IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee,	BRIEF ON BEHALF OF APPELLEE
v.	Crim. App. Dkt. No. 20130582
Sergeant (E-5) GENE N. WILLIAMS, United States Army, Appellant,	USCA Dkt. No. 17-0285/AR

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

Issue Presented

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)?

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2015).

Statement of the Case

On June 20, 2013, a general court-martial composed of officer and enlisted members convicted Sergeant (E-5) Gene N. Williams [Appellant], contrary to his pleas, of rape, forcible sodomy (four specifications), and assault consummated (five specifications) by a battery in violation of Articles 120, 125, and 128, UCMJ, 10 U.S.C. §§ 920, 925, and 928 (2012). The panel sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for twenty years, and a dishonorable discharge. The convening authority approved the findings and only so much of the sentence as extended to reduction to the grade of

E-1, forfeiture of all pay and allowances, confinement for twenty years, and a bad-conduct discharge. (JA 25). The convening authority credited Appellant with fifty days of confinement against his sentence. (JA 25).

On February 29, 2016, the Army Court affirmed the findings of guilty and the sentence. (JA 1-13). Appellant filed a Petition for Grant of Review with this Court on March 14, 2016. This Court granted the Appellant's petition on one issue on June 22, 2016. (JA 14). On August 8, 2016, this Court remanded Appellant's case to the Army Court for consideration in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). (JA 15).

On January 12, 2017, the Army Court again affirmed the findings of guilty and the sentence. (JA 16-18). The Army Court found that the Military Rules of Evidence [Mil. R. Evid.] 413 instruction was improper based on *Hills*, but that the error was harmless beyond a reasonable doubt. (JA 17). On March 13, 2017, Appellant filed a Petition for Grant of Review, which this Court granted on June 12, 2017.

Statement of Facts

A. Offenses Appellant Committed Against TW

Appellant was charged with one specification of raping TW "on divers occasions between on or about 7 July 2000 and on or about 1 January 2003." (JA 19). On May 23, 2000, Appellant married TW. (JA 332). Shortly after their

marriage, Appellant joined the Army. (JA 332). TW accompanied Appellant to his first duty location in Weisbaden, Germany, where they lived with their two children from August 3, 2000 to February 2003. (JA 332-4).

While they lived in Germany, TW and Appellant's relationship was "very distraught" and involved frequent arguing. (JA 334, 913). Appellant exerted control over TW in their relationship through means such as determining who TW could be friends with and arguing with her if she went out by herself. (JA 338-9). Appellant controlled TW not only emotionally, but physically and sexually. Appellant would consume alcohol, watch pornography, and demand sexual acts or intercourse from TW. (JA 335). TW testified that generally sex with Appellant was "very painful, very unwilling on [her] behalf. . . . It was all the time." (JA 335). TW testified that Appellant had sexual intercourse with her without her consent a few times a week, sometimes every day during a week, throughout the course of their marriage from 2000-2004. (JA 342). TW explained that she gave in to Appellant's sexual demands out of a fear that he would physically harm her or threaten to "get it from elsewhere." (JA 336).

TW testified that when she did not wish to have sex with Appellant, she would indicate this to him by "tell[ing] him no. I would tell him stop. Don't do that. Quit." (JA 341). Appellant would tug at TW's pants, hug her, kiss her, and continue to try to engage in sexual activity with TW after she told him no. (JA

336). On some occasions, Appellant became physical with TW after she indicated her lack of consent by pulling her ponytail, yanking her hair and telling her that it was her "duty as a wife to . . . make him happy." (JA 336). TW further explained:

> If I would consistently say no, he would eventually climb on top of me, try to pull my pants down, and I would still try to tell him to stop. I'd push his hands with my hands. He would still consistently keep doing that. His whole body weight would be on me while doing this and eventually, fighting him off would not do the trick, and he would eventually get the pants down, and at the point it was either I could keep fighting, you know, keep fighting and saying no, or just give in. And I would eventually give in.

(JA 340). Appellant would keep moving TW's hands away with his hands to get to her pants. (JA 340). TW's verbal and physical resistance would last anywhere from a few minutes to an hour. (JA 341).

TW testified to two specific periods of time when Appellant forced her to, or attempted to force her to have sex with him. The first time period was from the date TW had outpatient surgery to remove cancerous tissue on her cervix until four to six weeks afterwards. (JA 342-3). Despite the fact that TW needed time to recover and heal, Appellant repeatedly forced her to have sex because he wanted sex. TW testified, "I would tell him I was in pain and that I should heal; that, you know, the doctor keeps telling us that we should not have any intercourse for 4-6 weeks after these procedures, and he would insist that he needed to have sex." (JA

344). Appellant would become "irate" and "very angry" after TW attempted to resist his attempts until she gave in. (JA 344).

