IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON BEHALF OF
	)	
Appellee	)	APPELLANT
v.	)	
	)	
MASTER SERGEANT (E-8)	)	Crim. App. Dkt. No. 20140014
ALAN S. GUARDADO,	)	
United States Army,	)	USCA Dkt. No. No. 17-0183/AR
Appellant	)	

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

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	) USCA Dkt. No. 17-0183/AR
Master Sergeant (E-8) ALAN GUARDADO, United States Army, Appellant	)

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

ISSUE PRESENTED

WHETHER THE ARMY COURT INCORRECTLY FOUND THAT THE MILITARY JUDGE'S PANEL INSTRUCTIONS WERE HARMLESS ERROR IN LIGHT OF *UNITED STATES v. HILLS*.[1]

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)

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[1] This honorable Court also granted review as to a second specified issue, "WHETHER THE ARMY COURT INCORRECTLY RULED THAT AN OFFENSE DEFINED BY THE PRESIDENT CANNOT PREEMPT A GENERAL ARTICLE 134, UCMJ, OFFENSE, AND THAT PREEMPTION IS NOT JURISDICTIONAL IN SUCH CIRCUMSTANCES," but directed the appellant to file a brief only with regard to the first issue above.

(2012).

Statement of the Case

On October 16 and 30, 2013 and January 6-10, 2014, a general court-martial composed of officer and enlisted members tried Master Sergeant (E-8) Alan B. Guardado [hereinafter appellant]. Contrary to his pleas, the panel convicted appellant of aggravated sexual contact with a child, indecent liberties with a child (three specifications), aggravated assault, assault consummated by a battery upon a child under the age of 16 years(two specifications), indecent language, indecent assault, indecent act with a child and conduct to the prejudice of good order and discipline and of a nature to bring discredit upon the armed forces (three specifications), in violation of Articles 120, 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, 934 (2012) [hereinafter UCMJ]. The panel sentenced appellant to confinement for eight years, total forfeiture of all pay and allowances, and reduction to the grade of Private (E-1).[2]

On November 15, 2016, the Army Court affirmed in part the findings in appellant's case, while dismissing one specification of assault consummated by a

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[2] The panel acquitted appellant of one specification of indecent liberties with a child, one specification of rape, one specification of abusive sexual contact, and one specification of wrongful sexual contact, in violation of Art. 120, UCMJ, 10 U.S.C. § 920. After arraignment, but before the entrance of pleas, the Convening Authority withdrew and dismissed one specification of conduct generally to the prejudice of good order and discipline and of a nature to bring discredit upon the armed forces in violation of Art. 134, UCMJ, 10 U.S.C. § 934.

battery upon a child under the age of 16 years and two specifications of general disorder and conditionally dismissing one specification of assault consummated by a battery upon a child under the age of 16 years and one specification of indecent act. The Army Court affirmed only so much of the sentence as applies to confinement for seven years and eight months, forfeiture of all pay and allowances, and a reduction to the grade of E-1. (JA 28). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellant personally filed a Petition for Grant of Review on appellant's behalf

On March 3, 2017, this honorable Court granted the Petition as to the specified issues above, but directed that briefs be filed only as to the first specified issue.

Statement of Facts

The facts necessary to dispose of this matter are included in the Argument below.

WHETHER THE ARMY COURT INCORRECTLY FOUND THAT THE MILITARY JUDGE'S PANEL INSTRUCTIONS WERE HARMLESS ERROR IN LIGHT OF *UNITED STATE V. HILLS*.

This court should set aside and dismiss the findings for Specification 1 of Charge I because the Military Judge instructed the panel to consider charged misconduct for propensity purposes. Given the weakness of the government's

evidence and the trial counsel's closing argument insisting that the panel use propensity evidence of charged offenses to convict the appellant, this error was not harmless beyond a reasonable doubt.

