IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee*	**BRIEF ON BEHALF OF APPELLANT**
v.	Crim. App. Dkt. No. 39358
Staff Sergeant (E-5) **RALPH J. HYPPOLITE II** United States Air Force *Appellant*	USCA Dkt. No. 19-0119/AF February 26, 2019

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

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ISSUE PRESENTED

WHETHER THE MILITARY JUDGE'S ERRONEOUS ADMISSION OF EVIDENCE REGARDING SPECIFICATIONS 1, 2, AND 3 AS A COMMON PLAN OR SCHEME FOR SPECIFICATIONS 4 AND 5 WAS HARMLESS.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (CCA) had jurisdiction over this matter pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866(b)(1) (2012). The jurisdiction of this Honorable Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3)(2012).

STATEMENT OF THE CASE

On March 28, May 5, and June 5-8, 2017, Staff Sergeant (SSgt) Ralph J. Hyppolite II (Appellant) was tried at Kadena Air Base, Japan, before a military judge sitting as a general court-martial. Contrary to his pleas, Appellant was convicted of abusive sexual contact (three specifications) and sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). On October 17, 2017, the convening authority approved the adjudged sentence of reduction to E-1, total forfeitures, confinement for seven years, and a dishonorable discharge.

On October 25, 2018, the CCA issued its decision. *United States v. Hyppolite*, 2018 CCA LEXIS 517 (A.F. Ct. Crim. App. Oct. 25, 2018) (unpub.) (Joint Appendix (JA) at 001). The CCA set aside and dismissed Specification 1 of

the Charge with prejudice, affirmed the remaining findings, and reassessed the sentence to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. *Id*.

Appellant petitioned this Court for review on December 20, 2018, and this Court granted review on January 29, 2019.

STATEMENT OF FACTS

Evidence of Abusive Sexual Contact of SSgt RW in Specification1

Following tech school, Appellant, SSgt RW, SSgt SAK, and STK[1] were assigned to Seymour Johnson Air Force Base (AFB), North Carolina. JA at 181. This group of friends, except for STK, lived together in an off-base house until Appellant transferred to Kadena Air Base in 2014. JA at 182, 203, 580.

In August 2012, Appellant's unit was on a temporary duty (TDY) assignment to Mountain Home AFB, Idaho. JA at 183. Each Airman was billeted on base in separate rooms. JA at 575. After a night of drinking with friends, Appellant and SSgt RW returned to their respective rooms. JA at 187-88, 216. SSgt RW fell asleep and soon woke from a "very oddly realistic" dream that he was having sex with a woman. JA at 189-90, 217. His penis was partly exposed but still tucked under the waistband of his underwear. JA at 191, 220, 227. He

[1] By the time of Appellant's court-martial, SSgt STK had separated from the Air Force, but for the sake of consistency with the Charge Sheet, all references to him throughout this brief are without his rank.

sensed movement at the end of the bed and followed what he believed to be the unknown assailant into the hallway. JA at 190-91, 198, 218. SSgt RW saw Appellant, clad only in his underwear, enter the room next door. JA at 191-92, 219-20. SSgt RW felt confused about the alleged incident and convinced himself that he had experienced a dream and that the wetness on his penis was sweat. JA at 192-95, 220, 222.

The military judge convicted Appellant of abusive sexual contact of SSgt RW as charged in Specification 1. JA at 574.

The CCA found this conviction factually insufficient because there was reasonable doubt about whether Appellant had touched SSgt RW—much less made sexual contact with his penis—while SSgt RW slept.[2] JA at 24.

Evidence of Abusive Sexual Contact of SSgt SAK in Specification 2

One night in October 2013, Appellant and some friends, including SSgt SAK, went out drinking. JA at 297-98. After the bar closed, they returned to Appellant's house where an intoxicated SSgt SAK fell asleep on the couch after using the restroom. JA at 299-302. When SSgt SAK woke the next morning, his zipper was undone and his penis and testicles were exposed through his underwear's opening. JA at 302-03. SSgt SAK left Appellant's house and told no

[2] The Air Force Court recognized that it could not affirm a conviction for the lesser included offense (LIO) of attempted abusive sexual contact because the government admitted there was no LIO and because this theory had not been presented to the fact finder. JA at 14.

one about the alleged incident until SSgt RW called him in January 2014 to discuss the incident at Mountain Home AFB. JA at 304.

The military judge acquitted Appellant of abusive sexual contact of SSgt SAK as charged in Specification 2. JA at 574.

