IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) REPLY BRIEF TO GOVERNMENT'S) ANSWER
v.	) Crim. App. Dkt. No. 20140014
	) USCA Dkt. No. 17-0183/AR
Master Sergeant (E-8) ALAN S. GUARDADO, United States Army, Appellant	)

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

Pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby submits his reply to the government's answer

Argument

1. The government incorrectly avers the conclusory statements "[T]he evidence of aggravated sexual contact was overwhelming" and "the panel did not find that the other charged misconduct happened by a preponderance of the evidence". (Gov. Brief at 5).

The government disregards this Court's analysis in finding prejudice in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) and United States v. *Hukill*, slip. Op. (C.A.A.F. May 2, 2017), and ignores the similarities that led this Court to find prejudice in those cases to the present case. Instead, the government attempts to speak on behalf of the panel by plainly asserting the panel did not find certain charged offenses occurred by a preponderance of the evidence. (Gov. Brief at 5).

In doing so the government conveniently ignores the facts of the case and contradicts itself to support their contention that "[T]he evidence of aggravated sexual contact was overwhelming" and "[T]he remaining sexual offense allegations involving VC and CH were supported by weak evidence. . . ." (Gov. Brief at 5). In doing so, the Government erroneously conflates the harmless beyond a reasonable doubt standard of review to determine prejudice with a factual sufficiency review Under Article 66, UCMJ.

Here, there are certain facts that are undisputable. 1) There was no eyewitness testimony corroborating KG's (the accuser) account of the alleged incident; 2) The panel made no other findings involving KG that would invite the opportunity for appellate review to determine the extent to which the panel found her credible; 3) There was no physical evidence whatsoever to support KG's allegation. Given these undisputable facts, it cannot be determined "whether the instructions may have tipped the balance in the members' ultimate determination." *Hills*, at 358

However, the government ignores these undisputable facts and interestingly quotes *Hills* where this Court stated "[W]e note that the Government's case was weak as there was no eyewitness testimony other than the allegations of the accuser, the members rejected the accuser's other allegations against the Appellant, and there was no conclusive physical evidence. We cannot know whether the instructions may have tipped the balance in the members' ultimate determination." *Hills*, at 358. (Gov.

Brief at 8). Although the factors that this Court found constituted prejudice in *Hills* almost mirror the present case, the government somehow concludes "This case does not present the same difficulties caused by the erroneous instructions in *Hills*." (Gov. Brief at 8).

Furthermore, in *Hukill*, this Court reiterated its holding in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), stating "the use of evidence of charged conduct as M.R.E. 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected." *Hukill*, slip op. at 6. Such an error is constitutional error and the government must prove there was no reasonable possibility that the error contributed to [the] verdict." *Id.* (citing *Chapman v. California*, 386 U.S. 18, 22-24 (1967) and *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). Similar to its analysis in *Hills*, this Court in *Hukill*, stated "the Government's case was based entirely on the testimony of the victims and the alleged confession from Hukill to his fiancée that he had been unfaithful, all of which Hukill denied. No other evidence was offered." *Hukill*, slip op. at 7. In both *Hills* and *Hukill*, this Court held the Government failed to prove there was no reasonable possibility that the error contributed to the verdict. Id.; *Hills,* 75 M.J. at 358.

The trial counsel's closing argument, here, makes prejudice even more egregious than in *Hills* and *Hukill*. In its brief before this Court, the Government

completely ignored this additional issue and failed to address it. The trial counsel's closing argument magnified error. 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. The two page "spillover instructions" that trial counsel highlighted to the panel and specifically asked them to read included the aforementioned propensity instructions. (JA 287 - 90). Not only did trial counsel focus on these improper instructions, he essentially argued the panel should convict appellant because he is a predator. (JA 366; 371).

