NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	GOVERNMENT RESPONSE TO DEFENSE MOTION TO EXCLUDE EVIDENCE OF PRIOR SEXUAL MISCONDUCT BY ACCUSED
Douglas S. Wacker XXX XX 3913 Captain U.S. Marine Corps	)	1 November 2010

1. Nature of Motion

The defense has moved, pursuant to various rules of evidence, to exclude evidence of a prior sexual assault by the accused.[1] The government opposes the motion.

2. Summary of Facts

In addition to the facts set forth in the previous government motions and the other government responses, the government provides the following:

a. In December of 2006, the accused was introduced at a social function to another first-year law student at the University of San Diego (USD) named Nicole Cusack, who was, like the accused, from Seattle. During winter break of 2006-2007, the accused contacted Ms. Cusack while both of them were home in the Seattle area. Ms. Cusack met the accused in Seattle and went to a play, then to a bar in the University District in Seattle. While at the bar, the accused purchased several drinks for Ms. Cusack.

b. Ms. Cusack's memory of the remainder of the evening is spotty, with brief flashes of memory between lengthy gaps. Ms. Cusack testified at the Article 32 hearing that she

[1] The defense motion consolidated several issues into a single motion and was entitled "DEFENSE MOTION TO EXCLUDE EVIDENCE: Nicole Cusack story, Adderall, date rape drug allegations, etc." The government will respond to the separate issues raised in the defense motion via separate responses.

remembered (1) having difficulty unlocking the door to her sister's home in the University District, (2) vomiting on the front of her clothes, (3) falling down in the shower and hearing the accused laugh at her, (4) the accused bringing her someone else's toothbrush to brush her teeth, and (5) waking up on a bed to find the accused having sexual intercourse with her and asking him to stop.

c. After waking up the next morning, Ms. Cusack felt extremely ill for the remainder of that day and portions of the next. Ms. Cusack's symptoms included extreme fatigue, nausea, and muscle soreness. Ms. Cusack and her sister discovered in the morning that the accused had cleaned up Ms. Cusack's vomit during the night.

d. Within one to two days of this incident, the accused contacted Anand Upadhye, another first-year law student at USD, and told Mr. Upadhye about the night with Ms. Cusack. The accused told Mr. Upadhye that he had to help Ms. Cusack get home because she was a "drunken mess," that Ms. Cusack had vomited on herself, that he helped clean up her vomit, that he helped her into the shower to wash off the vomit, that Ms. Cusack was so drunk that she was falling over in the shower, and that Ms. Cusack had a "nice body." Curiously, despite sharing the details of seeing Ms. Cusack vomiting on herself and fall over naked in front of him in the shower, the accused did not mention any sexual activity during this conversation.

e. Within a couple of days of the incident, Ms. Cusack reported the incident to a friend, Jessie Baxter. Ms. Cusack told Ms. Baxter that the accused had helped her back to her sister's house when she became very intoxicated, that she vomited on herself, that the accused helped her into the shower, and that she passed out and woke up to find the accused having sexual intercourse with her. Ms. Cusack described large memory lapses occurring during the night. Shortly thereafter, Ms. Cusack also reported the same incident to two other friends,

Melissa Kopacz and Amos Lowder. Notably, she described the same incident to all three individuals prior to the charged offenses in April of 2007. No testimony or sworn statements from Ms. Baxter or Ms. Kopacz were presented during the Article 32, UCMJ hearing in this case.

f. The government does not dispute that Ms. Cusack had a sexual relationship with the accused following the charged incident.

g. In February or March of 2008, the accused became aware that Ms. Cusack had told some friends about the incident in Seattle in December of 2006. In a Google "chat" conversation with Joseph Gorman, the accused acknowledged that the night Ms. Cusack was referring to, during which he had previously told Mr. Upadhye that he had watched Ms. Cusack vomit on herself and fall down in the shower, was "the first time we hooked up."