In addition, this Court should set aside and dismiss the findings for Specifications 1 and 2 of Additional Charge II. The military judge improperly instructed the panel that if it found evidence of "intent to gratify sexual desire" in certain charged offenses, then the panel could use that evidence to prove the "intent to gratify sexual desire" in Specification 1 of Charge I and Specifications 1 and 2 of Additional Charge II.

Law

Military Rule of Evidence [hereinafter Mil. R. Evid.] 413 permits the use of evidence of uncharged sexual misconduct and evidence of convictions for acts of sexual misconduct. Mil. R. Evid. 413. Similarly, Mil. R. Evid. 414 allows evidence of uncharged child molestation offenses. This evidence may be used to show an accused's propensity to engage in sexual assaults, in derogation of the ordinary prohibition against the use of propensity evidence. *United States v. James*, 63 M.J. 217, 220-22 (C.A.A.F. 2006). "Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith. "It may, however, be admissible for other purposes such as proof of motive, opportunity, intent . . . ." Mil. R. Evid. 404(b).

These rules do not, however extend to evidence of charged misconduct, which the government may not use for propensity purposes. The constitutional presumption of innocence prohibits the use of evidence of charged misconduct for purposes of propensity. "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." *United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 27 Jun. 2016).

"If instructional error is found [when] there are constitutional dimensions at play, [the appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *Hills*, 75 M.J. 350, 357-358 (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). "'The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *Id.* (quoting *Kreutzer*, 61 M.J. at 298). An error is not harmless beyond a reasonable doubt when "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *Id. United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (internal quotation marks omitted) (quoting *Chapman v. California*, 386 U.S. 18, 24, (1967).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). Where there is error of constitutional magnitude, this court must be convinced beyond a reasonable doubt that the error did not contribute to the appellant's conviction or sentence. *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005).

Argument

The Army Court ignored the possibility that the panel used offenses of which the panel acquitted appellant for propensity purposes. The finder of fact may not consider evidence of charged misconduct for propensity purposes. *Hills*, 75 M.J., at 355. In this case, the Military Judge found that Specification 1, 6, 7, and 8 of Charge I were acts of sexual assault and child molestation as defined by Mil. R. Evid. 413 and Mil. R. Evid. 414 and instructed the panel that

> Further, evidence that the accused committed the sexual assault alleged in Specification 1, 6, 7, or 8 of Charge I may have no bearing on your deliberations in relation to each other **unless you first determine by a preponderance of the evidence** that it is more likely than not the respective offenses alleged in Specifications 1, 6, 7, or 8 of Charge I occurred. If you determined by preponderance of the evidence that the offense alleged in Specifications 1, 6, 7, or 8 of Charge I occurred **even if you are not convinced beyond a reasonable doubt that the accused is guilty of those offenses,** you may nonetheless then consider the evidence of those offenses for its bearing on any matter to which it is relevant in relation to those same offenses.

(JA 289, emphasis added). Of these offenses, the panel convicted appellant of Specification 1 of Charge I.

A. The Mil. R. Evid. 413/414 instruction was not harmless beyond a reasonable doubt in light of *United States v. Hills*.

The Army Court was correct in its holding that this instruction was error. (JA 3). However, the Army Court erred when it held that this error was harmless. (JA 3). The error was prejudicial because this Court cannot be convinced the error was harmless beyond a reasonable doubt and that the panel did not use impermissible propensity evidence from offenses of which it acquitted appellant to support the conviction of Specification 1 of Charge I.

In *Hills*, an intoxicated prosecutrix alleged that an appellant engaged in multiple sex acts with her during her inebriation, specifically sexual assault and abusive sexual contact. *Hills*, 75 M.J., at 352. Despite inconsistencies in the prosecutrix's allegations, the case went to trial. *Id.* At trial, the Military Judge instructed the *Hills* panel that:

> Each offense must stand on its own, and you must keep the evidence of each offense separate....
>
> The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense. (However, if you) determine by a preponderance of evidence that it is more likely than not that the sexual offenses occurred, evidence that the accused committed a sexual assault offense ... (these) may

> have a bearing on your deliberations in relation to the other charged sexual assault offenses .... [This may include] its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault.