The second instance was on April 29, 2001. (JA 345). Appellant became intoxicated and watched pornography while attempting to initiate sex with TW. (JA 348). Appellant grabbed TW by the back of her hair, telling her "this is your duties [sic] as a wife" as she said "no." (JA 351). Appellant pulled at TW's pants as she told him no and to go to bed, and attempted to back away. (JA 349). Appellant bear hugged TW from behind, holding her with one arm and tugging at her pants with the other. (JA 349). TW attempted to move his arm off of her. (JA 350). When Appellant was able to get TW's pants down to her knees, he moved the arm that was tugging her pants to her other arm and dug his nails into her hand to hold her down. (JA 350). Appellant gave up and pushed TW out of the front door and locked her out. (JA 351). TW subsequently reported the incident to the military police, causing Appellant to cease the assaults, but only for a few weeks before he resumed them again. (JA 352). TW divorced Appellant in 2004. (JA 334).

B. Offenses Appellant Committed Against SW

Appellant was charged with four specifications of forcibly sodomizing SW between September 2007 and March 2011 in Fort Lewis, Washington, Trabitz, Germany, Oerlenbach, Germany, and Sanford, North Carolina. (JA 21). Appellant

was also charged with six specifications of physically assaulting SW between September 2007 and December 2009 in Fort Lewis, Washington; Trabitz, Eschenbach, and Oerlenbach, Germany; and Fayetteville, North Carolina. (JA 21-2).

The same year Appellant and TW divorced, Appellant was stationed in Korea and met SW. (JA 57). Appellant and SW married later that year, in October 2004, and moved together to Fort Lewis in 2005. (JA 57). Appellant deployed from Fort Lewis in September 2006 and returned in September 2007. (JA 57). Appellant and SW moved from Fort Lewis, Washiton to Trabitz, Germany in June 2008, where they resided until approximately March 2009. (JA 58). Between March 2009 and June 2009, Appellant and SW moved to Eschenbach, Germany. (JA 59). They subsequently lived in Oerlenbach, Germany from June 2009 to 2010. SW accompanied Appellant to Fort Bragg, North Carolina in 2010, where they lived in Fayetteville, North Carolina for approximately a month before moving to a house in Sanford, North Carolina on December 21, 2010. (JA 61-2).

SW testified that the Appellant began forcing her to have anal sex shortly after his redeployment in 2007. (JA 80). The assaults lasted until 2011. (JA 86). SW initially indicated to Appellant that she would try anal sex, but after the first time, she told him that it hurt her, she did not like to do it, and she did not want to do it again. (JA 79-80). Appellant forcibly anally sodomized SW after that

occasion in Fort Lewis, Trabitz, Eschenbach, Oerlenbach, Fayetteville, and Sanford. Appellant would begin the assaults by drinking and watching pornography. (JA 80). When he attempted to anally penetrate SW, she would beg him to stop, "you can do with me whatever you want to but please don't ask me [for anal sex]. You know it hurts me." (JA 81). The anal sodomy left SW in pain, which she indicated to Appellant, and bleeding on numerous occasions. (JA 85). On several occasions, Appellant would take his penis from SW's vagina and put it in her anus. (JA 82). SW told Appellant to stop and would cry, but Appellant would tell her to "hush" and continue to anally sodomize her, pulling her hair and holding her tight so that she could not move. (JA 82).

SW reported the assaults to a neighbor in the fall of 2010 while in Oerlenbach. (JA 291). The neighbor, Ms. Kimberley Abbott, testified that Ms. SW was very shaky and fearful when she shared this information and requested Ms. Abbott not repeat it. (JA 292). SW also reported the assaults to a friend, Ms. Beata Dufresne, whom she knew while living in Sanford. (JA 312). Ms. Dufresne testified that ultimately Ms. SW told her "that her husband often beat her, especially whenever he got intoxicated; that he raped on several occasions." (JA 327). Ms. Dufresne stated that SW told her he would force her to have anal sex and that he would throw her to the floor if she refused. (JA 328).

On one occasion, in November 2007 while at Fort Lewis, Appellant put his penis in SW's anus without her consent and after, she told him, "this feel [sic] like somebody put knife into my butt[;]" SW was able to push him off and escape to her children's room. (JA 99). Appellant kicked in the door to the room, hitting her in the head with the door. (JA 101). SW's head was bleeding. (JA 102). SW became dizzy and thought she would die. (JA 103). SW ran to the neighbor's house for help. (JA 103). The neighbor subsequently called 9-1-1. (JA 103).