3. <u>Authorities</u>

a. MRE 404
b. MRE 413
c. *United States v. James*, 63 M.J. 217 (C.A.A.F. 2006).
d. *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000).
e. *United States v. Roberts*, 55 M.J. 724 (N-M. Ct. Crim. App. 2001).
f. 140 Cong. Rec. S12,990 (daily ed. Sept. 12, 1994) (statement of Sen. Dole)
g. David J. Karp, *Symposium of 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, 24-25 (1994)
h. *United States v. Scheffer*, 523 U.S. 303 (1998)
i. *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974)
j. *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76 (1891)
k. MRE 104
l. *Huddleston v. United States*, 485 U.S. 681 (1988)
m. *United States v. Burton*, 67 M.J. 150 (C.A.A.F. 2009)
n. *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005)
o. *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989)
p. *United States v. McDonald*, 59 M.J. 426 (C.A.A.F. 2004)
q. *United States v. Tanksley*, 54 M.J. 169 (C.A.A.F. 2000)
r. *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989).
s. *United States v. Dowling*, 493 U.S. 342 (1990)

t. *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987)
u. *United States v. Cuellar*, 22 M.J. 529 (N.M.C.M.R. 1986).
v. *Michelson v. United States*, 335 U.S. 469 (1948)
w. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994)
x. *United States v. Edwards*, 549 F.2d 362 (5th Cir. 1977)
y. *United States v. Brewer*, 43 M.J. 43 (C.A.A.F. 1995)

4. Discussion

a. The defense motion for exclusion of a past sexual assault by the accused should be denied because the evidence satisfies the threshold requirements for admissibility and its probative value is not outweighed by the danger of unfair prejudice.

With the addition of MRE 413, "we went from a relatively strong preference against admissibility of uncharged misconduct generally in MRE 404(a), to an exceptionally strong preference in favor of admitting propensity evidence in the cases involving specific sexual misconduct…" *United States v. James*, 63 M.J. 217, 220 (C.A.A.F. 2006). "The Rules reflect a political decision that there should be a greater range of admissible evidence in criminal [sic] actions involving specific sexual assault crimes." *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). It is under this strong preference for admissibility that this motion should be considered.

M.R.E. 413(a) provides:

> In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413(a) (2008) [hereinafter MCM]. Before admitting evidence of other sexual assaults under MRE 413, the military judge must make three threshold findings:

(1) The accused is charged with an act of sexual assault;

(2) The evidence proffered is evidence of the defendant's commission of another offense of sexual assault; and

(3) The evidence is relevant under *Rules* 401 and 402.

Wright, 53 M.J. at 482. The military judge must also conduct a MRE 403 balancing analysis, and should consider the following inexhaustive list of factors:

> (1) the strength of proof of prior act -- conviction versus gossip;
>
> (2) the probative weight of evidence;
>
> (3) potential for less prejudicial evidence;
>
> (4) distraction of factfinder and time needed for proof of prior conduct;
>
> (5) temporal proximity to the charged offense;
>
> (6) frequency of the acts; intervening circumstances or lack thereof; and relationship between the parties.

Id.. The Navy-Marine Corps Court of Criminal Appeals admonishes that the "MRE 403 balancing test is to be applied in a broad manner which favors admission." *United States v. Roberts*, 55 M.J. 724, 730 (N-M. Ct. Crim. App. 2001).

(1) <u>The proffered evidence satisfies the threshold requirements for eligibility under Mil.R.Evid. 413</u>

While the accused has limited his challenge to a MRE 403 theory, it is imperative that the Government demonstrate that the proffered evidence satisfies the 3 threshold requirements. First, the accused is charged with an offense of sexual assault as defined in MRE 413(d), which 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 UCMJ [*sic*]; [or] (2) contact, without the consent of the victim, between any part of the accused's body…[*sic*] and the genitals [*sic*] of another person.

MCM, MIL. R. EVID.413(d)(1-2). This first element is satisfied as the accused is charged under Article 120 with rape of an incapacitated victim and indecent assault of another.