Id. at 353

The *Hills* panel deliberated on the evidence presented and acquitted the appellant of two specifications of sexual assault, but convicted him of one specification of abusive sexual contact. *Id.* In *Hills* this Court determined the question of constitutional prejudice was whether "beyond a reasonable doubt that the conflicting standards of proof and directly contradictory statements about the bearing that one charged offense could have on another did not contribute to the verdict. *Id.* at 358 (citing *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007). This Court reviewed the strength of the government's case at trial to determine whether such confusion could have contributed to the verdict. *Id.* In *Hills*, the government's case was weak because there "was no eyewitness testimony other than the allegations of the accuser, the members rejected the accuser's other allegations, and there was no conclusive physical evidence." *Id.* Based on these findings, this Court held that it "cannot know whether the instructions may have tipped the balance in the member's ultimate determination." *Id.* Thus, the error was not harmless beyond a reasonable doubt. *Id.*

Here, rather than weigh the strength of the government's case regarding the charge of which appellant was convicted, the Army Court predicated its determination on an evaluation of the improper propensity evidence:

> More on point, we do not believe the propensity instruction in this case had any palpable effect on the panel's deliberations. We make this latter determination not so much because the evidence that supported appellant's conviction was strong (though we find appellant's daughter's testimony to be credible), but more because the evidence in support of the offense that the panel acquitted appellant of was quite weak. The likelihood of prejudice from propensity evidence is greatest when the evidence is solid and credible. In other words, weak evidence offered to show propensity poses less danger of contributing to the verdict. If the panel did not believe the other offenses happened, there is little danger they would rely on an impermissible propensity inference.

(JA 15). The Army Court went on to explain that any confusion caused by the conflicting standards from the case was remedied by the specific instruction not to consider proof of one sexual assault as proof of other sexual assaults, highlighting this instruction:

> The accused may be convicted of an alleged offense only if the prosecution has proven each and every element beyond a reasonable doubt. Each offense must stand on its own, and proof of one offense carries no inference that the accused is guilty of any other offense. *In other words, proof of one sexual assault creates no inference that the accused is guilty of any other sexual assault.* However it may demonstrate that accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense. (emphasis added [by the Army Court])

(JA 15).

The Army Court also misplaced reliance on *United States v. Schroeder*, 65 M.J. 49, 57 (C.A.A.F. 2007). The *Schroeder* court heard extremely strong evidence of a sexual offense which made instructional error concerning propensity harmless. *Id.* However, where "inconclusive" evidence is bolstered by improper propensity evidence, this Court must reverse the finding of the affected Specification. Here, as in *Hills*, the evidence of a sexual offense is also "inconclusive," due to the weakness of the evidence proving Specification 1 of Charge I.

In *Hills,* there was no conclusive physical evidence linking the accused to the alleged act. *Hills*, 75 M.J., at 353, 358. The specification relied solely on the testimony of the alleged accuser. *Id.* Here, the prosecutrix, K.G., gives an account uncorroborated by direct or circumstantial evidence. At trial, K.G. claimed that her father molested her in Alabama, during a visit. She claimed that this happened while her father was driving a truck. (JA 214). It did not happen, according to K.G., while the truck was parked, or in a secluded area. (JA 215). She claimed that she was in the front seat of her father's truck, that her father accessed her intimate area while she was clothed, and that she did not have much of a reaction when her father touched her. (JA 204 - 05).

While the Army Court found "appellant's daughter's testimony to be credible," it provided no factual predicate for this determination aside from a cursory statement that the defense failed to discredit her testimony. (JA 15, n. 14). The Army Court did not address the numerous inconsistencies between K.G.'s various versions of events. K.G.'s testimony in court is at variance with the account she gave to her boyfriend, A.C. She told A.C., that her father had "raped" her in Texas, (JA 242), that "sex" occurred in the back seat of her father's parked car in a secluded area, (JA 251), and that her father pulled her clothes off of her. (JA 256). This act caused K.G. to sob uncontrollably, according to A.C. (JA 256). This account is inconsistent with her in-court testimony as to the act of the averred crime, the geographic location of the incident, the detail of whether or not she was clothed, the location in the vehicle, and her reaction to the incident.