While ignoring the obvious and important facts, the government attempts to separate this case from *Hills* by contending that KG's testimony was "unimpeachable" and that her credibility alone should convince this court that the instructions were harmless beyond a reasonable doubt. (Gov. Brief at 8). However, the Government contradicts itself in its assertion that KG's testimony was unimpeachable, as it previously recognized that the defense impeached KG's testimony by introducing inconsistent statements she made to AC regarding the alleged incident. (Gov. Brief at 4). AC's inconsistent statements to KG include that the alleged event occurred at a different time and location (Texas v. Alabama). (JA at 688; 691).

The government also completely mischaracterizes the defense theory of the case relating to KG. The government states "When the best defense to a daughter

accusing her father of sexual abuse is anger over a television show or iTunes access, the result at trial will be the same regardless of whether the panel is instructed that they can consider propensity." (Gov. Brief at 9). Unfortunately for the government, the defense's position is more adequately described during their closing argument. Given the inconsistencies in the time and location of the alleged offense in KG's testimony, the defense asserted the lack of opportunity to commit the offense on her birthday and the facts of her stories did not make sense. In addition, the defense highlighted the alleged victim failed to report for five years and continued to see the appellant without informing anyone of any type of issue with him. (JA 326-29).

Although the government painstakingly details why the panel could not have been convinced by a preponderance of the evidence of the offenses against VC and CH, it ignores the fact that apparently the government thought the evidence was strong enough for preferral and referral of charges. Interestingly, after the appellant was acquitted the government is suddenly convinced that the panel could not have found him guilty by a preponderance of the evidence. Finally, in its analysis of the evidence presented by VC and CH the government completely fails to acknowledge that even in *Hills*, the panel acquitted appellant of several of the offenses against him.

In addition to solely relying on the alleged victim's testimony, the government incorrectly applied a new standard to determine prejudice. In its quest to persuade this Court that prejudice did not result from the error, the government asserts that because the evidence was strong enough to carry a case to a legally and factually sufficient guilty verdict, it should be strong enough to overcome the harmless beyond a reasonable doubt standard. (Gov. Brief at 8). The government attempts to shift its burden stating "It is not reasonable to assume (1) the panel believed that Appellant raped VC by a preponderance of the evidence; (2) yet acquitted him of the higher beyond a reasonable doubt standard." (Gov. Brief. at 10). However, this Court need not "assume" anything, rather the government has to prove beyond a reasonable doubt there is no possibility the error contributed to the conviction.

The government cannot show beyond a reasonable doubt the constitutional error here did not contribute to appellant's convictions. This was not a case involving overwhelming evidence. Just as in *Hills* and *Hukill*, there was no physical evidence presented. Exactly the same as in *Hills* and *Hukill*, the only eyewitnesses to the Article 120, UCMJ, specifications were the named victims themselves. The defense focused on the credibility issues of all three alleged victims and each of them had multiple motives to fabricate.

Simply put, none of the evidence was clear cut and was, instead, highly contested by both sides. The military judge's erroneous application of Mil. R. Evid. 414 created a risk that appellant was convicted based on evidence that did not establish his guilt beyond a reasonable doubt.

2. The government failed to respond to appellant's assertion that 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*. Thus, appellant reasserts his argument articulated in Appellant's Final Brief.

Conclusion

Appellant respectfully requests this honorable Court grant meaningful relief as requested on all of the issues under consideration.

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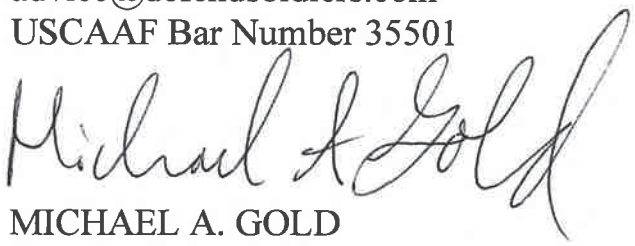

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing brief in the case of *United States v. Guardado*, Army Dkt. No. 20140014, USCA Dkt. No. 17-0183/AR, was electronically filed with the Court and Government Appellate Division on May 15, 2017.

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