Secondly, the evidence proffered must be evidence of another sexual assault committed by the accused, as defined above. Here, the other act of sexual assault with Ms. Cusack involves contact between the body of the accused, namely his penis, with the genitals of the victim.

Lastly, the evidence must be relevant under MRE 401 and 402. The proffered evidence has the tendency to show that the accused has a propensity to commit sexual assault against incapacitated victims and it also diminishes the likelihood that the accused would mistakenly believe that an overly intoxicated victim was capable of consenting on two separate occasions. The similarity in the symptoms described by the victims, not only during the nights in question but the unusual feelings of sickness or physical pain on the days after, also is strong circumstantial evidence that an intoxicant other than alcohol may have been involved in both cases. Because the threshold elements are readily satisfied, the inquiry must shift to the MRE 403 factors cited above.

(2) Applying the MRE 403 balancing test in a broad manner which favors admission, the proffered evidence should not be excluded.

Quoting Mr. David J. Karp, the drafter of Federal Rules 413-415, the Court of Appeals for the Armed Forces identified that "it is not expected that evidence [*sic*] admissible pursuant to proposed Rule 413 [sic] would often be excluded on the basis of *Rule 403*. Rather, the effect of [MRE 413] is to put evidence of uncharged offenses in sexual assault…cases on the same footing as other types of evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission." *Wright*, at 482-483. Further, "the courts should liberally construe the rules so that the defendant's propensities, as well as questions of probability in light of the defendant's past conduct, can be properly assessed." 140 Cong. Rec. S12,990 (daily ed. Sept. 12, 1994) (statement of Sen. Dole). With the context as a starting place, the individual factors favor admission of the uncharged misconduct in this case.

A. Strength of Proof of Prior Act

The government plans to call Ms. Cusack to testify as an eyewitness to the sexual assault. Short of a plea of guilty in a court of law or a confession, eyewitness testimony is the strongest form of proof that a party may present. The accused argues that because the accused is not currently charged with any sexual assault on Ms. Cusack the proof (by her testimony) is not sufficiently strong. This is a common concern that was voiced by those who opposed the promulgation of Rules 413-415.

It is important to note that nothing in the rules or the appellate case law requires that the accused be charged with the prior acts (much like evidence offered under MRE 404(b)). As CAAF pointed out in *Wright*, a victim may be "too traumatized, intimidated, or humiliated to file a complaint," but may be willing to come forward after another victim has cried out. *Wright*, at 483. Many times 'the victims in such cases are often willing to bear the more limited burden of testifying at the offender's trial for raping or molesting another person, when they find out that [*sic*] [he] has also victimized others." David J. Karp, *Symposium of 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, 24-25 (1994)[2]. The fact that Ms. Cusack came forward to law enforcement only after learning about other assaults committed by the accused, although cited by the defense as a reason to doubt her credibility, is in fact precisely the type of scenario envisioned by the drafters of MRE 413.

Additionally, "there is no disadvantage to the [accused] if he is only formally charged with a particular offense, and other (uncharged) offenses are offered as supporting evidence. The [accused] has the same rights and opportunities to respond to evidence of uncharged offenses that he has in relation to a formally charged offense, including the assistance of counsel, cross-examination of witnesses, and presentation of rebuttal evidence." *Id.* "The fact that the evidence supporting uncharged offenses may fall short of establishing their occurrence beyond a reasonable doubt is not a valid basis for barring admission and consideration of such evidence." *Id.*

The bulk of the defense motion is devoted to argument that Ms. Cusack's testimony should be excluded because it is not credible. However, "determining the weight and credibility of witness testimony… has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *United States v. Scheffer*, 523 U.S. 303, 318 (1998), quoting *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973), cert. denied, 416 U.S. 959 (1974), *Aetna Life Ins. Co.*

[2] Congresswoman Molinari (R-NY), a primary promoter of the reform, said that Mr. Karp's article should be considered an authoritative part of its legislative history. 140 Cong. Rec. H8991.