Furthermore, K.G's behavior after the time she claimed she was molested is inconsistent with her allegation. She did not report it to anyone at the time of the incident. (JA 204 - 05). She continued to visit her father, and went at times not ordered by her parents' visitation order. (JA 219 - 20, 327). She asked to see her father in excess of the requirement of the order. (JA 221). Her demeanor was unchanged. (JA 204). She only reported this incident after a dispute with her father concerning her unauthorized downloads from iTunes, which caused expenses to accrue to her father's credit card. (JA 228).

K.G. no longer speaks to her father. (JA 229). She does live with her mother, who intensely dislikes appellant. (JA 230). Her mother is an avid viewer of the television program "America's Most Wanted," which features vivid accounts of crime victims, including those of sexual assault victims. (JA 224). K.G.'s mother is also a controlling woman who reviewed K.G.'s testimony with her "many" times. (JA 230 - 31). Just as in *Hills*, the evidence with respect to Specification 1 of Charge I was weak and was unsupported by any conclusive evidence.

In an effort to distinguish this case from *Hills,* the Army Court concluded that because appellant was acquitted of the charge which provided the propensity evidence, the propensity evidence was therefore weak and posed less danger of contributing to the verdict. (JA 15). However, the very instruction the Army Court emphasized as clarifying any confusion in this case disproves this claim.

The Army Court's faulty logic stems from the very same confusion that arises from a panel applying differing burdens of proof in the first place. The preponderance of the evidence standard is such that a panel may very well have determined that evidence of the specifications of which appellant was acquitted nevertheless rose to the level of a preponderance of the evidence, which would allow it to utilize this specification for propensity purposes. Such evidence with respect to Specification 1 of Charge I may have tipped the balance of the scales.

The Army Court's argument also does not take into consideration the impermissible inference that may result from improper bootstrapping of a preponderance of the evidence standard being applied to Specification 1 of Charge I against the determination of guilt for itself.

This position is further highlighted by the Army Court's incorrect premise that "the likelihood of prejudice from propensity evidence is greatest when the evidence is solid and credible." (JA 15). This might be true if the *evidence* of one crime itself were applied against the other, but as the Army Court emphasized the panel was not given this instruction. The panel was not instructed to consider propensity evidence in gradation, but rather in a binary context. It was instructed to consider whether evidence of the charged offenses occurred by a preponderance of the evidence to determine if appellant either *did or did not* have a propensity to commit a sexual assault type offense. While the Army Court emphasized the instruction that "proof of one sexual assault creates no inference that the accused is guilty of any other sexual assault," it completely ignored the following sentence in the instructions "[h]owever, it may demonstrate that accused has a propensity to commit that type of offense." (JA 15). The panel was not instructed to consider the weight of appellant's propensity merely that he either did or did not have such a propensity. Thus, rather than pose less of a danger of contributing to the verdict, once the evidence met the threshold of a preponderance standard, it posed the same

danger even though it did not meet the burden of proof beyond a reasonable doubt. We cannot be certain that the panel did not believe the evidence rose to a preponderance standard and that this evidence of propensity did not tip the scales causing the panel to convict appellant of Specification 1 of Charge I.

