IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20210543
Specialist (E-4) **TONEY E. HENDERSON, J.R.,** United States Army Appellant	Tried at Joint Base Lewis-McChord, Washington on 6 May, 9 June and 27-2 October 2021, before a general court-martial appointed by Commander, 7th Infantry Division Lieutenant Colonel Larry A. Babin military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Statement of the Case

On 20 January 2023**,** appellant, Specialist Toney E. Henderson Jr, filed his initial brief. On 3 May 2023, the government filed its answer brief. This is appellant's reply.

Argument

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 413 BY ALLOWING THE GOVERNMENT TO INTRODUCE EVIDENCE OF A CASE WHERE APPELLANT WAS ACQUITTED.

The government misconstrues arguments by counsel with analysis by the military judge. To rebut appellant's contention that the military judge ignored appellant's acquittal in his analysis of the *Wright* factors, the government claims "the military judge heard appellant's arguments . . . and in his ruling he addressed appellant's concerns by finding the probative weight of the evidence favored admission of the evidence . . . ." (Gov't Br. at 12). Just because defense raised the issue and the judge heard it, does not mean the military judge adequately followed the mandate to use "*great sensitivity* when making the determination to admit evidence of prior acts that have been the subject of an acquittal." *United States v. Griggs,* 51 M.J. 418, 420 (C.A.A.F. 199) (emphasis added). The military judge failed to give the acquittal more than a single line in his entire analysis on admissibility or acknowledge the defense's grave concerns about how the government planned to use the acquittal. (App. Ex. LXII). The military judge failed to acknowledge the need for great sensitivity when considering evidence that was the subject of an acquittal – he applied no sensitivity.

The Government's reliance on *Nelms* is inapposite. The government uses *Nelms* to suggest that so long as the panel is instructed about the acquittal, the military judge, "exercised the requisite sensitivity." (Gov't Br. at 14). In *Nelms*, the Navy Court highlighted the judge's limiting order to find no error.

> "I do not intend that there be another trial on the merits regarding this. It's going to be very limited in scope, it will be the date on which this event occurred, the fact that the underlying facts that they went out, had drinks together, came back to the--her home, and she has a fragmented memory, woke up to the [appellant] having sexual intercourse with her or performing sexual acts upon her, and it was subsequently reported."

United States v. Nelms, No. NMCCA 201400369, 2015 CCA LEXIS 522, at *9 (N-M Ct. Crim. App. Nov. 19, 2015). Of course, no such limiting order was issued here. Despite the military judge acknowledging, "there is a risk for a protracted hearing within the trial on this collateral matter" (App. Ex. LXII), the lack of a limiting order permitted the government to devolve the case into a mini-trial and introduce text messages as an exhibit (Pros Ex. 9), question [redacted] beyond the incident to include later reported allegations on injuries she suffered, (R. at 790) and this required a defense witness to rebut it. (R, at 1106). Then the government misused DNA evidence from [redacted]'s case in their questioning of appellant which forms the basis of Assignment of Error II. (R. at 1276)

The government also incorrectly asserts appellant forfeited his objection to the government counsel's trial arguments. (Gov't Br. at 20). Therefore, they argue the burden of showing prejudice is with appellant. (Gov't Br. at 26). However, appellant moved for exclusion of the Mil. R. Evid. 413 evidence pre-trial, and the judge denied with no limitations on the use of the evidence. (App. Ex. LXII).

Appellant moved again for the exclusion of the evidence as an alternative remedy to a mistrial. (R. 1360).

This court's review of how the Mil. R. Evid. 413 evidence was used flows inextricably from the military judge's rulings on admissibility. To determine if the military judge's ruling was proper, this court is required to examine how the government used the Mil. R. Evid. 413 evidence throughout the trial, including its closing argument. This is true even though the military judge could not have known exactly how the government would use the evidence when his ruling was made. *United States v. Solomon*, 72 M.J. 176, 182 (C.A.A.F 2013). The military judge made his erroneous ruling – the evidence was admissible, the defense did not need to object each time it was used to preserve the issue. The government carries the burden of demonstrating the error did not have a substantial influence on the findings. *Id.*

II.

WHETHER THE PROSECUTORIAL MISCONDUCT BY MISSTATING FACTS ABOUT THE MIL. R. EVID. 413 EVIDENCE CAUSED APPELLANT TO RECEIVE AN UNFAIR TRIAL

The government defends the indefensible and concludes a mistake by the prosecutor cannot be misconduct because it was not willful. (Gov't Br. at 32, 34). The government offers no support in regulation, the model rules of ethics, or case

law for the proposition that an erroneous understanding of evidence by a prosecutor can constitute a good-faith basis to ask a question in court.

A ruling that a prosecutor can fail to understand or properly investigate their case and then ask questions on cross-examination which assert a fact based on their lack of understanding, so long as it was not done purposely, would eviscerate the ethics cannon of candor to the court. "A statement in open court, may properly be made only when the lawyer *knows* the assertion is true or *believes it to be true on the basis of a reasonably diligent inquiry*." Army Reg. 27 -26, Rules of Professional Conduct for Lawyers, Rule 3.3(3) (28 June 2018) [AR 27-26] (emphasis added).

The prosecutor, as both the Special Victim Prosecutor (SVP) and the government concede, made a mistake – no DNA examiner testified at the prior trial of [redacted] and no DNA from appellant was found inside [redacted]'s anus. Clearly, the SVP did not know a DNA examiner testified, because one did not, nor did she bother to get the record from that first trial to find out if a DNA examiner testified. There is even less of an explanation for her misstatements regarding where appellant's DNA was found because she seemed to have that evidence at hand. There was no diligent inquiry or inquiry at all.

Prosecutorial misconduct exists when there is a violation of a cannon of ethics. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F 1997). The cannon of candor to the court was violated and prosecutorial misconduct was committed.

Also, the government mischaracterizes defense counsel's reason for not asking the military judge to remove the SVP. (Gov't Br. at 32). The defense counsel clearly argued the SVP committed prosecutorial misconduct and only declined removing the SVP because removal would not cure the issue. (R. at 1372).

Last, the government argues there was insufficient prejudice to warrant a mistrial because "the DNA evidence was not relevant to any of the charged offenses." (Gov't br. at 38). Appellant wholeheartedly agrees the evidence was irrelevant. It is for that reason, as stated above in appellant's reply regarding AE I, it was error for the military judge to permit limitless use of the Mil. R. Evid. 413 evidence. Limiting the scope of that evidence was required in *Grigg*s, *Solomon* and *Nelms* – it ensures that if the panel convicted it would be for the charged offenses and not the acquitted conduct.

Once the prosecutorial misconduct occurred, the defense asked for a mistrial, or in the alternative for the Mil. R. Evid. 413 evidence to be stricken from the case. By continuing to allow its use, appellant received a fundamentally unfair trial.

Conclusion

WHEREFORE, appellant requests that this court set aside the finding and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on May 5, 2023.

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