v. Ward, 140 U.S. 76, 88 (1891). Accordingly, to find evidence admissible under Mil.R.Evid. 404(b) or 413, "the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence." *Huddleston v. United States*, 485 U.S. 681, 690 (1988); See also Mil.R.Evid. 104(b),

Although Ms. Cusack's testimony alone is legally sufficient for evidence of a prior sexual assault committed by the accused to be admissible, it is nevertheless corroborated by admissions of the accused. Although neither of the accused's individual statements to Joseph Gorman or Anand Upadhye gives a full, truthful account of what happened on the night of the assault in Seattle, when the two statements are combined, the accused admits that he had sexual intercourse with Ms. Cusack after watching her vomit uncontrollably on herself and fall down from excessive intoxication in the shower. Additionally, although Ms. Cusack did not use the term "rape" or believe it to be rape at the time, she told several friends that she passed out and woke up with the accused on top of her shortly after the incident. Ms. Cusack made these prior consistent statements not only before any mention of the charged offenses in New Orleans by NCIS, which the defense argues (and the investigating officer believed) influenced her story, but before those offenses even *happened*.

B. Probative Weight of the Evidence

The proffered evidence in this case is highly probative. The accused is charged with rape of a victim who was incapacitated due to consumption of alcohol or some other intoxicant. Ms. Cusack will also testify that the accused sexually assaulted her when she was in an extremely intoxicated, incapacitated state. The similarity between the physical symptoms described by Ms.

Cusack and by Ms. Brooder and Ms. Easley, both during the nights in question and on the days after, is eerie. This evidence is highly probative of the propensity and plan of the accused to target women who have passed out or are too intoxicated to be conscious of their surroundings. While the evidence may be undesirable for the defense, its probative value cannot be questioned.

The defense cites *United States v. Burton*, 67 M.J. 150 (C.A.A.F. 2009) for the proposition that "the government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity." However, with regard to evidence offered under Mil.R.Evid. 413, *Burton* says nothing of the sort. The central fact that resulted in the court's holding in *Burton* was that "the prosecution did not attempt to offer evidence or get a ruling from the military judge under M.R.E. 413 concerning propensity evidence." *Id.* at 153. The trial counsel's closing argument comparing the facts of two charged offenses was held to be improper, although not prejudicially so, because the government "did not follow the steps required by M.R.E. 413." *Id. Burton* is about notice and procedure, not admissibility. When the government follows the procedures outlined in MRE 413 to introduce evidence, such evidence may be considered for any purpose for which it is relevant, including modus operandi or propensity.

C. Distraction to Factfinder and Time needed for Proof of Prior Conduct

The government intends to call no more than two additional witnesses in order to establish the prior acts, in addition to asking some additional questions of witnesses who would be called by the government anyway. Simply because the defense may choose to call rebuttal witnesses is irrelevant to the consideration of this element. To exclude evidence under MRE 413 simply because the defense prepares a substantial rebuttal case would frustrate the intended effect of MRE 413.

The risk of distraction to the fact-finder in this case is also low. The judiciary has already created a response to assuage the fears of those who do not trust the age, education, training, experience, length of

service, and judicial temperament of a panel of officer members. By giving standard instruction 7-13-1 from the Military Judge's Benchbook, the military judge can assure that the members understand the proper uses of the evidence.

E. Temporal Proximity; Presence or Lack of Intervening Circumstances; and Relationship between the Parties.

All of these factors weigh in favor of the admission of the challenged evidence. The accused sexually assaulted Ms. Cusack less than four months before he sexually assaulted Ms. Brooder. This case also lacks any intervening circumstances which would weigh in favor of exclusion of the prior sexual assaults. The seminal case regarding intervening circumstances, cited by the defense, is *United States v. Berry*, in which the government offered a prior sexual assault that the accused committed when he was 13 years old. 61 M.J. 91 (C.A.A.F. 2005). In overturning the trial court's admission of the prior act, CAAF held that the intervening act was the fact that the accused had grown from a 13 year-old child into a 21 year-old man in the time between the prior incident and the charged conduct. *Id.* at 97. However, in this case, the accused was already an adult Marine officer and law student at the time of the first offense. Due to the negligible amount of time passed between the two offenses, the case at hand lacks any extraordinary intervening circumstance that would require exclusion of the proffered evidence as in *Berry*.

