IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. Dkt. No. 20130582
	)	USCA Dkt. No. 17-0285/AR
Sergeant (E-5) **GENE N. WILLIAMS**, United States Army, Appellant	)	

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INDEX

Issue Presented

Pages

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Page

Court of Appeals for the Armed Forces / Court of Military Appeals

State Courts

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Statement of the Case

On June 12, 2017, this Court granted appellant's petition on the issue presented. On July 27, 2017, appellant filed his final brief. The government responded on August 22, 2017. On August 29, 2017, this Court granted appellant's motion to extend time to file a reply brief until September 8, 2017. This is appellant's reply.

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WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRONEOUSLY FOUND THAT THE PROPENSITY INSTRUCTION GIVEN IN THIS CASE FALLS WITHIN AN EXCEPTION TO THE HOLDING IN *UNITED STATES V. HILLS*, 75 M.J. 350 (C.A.A.F. 2016).

Argument

Like the Army Court, the government asserts the error in this case was harmless beyond a reasonable doubt. (Gov't. Br. at 12–18). However, in making this assertion, the government: 1) mischaracterizes this Court's commentary on *People v. Villatoro*, 2) pretends to know the order in which the panel members "must have" voted on the charges, 3) claims that a conviction for misconduct "on divers occasions" means that the panel believed all the "countless" allegations in the specification had been proven beyond a reasonable doubt, and 4) grossly exaggerates the strength of the corroborating evidence. As outlined below, each of these errors is fatal to the government's defense of the Army Court decision.

1. The Army Court and the government brief mischaracterize this Court's commentary on *People v. Villatoro,* 54 Cal. 4th 1152 (Cal. 2012).

The Army Court and government mischaracterize the salient point this Court made in *Hills* about the instructions given in *People v. Villatoro*. 75 M.J. at 357; Gov't. Br. at 12–17. Critically, in *Villatoro*, there was *no* instruction about propensity based on a preponderance of the evidence.

Both the Army Court decision and the government brief incorrectly assert that the distinction in *Villatoro* was that "the offense had to *first* be proven beyond a reasonable doubt." (JA 17 (emphasis added); *cf*. Gov't. Br. at 13). The Army Court then describes this mischaracterization of *Villatoro* as "an exception" to *Hills* that renders the error harmless beyond a reasonable doubt.[1]

In actuality, the instructions in *Villatoro* did not contain the constitutional error of allowing evidence of any charged offense to be used for propensity under a lesser standard of proof than beyond a reasonable doubt. In *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), and again in *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017), this Court articulated a categorical prohibition against the use of charged misconduct as propensity evidence under a lesser standard than beyond a reasonable doubt.

Furthermore, the Army Court asserted this case was "distinguishable from *Hills* in that the propensity instruction flowed in only one direction." (JA 17). Appellant has two responses. First, sewage flowing in one direction is still sewage. Moreover, the instructions also stated, "You may also consider the evidence of such other acts of sexual assault for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault." (JA 623).

[1] On this point, appellant notes the government brief's contains the word "exception" only in the statement of the issue presented. (Gov't. Br. at 1).

This confusing and contradictory language may have caused a ricochet effect, as a panel member could have reasonably understood this language as instructing them to consider some of the "countless" allegations in Charge I to prove propensity or predisposition for *any* charged offense involving sexual assault, *including Charge I itself*.[2] The potential for circular findings arises when instructions confuse the evidentiary standard. That is the principle underlying *Hills* and *Hukill*, which the Army Court fails to appreciate as categorical.

2. The order in which the panel voted on the charges is unknown.

Moreover, neither the Army Court decision nor the government brief explains how appellate courts can say, to any degree of certainty, the order in which the panel members deliberated on the charges. Remarkably, rather than conceding that the order of voting is properly and perpetually cloaked in secrecy, the government instead baldly asserts it is "logical that the panel *must have* evaluated Charge I first." (Gov't. Br. at 18) (emphasis added). This speculation, however, is merely one defect in an argument that fails to address the fundamental, categorical imperative articulated by this Court in both *Hills* and *Hukill*.

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[2] Indeed, appellant personally remains convinced, and personally wishes pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), to note to this Court, that because the specifications of Charge III are also forms of assault with elements common to the other charges, the confusing and unconstitutional instructions to use evidence established only by "a preponderance" to show "propensity" to commit assaultive offenses undermined the presumption of innocence to which he was entitled, and rendered *all* the findings invalid.

3. The "on divers occasions" aspect of the charged misconduct used for propensity precludes a conclusion of harmlessness beyond a reasonable doubt.

In this case, the specification addressing charged misconduct that was also used for propensity described alleged misconduct "on divers occasions," and spectacularly so. The accusing witness alleged that sexual assaults occurred by the hundred, sometimes four or five a day, and the overall number was "countless." (JA 391–94).

In light of this testimony, a trier of fact who voted guilty on the specification may not have believed beyond a reasonable doubt that *all* the alleged misconduct was committed. Plain and simple, the verdict does not establish – as a matter of law – that any panel member believed beyond a reasonable doubt that more than *two* acts described by The Specification of Charge I occurred, or that any panel member came to any conclusion about Charge I *before* voting on Charge II. (*See also* Appellant Br. at 12–13). On this subject, again, the government merely speculates, asserting as fact what cannot be known, for the convenience of their argument that this constitutional error was harmless beyond a reasonable doubt.

4. The government grossly exaggerates the strength of the evidence.

In its brief, the government notes that "*Hills* lacked eyewitness testimony other than that of the accuser [and] lacked conclusive physical evidence." (Gov't. Br. at 14). This locution insinuates that appellant's case includes corroborative evidence for the sexual assaults. It does not.

In fact, regarding the supposed strength of the evidence, the government brief cites four portions of the record as corroborating evidence. (Gov't. Br. at 18) (citing JA 107–09, 291–92, 312, and 327–28). However, the government's case at trial – as in *Hills* – included no "conclusive physical evidence" or "eyewitness testimony" for the sexual offenses.

The first of these four citations refers this Court to the accusing witness authenticating corroboration of nonsexual violence – and not conclusively with regard to the identity of the perpetrator – in the form of photos of damage to a door and a scar she had from an injury. (JA 107–09). The other three citations refer this Court to friends of the accusing witness who repeated prior consistent statements *of the accusing witness*. (JA 291–92, 312, and 327–28). There was no independent "eyewitness testimony," but merely testimony of friends who said that the accusing witness had "disclosed to them at different points in time" that the appellant had allegedly committed the offenses. (Gov't. Br. at 18).

This case is indeed precisely *like Hills*, in that "there was no eyewitness testimony other than the allegations of the accuser" and "no conclusive physical evidence" that the sexual assaults occurred. 75 M.J. at 358. As such, this Court "cannot know whether the instructions may have tipped the balance in the members' ultimate determination. The instructions were, therefore, not harmless beyond a reasonable doubt." *Id*.

Conclusion

Wherefore, at a minimum, SGT Williams requests this Court set aside and dismiss The Specification of Charge I and the Specifications of Charge II.[3]

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[3] Appellant's final brief prayed for relief in the form of dismissing the Specifications of Charge II, but noted the potential effect of the erroneous instruction on Charge I itself. (Appellant Br. at 14). On further consideration of the Army Court decision and the parties' pleadings, appellant now requests this Court also set aside and dismiss The Specification of Charge I.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Williams*, Crim. App. Dkt. No. 20130582, USCA Dkt. No. 17-0285/AR, was delivered to the Court and Government Appellate Division on September 8, 2017.

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