IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Jonathan QUEZADA
Lance Corporal (E-3)
United States Marine Corps,
Appellant

APPELLANT'S REPLY BRIEF

Crim. App. Dkt. No. 201900115

USCA Dkt. No. 21-0089/MC

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

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Issue Presented

BY INSTRUCTING THE MEMBERS ON FALSE EXCULPATORY STATEMENTS IN A CASE WHERE APPELLANT WAS CHARGED WITH A FALSE OFFICIAL STATEMENT FOR THE SAME STATEMENT, DID THE MILITARY JUDGE UNDERMINE APPELLANT'S PRESUMPTION OF INNOCENCE UNDER THE DUE PROCESS CLAUSE?

Argument

1. **The conflict in this case is the charging scheme and false exculpatory statement instruction—not conflicting burdens of proof.**

The Government argues there is no error here because the Military Judge did not give the members conflicting standards of proof.[1] This distinction does not address the issue in this case: whether the accused remains presumed innocent of the same conduct from which members were instructed they could infer consciousness of guilt.

In *United States v. Hills*, the Military Judge's instruction contained conflicting standards of proof relating to charged misconduct.[2] Here, the conflict is the interaction of the charges and the false exculpatory statement instruction. By requesting the false exculpatory statement instruction when LCpl Quezada was charged with a false official statement for the same denials, the Government functionally requested to use charged conduct as a basis upon which the members were permitted to infer that LCpl Quezada was guilty of another charge. That is how this case implicates *Hills*. The Government's argument seeks to limit *Hills* to explicitly conflicting standards of proof. This view is too narrow. This case seeks to answer a more general question than the Court answered in *Hills*, which is the

[1] Gov't Br. 12-17.
[2] *Unites States v. Hills*, 350, 355 (C.A.A.F. 2016).

harm to the presumption of innocence when instructions operate to direct members to use one charge as propensity evidence of another charge.

The Court should reject the Government's narrow view of the issue and hold that it was erroneous to give the false exculpatory statement instruction for denials of other charged misconduct when the denial was the subject of a false official statement charge.

2. The Government's citations to *Colcol* and *Scogin* overlook the error caused by the interaction of the charging scheme and instructions in this case.

The Government relies on *Colcol* and *Scogin* to argue that, because LCpl Quezada made specific rather than general denials of guilt, the instruction did not undermine the presumption of innocence by creating a circularity problem.[3] This Court held in *Colcol* that "a general denial of guilt does not demonstrate consciousness of guilt."[4] The Court went on to state that instructing on consciousness of guilt in that scenario would force the members to decide the issue of guilt itself and "produce confusion because of its circularity."[5] Courts follow the guidance in *Colcol* in cases where the accused is not charged for false official statement for denying conduct that was subject of another charge.

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[3] Gov't Br. at 17; *United States v. Colcol*, 14 M.J. 479, 484 (C.M.A. 1983); *United States v. Scogin*, 2012 CCA LEXIS 177 (N-M. Ct. Crim. App Aug. 31, 2012).
[4] *Colcol*, 14 M.J. at 484.
[5] *Id*.

The Government overlooks how the charged false official statement distinguishes this case from *Colcol* and *Scogin*. In *Scogin*, the appellant made numerous false statements.[6] The Government used those statements as evidence of consciousness of guilt for the Article 120 offense in that case.[7] The trial judge in *Scogin* tailored the instructions to apply to the six false exculpatory statements at issue.[8] The military judge in this case offered no tailoring of the instruction for further guidance to the members for how to use the false statements. These cases do not offer appropriate guidance for the scenario LCpl Quezada faced when he objected to the false exculpatory statement in his case. Because the false exculpatory statement instruction was supposed to apply to the denial of the sexual assault, the false statement had no other distinct probative value in this case except as to serve a propensity evidence for the sexual assault.

Giving the instruction was erroneous because guilt or innocence of one charge was linked to the other in the absence of clear instructions. There was no tailoring or further guidance for the members in this case to give the false statements any other relevance. This Court should find that cases in which an accused is charged with a false official statement for denials of other charged

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[6] *Scogin*, 2012 LEXIS 714 at *6.
[7] *Id*. at *5-6 (Appellant also failed to object to the instruction at trial inviting less deferential standard of review).
[8] *Id.*

misconduct it is an error to provide no guidance as to which statements go to the accused's consciousness of guilt and which elements of the false official statement they apply.

