, military practitioners must be prepared to deal with MRE 413 and MRE 414 evidentiary issues as admission of propensity evidence in courts-martial increases. This section offers practice tips for dealing with these rules at trial.

Trial Counsel

In most cases, trial counsel will like these rules because they permit the government to present evidence that the accused has committed similar offenses in the past. Therefore, the trial counsel can argue that the accused is more likely to have committed the offenses with which he is charged. To be effective, however, the trial counsel must remember the following predicate factors that open the door to admitting evidence under either MRE 413 or MRE 414.

First, there are strict notice requirements. Both MRE 413 and MRE 414 state that "the Government shall disclose the evidence to the accused . . . at least five days before the scheduled date of trial . . . ."[162] Trial counsel should not wait until the last minute to provide the required notice to the accused. The notice requirement is designed to promote fairness, eliminate surprise, and allow the defense sufficient time to investigate and prepare rebuttal or cross-examination. Timely notice preserves these concerns. Arguably, it may even press the accused closer to a plea agreement if he believes, after investigation, that the damaging evidence will be admitted.

Second, trial counsel must collect sufficient evidence to meet the burden of proving the prior offense. Obviously, this entails thorough investigation. Compiling evidence is not the trial counsel's only concern. He must also precisely articulate the government's burden under MRE 413 and MRE 414. Trial counsel will likely assert the diminished standard of proof used by the Air Force court in *Dewrell*. While *Dewrell* does not specifically address the burden of proof required, the court's ruling has the potential effect of lowering the "preponderance" standard followed by the federal courts and other military courts. Because the Court of Appeals for the Armed Forces has not ruled on this issue, however, trial counsel must be prepared to prove the prior offense by a preponderance of the evidence, as used in *Huddleston*. The greater the weight of the evidence presented concerning the offense, the more likely it is that the military judge will find the evidence probative, relevant, and reliable.

Third, trial counsel must be prepared to overcome the accused's inevitable objection under MRE 403. To overcome the MRE 403 objection, the trial counsel must articulate the significant probative value of the evidence. Trial counsel should discuss the similarities between the charged offense and the prior offense, including similarities between the victims. Trial counsel should also counter the age of the prior offense, when appropriate, by emphasizing the reliability of the prior victim, the presence of a sworn statement, and any other corroborating evidence. At the same time, the trial counsel must be prepared to explain why the danger of unfair prejudice to the accused does not significantly outweigh the probative value of the evidence.

Fourth, the trial counsel must be prepared to argue propensity evidence creatively during closing. The military judge may be uncomfortable with the new rules, due to the general prohibitions of MRE 404(b). However, the MRE 404(b) prohibitions should not apply to MRE 413 and MRE 414 admissibility issues. Rather, the new rules permit admission of propensity evidence "for any matter to which it is relevant."[163] Moreover, recent case law supports the use of MRE 413 or MRE 414 evidence to argue the propensity of the accused to commit a particular offense.[164] The trial counsel presents a compelling argument to the panel when he demonstrates that the accused has a propensity to commit the charged offenses because he committed similar offenses before.

Trial Defense Counsel

161. *See* Imwinkelreid, *Undertaking the Task*, *supra* note 6.

162. MCM, *supra* note 32, MIL. R. EVID. 413, 414.

163. *Id.*

164. United States v. Wright, 48 M.J. 896, 901 (A.F. Ct. Crim. App. 1998).

The trial defense counsel's job is formidable in cases where MRE 413 or MRE 414 evidence is offered. The defense counsel may believe that the most damaging evidence against his client is about to be admitted, and that the defense counsel is powerless to prevent that from happening. However, if the defense counsel has done his job, he will be well prepared at trial to protect his client from MRE 413 or MRE 414 evidence.

First, the defense counsel must begin investigation as soon as he receives notice of the government's intent to use propensity evidence. The more evidence gathered about the alleged uncharged offense, the better position the defense counsel will be in to defend his client. A thorough understanding of the facts will help the defense counsel to either rebut the allegations or to cross-examine the government's witness. If done properly, this may lay the foundation to later argue against admitting the evidence under MRE 403. The trial counsel has the burden to prove the prior offenses—defense counsel must hold the government to that burden. The defense counsel should assert the preponderance standard, as set out in *Huddleston*. Notwithstanding the *Huddleston* standard, the defense counsel could assert the position taken by this article, and argue that the court should apply a clear and convincing standard to evidence offered under MRE 413 and MRE 414. The defense counsel can argue that, because MRE 413 and MRE 414 allow evidence to "be considered for its bearing on any matter to which it is relevant," such evidence falls outside of the scope of the 404(b) standard articulated in *Huddleston*.