Therefore, as in *Hills*, the panel's acquittal as to other charged misconduct has no bearing on the strength of the government's case with respect to the specification of which appellant was convicted. There are numerous way the panel could have considered the propensity evidence. In Specifications 7 and 8 a minor made allegations of non-penetrative sexual misconduct. (JA 77 - 78). Although the panel acquitted appellant of these charges, the panel certainly could use the presence of an underage prosecutrix in these specifications to presume, consistent with its instructions, that appellant has a propensity to commit non-penetrative sexual offenses against minors. The *Hills* court found that the same possibility required reversal. *Id.* Also, pursuant to the military judge's instructions, the panel could have found appellant committed Specifications 1, 6, 7, and 8 of Charge I against K.G., V.C. and C.H by a preponderance of the evidence. The panel then could have used these findings as propensity evidence that appellant was likely to engage in sexual misconduct to convict him only of Specification 1 of Charge I. The additional alleged victims in this case makes the propensity instructions even more dangerous as it allowed the panel the opportunity to find by a preponderance

of the evidence that appellant, not only has the propensity to commit sexual misconduct because of one previous incident, but is indeed an individual who has such a propensity resulting from multiple individuals on separate occasions. As such, this increased the tangible risk that appellant was convicted based on evidence that did not establish his guilt beyond a reasonable doubt.

This court cannot ignore the possibility that the panel overcame the frailties of the government's case through use of impermissible propensity evidence. No physical evidence corroborates K.G.'s account of the incident. She did not report the incident at the time. (JA 204). Her account of the incident to her boyfriend varied wildly from her "official" version of the incident. Similar to *Hills,* the extent to which the panel utilized the improper propensity evidence is unknown, and given weakness of the remaining evidence, this error cannot be said to be harmless beyond a reasonable doubt.

In addition, the trial counsel magnified this error during his closing argument. His theme focused on propensity evidence as he repeatedly called appellant a predator and argued that appellant was the type of man who often engaged in sexual misconduct. Trial counsel began his argument by stating appellant "is a senior NCO who likes teenagers, young women, kids. He isolates them and he flirts with them and he tests them. . . ." (JA 293). The trial counsel continued with this type of argument throughout his closing. Trial counsel asserted

"appellant isolates these people. And he also grooms them and he tests them and he pokes at them." (JA 294). During rebuttal, and in response to the defense counsel's argument that every charge must stand alone and be proved beyond a reasonable doubt, the trial counsel essentially argued that such a spillover instruction did not apply to Specifications 1, 6, 7, or 8 of Charge I. The trial counsel specifically redirected the panel to the propensity instructions for the charged offenses. He stated,

> Mr. President, members of the panel, I'll be brief. It's been a long day and a long week. The defense gave you about half of what's called the spillover instruction of what you can use from one offense related to another. They showed you about half of it. Its actually about two pages that the judge read you about how you can use other offenses to help decide if something else was committed for certain acts. We ask you just look over those to get the full rule on what you can use and not just use just half of those that defense did when they explained that to you.

(JA 360).

Over defense objection, trial counsel continued with his theme that the panel should convict appellant because he was a sexual predator. (JA 366).

> "He is a predator that's been preying on children for a long time." (JA 366).
>
> "Predators know what they need to do so they keep getting away with it." (JA 366).
>
> "Predators tell victims no one would believe them." (JA 371).
>
> "Predators isolate victims so there's no witnesses." (JA 371).

> "[P]redators create an alibi so when they are accused they can say, I couldn't have done it." (JA 371).

And finally trial counsel concluded,

> "And you saw what he did in this case. Exactly what he was trained that predators do." (JA 371).

The two page "spillover instructions" that trial counsel instructed the panel to read specifically included the aforementioned propensity instructions. (JA 287 - 90). Not only did trial counsel highlight these improper instructions, he essentially argued the panel should convict appellant because he is a predator.[3] This Court has found prejudice when the improper evidence is highlighted by the trial counsel's closing argument and the use of the word predator. In *United States v. Hoffmann*, 75 M.J. 120, 128 (C.A.A.F. 2016), during his closing and rebuttal arguments on findings, the trial counsel argued that all of the offenses were manifestations of appellant's character: that of a predator. This Court considered trial counsel's argument an important factor in determining that Government failed to establish that the admission of the improper evidence was unimportant in relation to the other evidence the panel heard on the remaining offenses. *Id.* Interestingly, the government argued and the Army Court in *Hills* originally found no prejudice

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[3] The trial counsel in this case who called appellant a predator no less than seven times is the same trial counsel who this Court previously ruled his use of the word predator in closing was improper. *United States v. Sewell*, 76 M.J. 14, 17 (C.A.A.F. 2017)

because the propensity issue only arose during the military judge's instructions, and neither party discussed propensity in their closing arguments. *Hills*, 2015 CCA LEXIS 268, at *28-29, 2015 WL 3940965, at 10 (Army Ct. Crim App. 2015). Here, the Army Court failed to consider the importance of this factor in their prejudice analysis.