3. The Government's argument that there is no prejudice misapprehends the utility of the tailoring in *Francis* and fails to see that redundancy in *Littlefield* operates as prejudice in this case.

United States v. Francis directly addressed the false exculpatory statement instruction, charging exculpatory statements as false official statements, and further tailoring of the instruction.[9] In *Francis*, defense counsel did not object to the instruction.[10]

The Air Force Court of Criminal Appeals (AFCCA) distinguished the tailored instruction in *Francis* from the generalized instruction in *Colcol*. Although defense counsel did not object to the instruction, the military judge addressed his concerns by stating he "would limit [the false exculpatory statement instruction's] applicability to circumstantial evidence as it related to the specific intent element of the false official statement offense."[11] In finding no error, the AFCCA held that the trial judge provided a "specific and detailed instruction to the court members on the limited purpose for which they could consider the false exculpatory

[9] *United States v. Francis*, 2000 LEXIS 177, *4-6 (A.F. Ct. Crim. App, Jul. 25 2000)
[10] *Id.* at 4
[11] *Id.*

statements the appellant 'may have made.'"[12] By instructing members on the applicability of the false exculpatory statements to the intent to deceive element, the military judge in *Francis* gave the false statements a distinct probative value. Focusing the consciousness of guilt instruction on an element of the false official statement charge prevented one charge from being used as propensity evidence of the other, and preserved the presumption of innocence.

The First Circuit Court of Appeals found error in providing the false exculpatory statement in *United States v. Littlefield*.[13] Although the Government charged several counts of fraud, it did not charge Littlefield with a civilian equivalent of false official statement.[14] The Court found that the instruction was problematic because it had the potential to confuse the jury and was unnecessary.[15] The Court stated that for an accused's false statements to be of any value to a factfinder it should "involve matters collateral to the facts establishing guilt."[16] The

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[12] *Id*.
[13] *United States v. Littlefield*, 840 F.2d 143, 149 (1st Cir. 1988).
[14] *Id*. at143.
[15] *Id*. at 149; Bender, S2 Modern Federal Jury Instructions-Criminal 4.15 (2021) ("[T]he [Eight Circuit] Committee does not normally recommend an instruction on this issue); *see* Federal Judicial Center, Pattern Criminal Jury Instructions § 44 (1988), Seventh Circuit Federal Jury Instructions: Criminal § 3.22 (1999) and Ninth Cir. Crim. Jury Instr. 4.3 (1997) recommend that no instruction on this subject be given and that the subject be left to argument of counsel.
[16] *Littlefield,* 840 F.2d at 149 (stating the false exculpatory statement could also be helpful to the factfinder if it was so "incredible" that it suggests it was created to conceal guilt).

Court stated that there was redundancy in the case because the jury could have believed the handwriting expert in the case.[17] This justified finding the error harmless.[18]

The potential for confusion was greater in this case than in *Littlefield* because there was no charge for providing false statements in that case. Furthermore, statements at issue in this case were not collateral to the facts establishing guilt like the statements in *Littlefield*. The statements in this case went to the heart of guilt or innocence. What operated as a redundancy in *Littlefield* operated as prejudice here. The denials in *Littlefield* underscored that the accused knew his actions were wrong but were insufficient by themselves to establish guilt.[19] Without further guidance, the Military Judge in this case did not direct the members to any other piece of evidence that would have resulted in a redundancy if they found that evidence credible.

This case is about a more than a general denial. The Military Judge failed to instruct the members that the false statement had any probative value other than it was false. Therefore, it had no purpose other than propensity and had the effect of undermining the presumption of innocence.

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[17] *Id*. at 150.
[18] *Id*.
[19] *Id*.

Conclusion

This Court should find that the false exculpatory instruction in this case undermined the presumption of innocence, reverse the decision of the lower court, and set aside the findings and sentence in this case with respect to the Article 107 and 120 convictions.

Respectfully submitted,

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on July 13, 2021.

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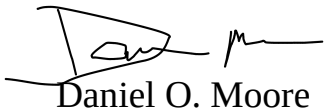

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