Second, the defense counsel must hold the trial counsel to the notice requirements in the rules. Although the military rules require only five days notice, the defense counsel can argue that he needs additional time to prepare, depending on the age of the prior offense. The defense counsel can further argue that he needs more than the five days provided in MRE 413 and MRE 414 to respond; after all, Congress allowed fifteen days under the federal rules. When appropriate, the defense counsel should give notice of MRE 412 evidence.[165] Arguably, if MRE 413 allows the government to offer evidence of prior alleged rapes, then the accused should be given wider latitude in offering evidence under MRE 412.

Third, the defense counsel must ask the military judge to determine the admissibility of propensity evidence in an Article 39a session of the court. This is the type of potentially inflammatory information that the defense counsel does not want to slip out in front of the panel. The prejudicial impact of such evidence, offered in an open session of the court, but not admitted, would be difficult to overcome.

Fourth, a thorough presentation of the evidence will help the defense counsel articulate a good MRE 403 objection. He must aggressively cross-examine the government's witnesses and should emphasize the prejudicial nature of the government's evidence. Oftentimes, evidence offered under MRE 413 or MRE 414 will be old and the defense counsel can challenge the reliability of that evidence. In addition, the defense counsel must distinguish between the prior act and the charged offense. The more differences shown by the defense counsel, the less reliable the government's evidence becomes. If the defense counsel is unable to distinguish the evidence, he should cautiously emphasize to the panel that the similarities between the prior act and the charged offense are confusing, and that the panel should take great care to try the accused only for the charged offense.

Fifth, the defense counsel must be prepared to ask for a limiting instruction to the panel concerning proper use of MRE 413 and MRE 414 evidence. Courts have looked to limiting instructions under MRE 404(b) for guidance. The trial counsel will likely argue that rules and relevant case law allow the government to offer evidence that shows the accused's propensity to commit the charged offense. The defense counsel should counter that propensity is only one factor to be considered.[166] Although the rules state that propensity evidence may be used for any matter to which it is relevant, courts frequently place limitations on the use of the such evidence by instructing the panel.[167] Moreover, a limiting instruction detracts from the trial

165. MCM, *supra* note 32, MIL. R. EVID. 412. In pertinent part, MRE 412 provides:

> (a) . . . The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c) of this rule:
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.
>
> (1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
>
> (B) Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) Evidence the exclusion of which would violate the constitutional rights of the accused.
>
> (c) Procedure to determine admissibility.
>
> (1) A party intending to offer evidence under subdivision (b) of this rule must:
>
> (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial;
>
> (B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

166. Unites States v. Dewrell, 52 M.J. 601, 610 (A.F. Ct. Crim. App. 1999).

counsel's arguments concerning propensity, and it may even diminish the trial counsel's ability to make such an argument. If the damaging evidence comes in, the defense counsel must be prepared to use every available tool to limit the damaging impact of the evidence to his client.

The Military Judge

The military judge may have the most difficult job when it comes to MRE 413 and MRE 414 evidence. That difficulty is compounded, because the Court of Appeals for the Armed Forces has not yet heard a case involving these evidentiary rules. However, the job of the military judge is made easier by the military and federal cases that have addressed the admissibility of propensity evidence under the new rules. The following guidance can be gleaned from those cases that interpreted MRE 413 and MRE 414.

First, the military judge must satisfy the predicate criteria listed by Judge Rolph in *United States v. Meyers*,[168] before admitting evidence under either MRE 413 or MRE 414. Implicit in this determination is applying a proper balancing test under MRE 403.[169] It is probably wiser to use the complete MRE 403 balancing test, instead of the modified version used by the Air Force court in *Dewrell*. For courts-martial in the Army, complete MRE 403 balancing is required.[170] In addition, the *Dewrell* court basically turned its brow at existing case law to further open the doors of admissibility. It is likely that the Court of Appeals of the Armed Forces will adhere to the higher standard when it addresses the issue. Finally, because MRE 413 and MRE 414 can be analogized to evidence offered under MRE 404(b), military judges should use the complete 403 balancing test, which was also the higher standard set forth by the Supreme Court in *Huddleston*.

