IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Army Misc. Dkt. No. 20140939
Specialist (E-4) **CHRISTOPHER B. HUKILL,** United States Army, Appellant	)	USCA Dkt. No. 17-0003/AR

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

Issue Granted

WHETHER, IN A COURT-MARTIAL TRIED BY MILITARY JUDGE ALONE, THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S MOTION TO USE THE CHARGED SEXUAL MISCONDUCT FOR MILITARY RULE OF EVIDENCE 413 PURPOSES TO PROVE PROPENSITY TO COMMIT THE CHARGED SEXUAL MISCONDUCT.

Statement of the Case

On November 23, 2016, this Honorable Court granted Specialist (SPC) Christopher B. Hukill's petition for review. On January 6, 2017, SPC Hukill filed his final brief with this Court. The government responded on February 6, 2017. This is SPC Hukill's reply.

Argument

a. As this Court held in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), the creation of an inference of propensity from a charged offense before it has been proven beyond a reasonable doubt undermines the presumption of innocence.

Referencing the text of Military Rule of Evidence (Mil. R. Evid.) 413, the government claims, "Whether this 'other sexual offense' is charged or uncharged is not, in itself, what might undermine the presumption of innocence. Rather, what presents the risk of undermining the presumption of innocence is that the propensity inference, once drawn, might lead the jury to give it undue weight and convict based on propensity alone or anything less than evidence beyond a reasonable doubt." (Gov't Br. 16). In doing so, the government responds to an argument that was neither advanced in *Hills*, nor in this case. It is not the mere application of the propensity inference that presents the constitutional concern, rather, as this Court noted in *Hills*, the issue is the creation of the propensity inference from a charged offense because an accused is presumed innocent of charged offenses. *Hills*, 75 M.J. at 356 ("It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent.").

In an attempt to overcome this constitutional error and save the use of propensity evidence for charged misconduct, the government argues, "It is the

M.R.E. 403 balancing test that ensures the inference of propensity does not erode the presumption of innocence." (Gov't Br. 17). However, as noted above, the constitution forbids applying an inference of propensity to charged offenses before the presumption of innocence has been overcome. *Id.* Consequently, the creation of an inference of propensity from a charged offense before it has been proven beyond reasonable doubt is impermissible and will never survive the Mil. R. Evid. 403 balancing test.

Further, it should be noted that the government argues for a bifurcated approach to Mil. R. Evid. 413. In doing so, the government attempts to analogize Mil. R. Evid. 413 to Mil. R. Evid. 404(b), however, the rules are distinct in purpose and application. The propensity inferences drawn from evidence admitted under Mil. R. Evid. 404(b) do not present the same concern as evidence offered under Mil. R. Evid. 413 because the inferences drawn Mil. R. Evid. 404(b) do not permit the fact-finder to infer the accused has a propensity to commit the charged conduct. (Gov't Br. 11-12). Indeed, such an inference is expressly prohibited;[1] rather, inferences drawn under Mil. R. Evid. 404(b) go to prove some other fact, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Mil. R. Evid. 404(b).

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[1] "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." Mil. R. Evid. 404(b).

b. The military judge is presumed to know and follow the law and, consequently, this Court should find the military judge used propensity evidence in an impermissible and unconstitutional manner based on the understanding of the law at the time of SPC Hukill's court-martial.

The government argues, "Military judges are presumed to know the law and follow it absent clear evidence to the contrary." (Gov't Br. 19) (internal citations omitted). In doing so, however, the government seems not to appreciate that this presumption means that appellant was prejudiced because of the law at the time of SPC Hukill's court-martial, including the Army Court of Criminal Appeals' mandate in *United States v. Dacosta*, 63 M.J. 575, 583 (Army Ct. Crim. App. 2006) (mandating a determination by a preponderance of the evidence that the offenses occurred before considering the propensity evidence). Further, while the military judge's ruling may not have specifically referenced the preponderance standard, this alone is not enough to overcome the presumption that the military judge followed the law at the time of SPC Hukill's court-martial. Indeed, the government's motion for admission of this evidence, a motion the military judge granted, cites to the then-applicable erroneous instruction from the Military Judge's Benchbook [hereinafter Benchbook]. (JA 143-143).

For these reasons, if as the government argues, the military judge is presumed to know and follow the law (a notion that SPC Hukill does not dispute), then the military judge in SPC Hukill's case followed the law as stated in *Dacosta* and the Benchbook, which this Court found erroneous in *Hills*.

c. The government has not met its burden to prove the error was harmless beyond a reasonable doubt.

The government's conclusory statements, devoid of analysis, are insufficient to meet its burden to prove the military judge's error was harmless beyond a reasonable doubt. *Hills*, 75 M.J. at 357 (noting that an error is not harmless beyond a reasonable doubt "when there is a reasonable probability the error might have contributed to the verdict") (internal quotations and citations omitted). Here, the government has failed to prove that the erroneous admission of propensity evidence did not contribute to the findings of guilty.

Conclusion

WHEREFORE, SPC Hukill respectfully requests this Honorable Court dismiss Specifications 1 and 2 of the Charge.

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CERTIFICATE OF COMPLIANCE WITH RULE 21(b)

1. The reply brief complies with the type-volume limitation of Rule 24 because it contains 1,079 words and 146 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with Times New Roman font, using 14-point type. Margins are at least 1 inch on all four sides.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hukill*, Army Dkt. No. 20140939, USCA Dkt. No. 17-0003/AR, was electronically filed with the Court and the Government Appellate Division on 15 February 2017.

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