Given the lack of corroborating evidence and trial counsel's insistence that the panel specifically review the improper propensity instructions combined with trial counsel's continuous use of the word predator to describe appellant, the Government cannot establish that the admission of the propensity evidence was unimportant in relation to the other evidence heard by the panel.

In light of the unconstitutional panel instructions compounded by the trial counsel's argument, this honorable Court cannot be convinced beyond a reasonable doubt that the findings with regard to Charge I, Specification 1 were unaffected by the Military Judge's instructional error. Therefore, this Court should set aside Specification 1 of Charge I and the sentence.

B. The military judge's instruction that proof of the element of intent to gratify sexual desires in certain charged offenses could be used as proof of the element of intent to gratify sexual desires in the other charged offenses constituted constitutional instructional error and was not harmless beyond a reasonable doubt in light of *United States v. Hills*.

In addition to the unconstitutional propensity instructions for charged offenses under Mil. R. Evid. 413/414, the military judge also erred when she

instructed the panel that if they found evidence that the accused intended to gratify his sexual desires in certain charged offenses, they could use that as evidence that the accused intended to gratify his sexual desires in the same charged offenses.

In Specification 1 of Charge 1, the government charged appellant with rape of a child and the lessor included aggravated sexual contact of a child[4]. Article 120, UCMJ. (JA 31). The military judge instructed the panel that the government was required to prove beyond a reasonable doubt all the elements of this offense including element one, sexual contact. (JA 258). The military judge instructed the panel that the term sexual contact includes "the intent to gratify the sexual desire of any person. (JA 258 - 59). In Specification 4 of Charge I, the government charged appellant with indecent liberties with a child in violation of Article 120, UCMJ. (JA 32). The military judge instructed the panel that the government was required to prove beyond a reasonable doubt all the elements of this offense including the fourth element, "that the accused committed the acts with the intent to arouse, appeal to, and gratify his sexual desires." (JA 262). In Specifications 1 and 2 of additional Charge II, the government charged appellant with indecent assault under Article 134, UCMJ. (JA 36). The military judge instructed the panel that the government was required to prove beyond a reasonable doubt all the elements of

[4] Appellant was convicted of aggravated sexual contact of a child.

this offense including, the sixth element, "the acts were done with the intent to gratify the lust and sexual desires of the accused." (JA 280 - 81).

The military judge instructed the panel that "the burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt." (JA 287). However, the military judge then instructed the panel that they could also use evidence of charged offenses for certain purposes. The military judge stated,

> I just instructed you that you may not infer the accused is guilty of one offense because his guilt may have been proven on another offense and that you must keep the evidence with respect to each offense separate; However,
>
> . . . .
>
> [T]here has been some evidence presented with respect to rape of a child, indecent acts with a child, assault on a child, and indecent assault as alleged in Specification 1 of Charge I, Specification 4 of Charge I, Specification 1 of Charge II, The Specification of Additional Charge I, Specification 1 of Additional Charge II, and Specification 2 of Additional Charge II that also may be considered for a limited purpose with respect to each other. This evidence that the accused may have isolated K.G., B.R., and S.W. in a location where the possibility of another individual witnessing the misconduct would be unlikely may also be considered for the limited purposes of its tendency, if any, to show that the accused's modus operandi, and flirt with teenage girls, and intent to gratify his sexual desires, and to prove an absence of mistake of the accused.[5]

(JA 288 - 89).