Second, the military judge should ensure that the government satisfies its burden of proving any prior offense offered under the rules. To accomplish this, the military judge should conduct a pretrial hearing and require the government to put on its evidence. This allows the military judge to fully evaluate the evidence, and make an assessment of witness credibility. It also allows the military judge to make a first-hand assessment of the relevance and reliability of the evidence. Finally, this allows the military judge to make a reasoned record of the decision, articulating for the record the precise factors considered in conducting the MRE 403 balancing test.

Conclusion

The Crime Control Act was probably the most sweeping crime bill ever passed by Congress. The Act's amendments to the Rules of Evidence reflect a significant departure from the historical prohibition against using character evidence to show a person's propensity to commit a crime. Congress carved out these exceptions, encompassed by Rules 413 and 414, to specifically combat a perceived increase in sexual offenses against

167. *See id*. (stating that the military judge gave clear limiting instruction to members on how they were to use evidence admitted under MREs 413 and 414); United States v. Bailey, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (stating that the military judge gave limiting instruction to members on proper use of Rule 413 evidence); United States v. Henley, 48 M.J. 864, 872 (A.F. Ct. Crim. App. 1998) (stating that the military judge provided the members a limiting instruction on the proper use of evidence admitted under MRE 414); United States v. Hughes, 48 M.J. 700, 713 (A.F. Ct. Crim. App. 1998) (stating that the military judge gave limiting instruction that witness's testimony regarding prior allegation of sexual abuse could be considered only "for the limited purpose of its tendency, if any, to explain the state of mind of [the witness] . . . , [and that members should] not consider this evidence for any other purpose, [or] conclude from this evidence that the accused is a bad person or has criminal tendencies and that he therefore committed the offenses charged").

168. United States v. Myers, 51 M.J. 570, 580-81, n.20. (N.M. Ct. Crim. App. 1999). Judge Rolph opined:

> There now appears to be a number of predicate determinations that every military judge must make when facing the decision of whether or not to admit evidence under Mil. R. Evid. 413. These include:
>
> Determining that the accused is charged with "an offense of sexual assault." Mil. R. Evid. 413(a) and (d)(defining an "offense of sexual assault");
>
> Determining that the evidence offered is "evidence of the accused's commission of one or more offenses of sexual assault." Mil. R. Evid. 413(a);
>
> Determining that the evidence is relevant under Mil. R. Evid. 402 ("Evidence which is not relevant is not admissible."). In this regard, the military judge must conclude that the evidence shows the accused had a particular propensity bearing on the charged offense. Part of this relevance determination involves the military judge concluding that the members could reasonably find the conditional fact (i.e. that the accused committed the prior sexual assault) by a preponderance of the evidence;
>
> Determining and ruling that the prejudicial impact of the evidence is substantially outweighed by its probative value. Mil. R. Evid. 403;
>
> Determining that proper disclosure and notice, at least 5 days before trial, of the Government's intent to offer this evidence has been made. Mil. R. Evid. 413(b).

Id.

169. United States v. Green, 50 M.J. 835, 839 (Army Ct. Crim. App. 1999).

170. *Id*. at 839.

women and children. The call to adopt these rules was not from legal scholars and practitioners; instead, Congress acted in response to public opinion. As a result, our legal system now operates under ill-conceived evidentiary rules that are overly complex in application.

Although the accused faces tremendous risks from the admission of propensity evidence, military and federal courts have given great deference to the congressional intent underlying Rules 413 and 414. Moreover, the federal courts have overwhelmingly held that the rules are constitutional. The best solution requires Congress to make comprehensive amendments to the Federal Rules of Evidence, with the express purpose of effectively integrating Rules 413 and 414 into the existing rules. Because a major revision is unlikely, however, practitioners must struggle with the ambiguities inherent in Rules 413 and 414 until the courts provide more consistent guidance. In so doing, practitioners must ensure that fairness to the accused is maintained in the courtroom.