Appellant also physically abused SW throughout their marriage, particularly when he was drunk or when SW refused sex. (JA 67). The physical abuse included hitting, pushing, and pulling her hair, and occurred even while SW was pregnant. (JA 97). SW testified, "I do know that in his mind he just gets him (sic) upset when he wants sex – I don't like sex – when I tell him I don't like anal sex – I don't want this. And he's getting more and more mad and started hitting me." (JA 71). SW also described another incident whereby Appellant pushed her causing her to fall back on the floor because he was angry about the floor being dirty in the house. (JA76). SW and Appellant divorced in 2012. (JA 57).

C. Mil. R. Evid. 413 Motion

Prior to trial, Appellant filed a motion in limine under Mil. R. Evid. 413, requesting the government be precluded from using the evidence of sexual assault against one of the victims to prove Appellant's propensity to commit sexual assault

against the other victim. (JA 633). During the pre-trial 39(a), the military judge stated:

> So this is really an issue of whether or not I'm going to grant or I'm going to give an unmodified spillover instruction to the panel or whether or not I'm going to give an instruction to the panel about how they may use the offenses vis-à-vis each other to show some type of propensity for sexual assaults.

(JA 041). The military judge took the motion under advisement and stated that there would be a decision within a reasonable period of time. (JA 53). However, the military judge did not make a specific ruling on the motion. At trial, the military judge gave the following instruction to the panel[1]:

> Evidence that the accused committed rape on divers occasions alleged in the Specification of Charge I may have no bearing on your deliberations in relation to any of the allegations of forcible sodomy in the Specifications of Charge II, unless you first determine by a preponderance of the evidence that it is more likely than not that the offenses alleged in the Specification of Charge I occurred. If you determine, by a preponderance of the evidence that the offenses alleged in Specification 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 the forcible sodomy alleged in Charge II. You may also consider the evidence of such other acts of sexual assault for its tendency, if any, to show the accused propensity or predisposition to engage in sexual assault.

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[1] Appellant fails to account for the entirety of the propensity instruction in his brief. (Appellant's Br. at 5).

> You may not, however, convict the accused solely because you believe he committed these other offenses or solely because you believe the accused has a propensity or predisposition to engage in sexual assault. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each 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 the 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.

(JA 623). The military judge also instructed the panel that uncharged misconduct consisting of the sexual assault or attempted rape of TW in April 2001 could be considered propensity evidence as to Charge I (rape of TW) if they determined that the incident occurred by a preponderance of the evidence. (JA 624).

The panel members convicted Appellant of the specification of Charge I (rape), all specifications of Charge II (forcible sodomy), and five of the six specifications of Charge III (assault consummated by a battery).

Summary of Argument

The Army Court did not err in its ruling that the erroneous propensity instruction given was harmless beyond a reasonable doubt. This Court should find the instructional error harmless because the panel, using the standard of beyond a reasonable doubt and evidence independent of other charges, determined that Appellant was guilty of the offense which could be used as propensity evidence. Even if this Court finds that the instructional error was not harmless beyond a reasonable doubt, it should still affirm Appellant's sentence given the scope and severity of the other offenses for which he was convicted.

Standard of Review

In *United States v. Hills*, this Court rejected an application of Mil. R. Evid. 413 "as a mechanism for admitting evidence of charged conduct . . . in order to show propensity to commit the very same charged conduct." 75 M.J. 350, 354 (C.A.A.F. 2016) (see also *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017) (stating that "the use of evidence of charged conduct as Mil. R. Evid. 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"). In doing so, it identified two issues with the use of Mil. R. Evid. 413 in *Hills*: one statutory ("Neither the text of M.R.E. 413 nor the legislative history of its federal counterpart suggests that the rule was intended to permit the government to show

propensity by relying on the very acts the government needs to prove beyond a reasonable doubt in the same case."), and the other constitutional (". . . the instructions that the military judge provided both undermined the presumption of innocence and created a tangible risk that Appellant was convicted based on evidence that did not establish his guilt beyond a reasonable doubt."). *Id.*

"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." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006). "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.* "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.'" *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007).

Law and Argument

I. The erroneous propensity instruction was harmless beyond a reasonable doubt.

In this case, the Army Court found that the propensity instruction was erroneous but harmless beyond a reasonable doubt. (JA 17). Relying upon this Court's discussion of *People v. Villatoro*, 281 P.3d 390 (Cal. 2012) in *Hills*, the Army Court found that that such an instructional error is harmless beyond a

reasonable doubt if the offense used as evidence of propensity "stemmed from a specification *that had been independently proven beyond a reasonable doubt*." (JA 17) (emphasis in original). Since the panel found Appellant guilty beyond a reasonable doubt of rape using evidence that was independent of the evidence used to prove forcible sodomy,[2] the instructional error did not contribute to Appellant's conviction. (JA 17-8).