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[5] In his instructions, the military judge previously referred to Specification 4 of Charge I as indecent liberties with a child and then refers to it in this portion of her instruction as indecent acts with a child.

In upholding appellant's convictions, the Army Court recognized that this Court's ruling in *Hills* "could be considered to apply equally to evidence introduced under Mil. R. Evid. 404(b)." (JA 10). Specifically, The Army Court recognized "the military judge instructed the panel that evidence from one charged offense could be considered to prove appellant's intent to gratify his sexual desires in other charged offenses." (JA 10). However, the Army Court concluded "we do not believe our superior court intended the reach of *Hills* to go beyond Mil.R. 413 and 414." (JA 10). The Army Court also declined to find plain error. (JA 10).

The Army Court erred by confining this Court's sound reasoning in *Hills* to simply Military Rules of Evidence 413 and 414 and in doing so failed to recognize the numerous constitutional concerns with the instructions in *Hills* that are identical in the present case. Whether the instruction is labeled under the number 413 or 404 does not alleviate the constitutional protections afforded an accused.

In Specification 4 of Charge I, indecent liberties, the government was required to prove beyond a reasonable doubt the element "intent to arouse, appeal to, and gratify his sexual desires." In both Specifications 1 and 2 of Additional Charge II, the prosecution was required to prove beyond a reasonable doubt the element "intent to gratify sexual desires." In Specification 1 of Charge I the prosecution was required to prove beyond a reasonable doubt the sexual contact was committed with "an intent to abuse, humiliate, or degrade any person or to

arouse or gratify the sexual desire of any person." The military judge instructed the panel that if the panel found some evidence of intent to gratify sexual desires in an element of one charged offense that they could use that evidence to prove the required elements of intent to gratify his sexual desires in other charged offenses.

Put simply, the military judge instructed the panel that if they found evidence of the accused's intent to satisfy his sexual desires in Specification 4 of Charge I or Specification 1 or 2 of Additional Charge II or Specification 1 of Charge I, they could use that as evidence to prove the element "intent to satisfy his sexual desires" in the same specifications. At a minimum, this has the same effect as the prohibited propensity instruction in *Hills* as the panel was instructed that if this evidence exists to some degree in any specification, they can use that to prove the accused has the propensity to engage in certain acts with an intent to satisfy his sexual desires in other charged specifications.

An accused has an absolute right to the presumption of innocence until the government has proven every element of every offense "beyond a reasonable doubt," and members may only determine that the accused is guilty if the government has met that burden. *In re Winship*, 397 U.S. 358, 363, (1895). This Court does not permit "broad talismanic incantations of words such as intent, plan, or modus operandi... (because of) the danger in admitting such evidence" allows propensity evidence to convict an accused. *United States v. Ferguson*, 28 M.J.

104, 109 (C.M.A. 1989). Here, the military judge's instructions allowed the panel to interweave all these offenses in a net of propensity. In addition to the Mil. R. Evid. 413/414 instruction, the military judge's Mil. R. Evid. 404(b) instruction was improper and further misled the panel into thinking that improper propensity evidence was acceptable to convict the appellant.

Conclusion

Given the unconstitutional panel instructions, appellant requests this honorable Court dismiss Specification 1 of Charge I, to dismiss Specification 1 and 2 of Additional Charge II, and set aside the sentence.

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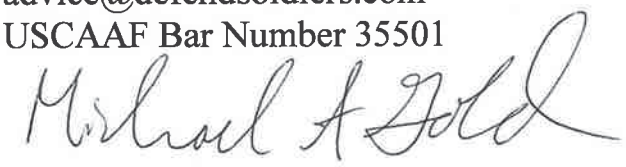

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USCAAF Bar No. 36629

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I certify that a copy of the foregoing in the case of *United States v. Guardado,* Army Dkt. No. 20140014, USCA Dkt. No. 17-0183/AR, was electronically filed brief with the Court and Government Appellate Division on April 3, 2017.

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