Because the Mil.R.Evid. 403 balancing test should be applied in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, and because the factors laid out above point strongly toward admission, the defense motion to exclude the prior sexual acts should be denied.

(3) <u>The proffered evidence should be admitted under Mil.R.Evid. 404(b) in order to show the plan of the accused, his intent, and the absence of mistake or accident.</u>

Under Military Rule of Evidence 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MCM, MIL. R. EVID. 404(b) (2008). Such evidence, however, may be admissible to prove "motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. In order to be admissible, this evidence must meet each of three different standards. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). They are: (1) Does the evidence reasonably support a finding by the court members that the accused committed prior crimes, wrongs or acts?; (2) What fact of consequence is made more or less probable by the existence of the evidence?; and (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice? *Id*. The government argues that the prior sexual assaults committed against incapacitated victims are M.R.E. 404(b) evidence of the following:

1. The accused's plan to assault woman once they are incapacitated and cannot object;
2. The accused's knowledge of Ms. Brooder and Ms. Easley's state of intoxication;
3. The intent of the accused to sexually assault Jessica Brooder and Elizabeth Easley on the night in question; and
4. That the conduct of the accused was not due to a mistaken belief or accident.

Applying the *Reynolds* test to our facts, under the first factor, the evidence reasonably supports a finding that the members would conclude by a preponderance of the evidence that the misconduct occurred; in this case, that the accused sexually assaulted Ms. Cusack without her consent. The government will provide evidence that the accused waited until his victims were in a physical state in which they could not consent or object before he committed the sexual acts.

Turning to the second *Reynolds* factor, the prior sexual assaults make a fact of consequence, that women who are under heavy influence of drugs or alcohol are unable to resist sexual advances, more probable than not. When considering whether uncharged misconduct constitutes admissible evidence of intent under M.R.E. 404(b), the court should consider whether the accused's "state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004). "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *United States v. Tanksley*, 54 M.J. 169, 176 (C.A.A.F. 2000) (quoting *Huddleston*, 485 U.S. at 685).

Finally, the third *Reynold*s prong requires applying the balancing test under M.R.E. 403 and finding that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. In this case, the prior sexual assaults are very probative as to whether the accused would have a reasonable mistake of whether the victim consented. Although the prior sexual assaults are offensive, that is the nature of much of the evidence in cases involving sexual crimes. Even if the evidence of the accused's sexual assault of Ms. Cusack might tend to be inflammatory and therefore prejudicial, that alone does not require that the conclusion that there would be *unfair* prejudice to the accused by the admission of the evidence. "An accused is not immunized… against the Government's use of evidence of other misconduct because that other misconduct was especially flagrant and repugnant." *United States v. Castillo*, 29 M.J. 145, 151 (C.M.A. 1989).

(4) The Article 32 report in this case does not preclude the government from introducing relevant evidence of sexual misconduct by the accused.

The bulk of the defense motion focuses on the Article 32 Investigating Officer's report in this case and the subsequent dismissal of charges relating to Ms. Cusack. However, the defense cites no authority holding that offenses of sexual misconduct must remain on the charge sheet in order for the members to consider them under MRE 404(b) or MRE 413. In fact, both military and civilian cases have considered the question of whether the government is precluded from introducing evidence of uncharged misconduct for which the accused has previously been *acquitted*, and answered that question in the negative. *United States v. Dowling*, 493 U.S. 342 (1990); *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987); *United States v. Cuellar*, 22 M.J. 529, 533-34 (N.M.C.M.R. 1986).[3]

[3] The court in *Cuellar* did not consider the fact that the prior acquittals were in state courts rather than federal courts, but did not rely on this fact for its ultimate holding. 22 M.J. at 533. The court also found that while evidence of the prior acts for which the accused had been acquitted was properly admitted, evidence of the acquittals was properly excluded. *Id*. at 534.