In *Hills*, this Court found that instructional error involving charged offenses as Mil. R. Evid. 413 propensity evidence was not harmless beyond a reasonable doubt because it "implicate[d] 'fundamental conceptions of justice' under the Due Process Clause by creating the risk that the members would apply an impermissibly low standard of proof" —a preponderance of evidence standard— and thereby "undermin[e] both 'the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt. 75 M.J. at 357 (*quoting United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000)). *Hills* involved an accused facing three specifications of sexual assault involving the same victim as she went in and out of consciousness over the course of a few hours. This Court found that the propensity instruction impermissibly allowed the

[2] As to charged misconduct, the panel was instructed that they could use evidence of rape in Charge I as propensity to commit the forcible sodomy specifications in Charge II. The panel was not instructed that they could use evidence of multiple acts of forcible sodomy as propensity evidence to support the rape charge.

members to "bootstrap their ultimate determination of the accused's guilt with respect to one offense using the preponderance of the evidence burden of proof with respect to another offense[.]" *Hills*, 75 M.J. at 357.

In *Hills*, where "none of the offenses were factually independent of each other," the use of each offense to prove the next "created the potential for circular findings of proof; a possible triple helix of evidence where the evidence of guilt of each offense helps establish the next, spiraling upward until the threshold of reasonable doubt is crossed." *United States v. Guardado*, 75 M.J. 889, 893 (A.C.C.A. 2016). "[G]iving multiple standards of review for what was essentially one criminal escapade expected too much from the panel." *Id.* at 897. This Court also noted in its analysis the weakness of the Government's case. *Hills* lacked eyewitness testimony other than that of the accuser, lacked conclusive physical evidence, and the members acquitted the accused of the other two specifications of sexual assault in convicting him of a separate specification of abusive sexual contact. *Hills*, 75 M.J. at 357.

In noting the constitutional implications of conflicting burdens of proof, this Court distinguished *Hills* from *Villatoro*. *See Hills*, 75 M.J. at 375. In *Villatoro*, there was "no risk the jury would apply an impermissibly low burden of proof" where propensity instruction was clear that all offenses must be proven beyond a reasonable doubt. 281 P.3d at 400. In that case, the accused was charged with

sexual offenses relating to five different victims. *Id.* at 1156. The propensity instruction did not provide that the charged offenses used to demonstrate propensity must be proven only by a preponderance of the evidence. *Id.* at 1167-8. The instruction did not reference a particular burden of proof that the fact-finders should use when determining what offenses to use as propensity evidence,[3] but merely emphasized that all offenses must be proven beyond a reasonable doubt. *Id.*

The presumption that can be drawn from this is that the only offenses the jury in *Villatoro* used as propensity evidence were offenses that they determined to have occurred beyond a reasonable doubt. This is distinguishable from cases where the fact-finder may use all charged offenses as propensity evidence to prove the other offenses if they find that those offenses occurred by a preponderance of the evidence. "A robot or computer program could be imagined capable of finding charged offenses true by a preponderance of the evidence, and then finding that this meant the defendant had a propensity to commit such offenses, while still saving later a decision about whether, in light of all the evidence, the same

[3] The pertinent portion of the instruction read: "If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or include to the commit the other charged crimes." *Villatoro*, 2 Cal. App. 5th at 1167.

offenses have been proven beyond a reasonable doubt. . . . But it is not reasonable to expect it of lay jurors." *People v. Cruz*, 2 Cal. App. 5th 1178 (2016).

This case is analogous to *Villatoro* because the offense (rape) used to demonstrate propensity was proven beyond a reasonable doubt and is distinguishable from *Hills* because the propensity instruction did not create circular findings of proof where evidence of any and all charged offenses could be used as propensity evidence of any other charged offense. Rather, the panel was instructed that they could only use the evidence of the rape of TW charged in The Specification of Charge I to show propensity to commit the multiple acts of forcible sodomy as to SW in Charge II. Given that the propensity instruction only flowed in a one-way linear direction from Charge I to Charge II, Charge I was proven with evidence independent of all other Charges. It is only logical that the panel must have evaluated Charge I first before determining whether the offenses in Charge II occurred if they considered propensity with regard to Charge II. This specifically avoids the dangers of the panel merely applying a lower standard of proof for all offenses and using that determination to bootstrap their determination of the offenses as to each other. That the panel found Appellant guilty beyond a reasonable doubt of rape in Charge I using evidence without the taint of propensity from the forcible sodomy acts in Charge II demonstrates that the panel did not use an impermissibly lower standard, preponderance of the evidence, to determine that

that offense occurred and use it as evidence of propensity to commit the acts of forcible sodomy. The one-way flow of the propensity instruction and finding of guilt beyond a reasonable doubt using independent evidence as to rape in Charge I demonstrates that the burden of proof and presumption of innocence was not eroded by the military judge's instructions. Accordingly, there is no reasonable possibility that the instructional error might have contributed to Appellant's conviction.

Appellant argues that we cannot know which instances of rape in Charge I the panel used as propensity evidence for the forcible sodomy acts in Charge II because Charge I was charged as "on divers occasions." The primary evidence for Charge I was the testimony of the victim herself, TW. It does not logically follow that the panel would find her testimony credible as to some instances of assault but not others, yet determine her credibility was such that they were convinced beyond a reasonable doubt Appellant committed rape. This is particularly the case when TW's testimony consisted primarily of a general description of the pattern of assaults and did not refer to any particular assault apart from those which she suffered after her surgery for cervical cancer.

Furthermore, the military judge clearly instructed the panel members that propensity evidence could not overcome a failure of proof in the government's case, that the Accused is presumed to be innocent, and stated approximately nine

times that they must be convinced beyond a reasonable doubt to convict Appellant. (JA 611, 622-3). This is in contrast to the two instances in which the military judge mentioned the preponderance of the evidence standard in reference to Charge I. (JA 611). In contrast to *Hills*, the evidence for Charge I (rape) stood completely independent of Charge II (forcible sodomy). Charges I and II involved distinctly separate victims, acts, and time period of those acts. These facts and the presentation of evidence which corroborated the testimony of TW and SW substantially lessened the risk of confusion, "bootstrapping," and "mental gymnastics" by two different standards of proof required to apply to the same evidence. While a majority of evidence with regard to the acts of forcible sodomy specifications in Charge II was testimonial, SW's testimony was corroborated by photographs of the door Appellant kicked in after SW was able to push Appellant away during one act of forcible sodomy in 2007 in Fort Lewis, photographs of SW's injuries she suffered when the door hit her in the head and the resulting scar that was left, and the testimony of two neighbors who knew SW in Oerlenbach, Germany and Sanford, North Carolina. (JA 107-9, 291-2, 312, 327-8). Those neighbors testified that SW disclosed to them at different points in time that Appellant raped and physically assaulted her on multiple occasions. (JA 291-2, 312, 327-8). The amount of evidence that Appellant committed offenses against

SW made any error regarding the use of Mil. R. Evid. 413 evidence harmless beyond a reasonable doubt.

II. Even if the Army Court erred, this Court should still affirm the findings and sentence in this case.

Even if this Court finds that the instructional error as to Charge II was not harmless beyond a reasonable doubt, this Court should affirm the adjudged sentence because Appellant's other misconduct was significant and egregious. Outside of the forcible sodomy charge and its specifications at issue, Appellant was convicted of raping TW and physically assaulting SW on multiple occasions. (JA 23-5). Appellant relentlessly raped TW on a near daily basis throughout their marriage from 2000 to 2003. (JA 342). On each occasion, TW would indicate her lack of consent by telling Appellant she did not want to have sex or attempting to physically resist him. (JA 341, 346). Despite this resistance, Appellant physically forced TW to submit to sex by pulling her hair and using his body weight to pin her down. (JA 340). The rapes left TW in significant pain and in fear for her physical wellbeing. (JA 335-6). The rapes even occurred almost immediately after TW had surgery to remove cancerous lesions on her cervix despite her doctor's order that she needed approximately six weeks to heal from that surgery. (JA 342-3).

Appellant also physically abused SW over multiple years of their marriage. (JA 71). Occurring both with and independent of the anal sodomy, Appellant

struck SW on a weekly basis, pushed, and pulled her hair between 2007 and 2010, including while she was pregnant with their child, and kicked a door into her head causing her to bleed in 2008. (JA 67-9, 71, 76, 101-2). The abuse would often occur in front of their children. (JA 69). A sentence of a bad conduct discharge, confinement for 20 years, reduction to the grade of E-1 and forfeiture of all pay and allowances is wholly appropriate for Appellant's convictions of these grievous offenses, convictions which were not impacted by the erroneous instructions.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm Army Court's decision and the findings and sentence in this case.

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I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 12 day of August, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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