In *Dowling*, the accused made an argument nearly identical to that now made by the defense: that "evidence relating to acquitted conduct is inherently unreliable." 493 U.S. at 675. The Court rejected that argument, holding that "the jury in this case… remained free to assess the truthfulness and the significance of [the former victim's] testimony, and petitioner had the opportunity to refute it." *Id*. In this case, the members remain free to assess the credibility of the accused's uncharged misconduct, and the defense remains free to attempt to refute it. The investigation and referral process has not been subverted, because the accused is no longer facing any criminal liability for any sexual offenses involving Ms. Cusack. Nevertheless, where the uncharged misconduct is as similar and relevant to the charged offenses as it is in this case, the members are entitled to hear the evidence and make their own decisions.

(5) If the defense puts the accused's character at issue, the government has a good faith basis to ask character witnesses about the sexual assault on Ms. Cusack.

When character evidence is introduced pursuant to Rule for Courts-Martial 405(a), that rules states that "inquiry is allowable into relevant specific instances of conduct" during cross examination. The cross examiner must have a good faith basis for asking the question. See generally *Michelson v. United States*, 335 U.S. 469, (1948); *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). The evidence that is the basis of the cross-examination question need not be admissible. See *United States v. Edwards*, 549 F.2d 362 (5th Cir. 1977), cert. denied, 434 U.S. 828 (1977).[4] The questions are designed to test the basis for the witness' testimony concerning opinion or reputation of the accused by asking either "did you know" or "have you heard" questions. *United States v. Brewer*, 43 M.J. 43, 46 (C.A.A.F. 1995). Whether a cross-

[4] The government brings to the court's attention dicta in *U.S. v. Saul*, which states that such inquiries may be made "presuming there is a good faith basis for asking the question and it is otherwise admissible under our rules of evidence." *U.S. v. Saul*, 26 M.J. 568, 572 (A.F.C.M.R. 1988). The service court's dicta regarding "admissibility" is not supported by other case law, and cites only an evidence manual; furthermore, the government believes that the point of this dicta is to point out that an M.R.E. 403 balancing test is required, which the government concedes is true.

examination question is relevant depends on the scope of the direct examination and which character trait the defense elicits; thereafter, it is "relevant on cross-examination to ask the witness his awareness of any specific instances of conduct that logically would bear upon that character trait." *Id.* at 47. As the Supreme Court noted, "[t]he price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States,* supra at 479. Should the defense seek to put the accused's character at issue as a defense in this trial, the fact that the accused had sexual intercourse with a woman who was so intoxicated that she vomited on herself, fell down in the shower, and then passed out will be directly relevant to test the foundation of any witness' opinion as to the accused's character.

5. Relief Requested

The government respectfully requests that the court deny the motion and allow the admission of evidence of the other sexual assault committed by the accused under MRE 413 and 404(b).

6. Evidence and burden of proof

The defense bears the burden of proof by a preponderance of the evidence. The government offers the following evidence on this motion:

a. Summary of Article 32 testimony of Nicole Cusack and Amos Lowder[5]

b. Sworn statement of Anand Upadhye[6]

c. Google "chat" conversation between accused and Joseph Gorman[7]

e. Testimony of Jessie Baxter (telephonic)

[5] Previously provided as Enclosure (1) to the government's response to the defense motion to quash a subpoena for the accused's emails.
[6] Previously provided as Enclosure (4) to the government's response to the defense motion to quash a subpoena for the accused's emails.
[7] Previously provided as Enclosure (5) to the government's response to the defense motion to quash a subpoena for the accused's emails.

f. Testimony of Melissa Kopacz (telephonic)

7. <u>Oral Argument</u>

The government respectfully requests oral argument on this motion.

E. S. DAY
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Trial Counsel

A copy of this motion was served on the court and defense counsel via email on 1 November 2010.

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