Evidence of Abusive Sexual Contact of STK in Specification 3

After one swing shift sometime between December 2013 and March 2014, Appellant and STK returned to Appellant's house for a few drinks. JA at 244-45, 247, 270-71. Between 0300 and 0400, STK fell asleep in his uniform on the living room couch. JA at 248, 255. Less than ten minutes later, he woke to see what he believed was Appellant's hand reach over the back of the couch to touch his penis over his pants. JA at 248-50, 272. He swatted the hand away several times. JA. at 251, 251, 272-73. Appellant ran to his bedroom. JA at 251, 253, 274. STK lay awake on the couch for several hours before telling a friend what had transpired. JA at 254-55, 275.

The military judge convicted Appellant of abusive sexual contact of STK as charged in Specification 3. JA at 574.

The "Intervention"

Sometime in early 2014, SSgt RW, SSgt SAK, and STK discussed what they called their "similar" stories with Appellant. JA at 206-07, 305-05. They conducted an "intervention" with Appellant in which SSgt RW told him, "We

know what you've been doing to us while we're passed out sleeping," or words to that effect. JA at 209, 229, 258-59, 261, 305. Appellant allegedly seemed nervous and replied, "I know it's a problem. It's something I do when I drink," or words to that effect. JA at 210, 260, 262, 306, 313. The group threatened to report Appellant if a similar incident occurred. JA at 211, 261, 277. Appellant moved out of the house several months later. JA at 211-12, 265, 278.

Evidence of Abusive Sexual Contact of SrA JD in Specification 4

Senior Airman (SrA) JD, who was then an E-2 (Airman), joined Appellant's unit in June 2014. JA at 322. In August 2014, SrA JD attended a party at Appellant's house. JA at 326, 377-78. SrA JD drank two beers and three or four mixed drinks. JA at 328, 383. He felt more intoxicated than he had ever been. JA at 328-29, 382. SrA JD told Appellant that he was really drunk and did not know where he should sleep. JA at 329, 387. Appellant offered his own bed to SrA JD. *Id*.

SrA JD quickly fell asleep and woke some unknown time later to the sound of Appellant entering the bedroom and getting into bed. JA at 332-33, 367, 370, 388. He did not want to kick Appellant out of his own bed and he knew that the bed was big enough for two people, so SrA JD did not say anything. JA at 333. Appellant turned toward SrA JD, who lay face-up on the bed, and asked if he had ever considered experimenting with guys. JA at 334, 368. SrA JD said "no" and

said he wanted to sleep. *Id*. As Appellant asked again, he massaged SrA JD's penis over his pants with his hand. JA at 334-35, 368, 371, 404. SrA JD did not verbally or physically resist, nor did he manifest a lack of consent; rather, when asked by the trial counsel (TC) if he told Appellant that he did not want to have sex with him, SrA JD answered, "Yes, ma'am, to that effect." JA at 335, 368-70, 426.

The military judge convicted Appellant of abusive sexual contact of SrA JD as charged in Specification 4. JA at 574.

Evidence of Sexual Assault of SrA JD in Specification 5

SrA JD had no recollection of how much time passed or what had transpired after Appellant touched his genitalia. He testified, "[t]he next thing I remember is, being naked and kind of in an inverted position where my feet are now towards the head of the bed and my head is positioned over his groin and his penis is going into and out of [my] mouth." JA at 336, 371, 404-05. Though he did not remember whether he kneeled or lay over Appellant's crotch, SrA JD remembering holding his own head up. JA at 411. He tasted lotion on Appellant's penis. JA at 337. SrA JD did not physically or verbally manifest a lack of consent; indeed, he testified that he did not tell Appellant to stop, nor did he physically resist or attempt to leave. JA at 338, 409-10.

SrA JD testified that Appellant moved him into a "chest-to-chest position where I was over the top of him." JA at 339-41. Appellant penetrated SrA JD's

anus. *Id*. SrA JD scrunched up his face and Appellant stopped, rolled away, and masturbated. JA at 343, 414, 423, 431. SrA JD did not yell, leave, or contact anyone for help or for a ride home; instead, he fell asleep in Appellant's bed. JA at 344, 413, 423-24. He woke, found his clothes next to the bed, dressed, and lay on the family room couch for approximately two hours even though his anus hurt and he felt nauseated. JA at 344-47, 391-94, 424, 429. After Appellant and his roommate left to grab some food, SrA JD drove to his dorm room. JA at 346-47, 395, 443. He felt concerned that he had sent Appellant mixed signals the previous night. JA at 380, 427.

SrA JD told his girlfriend about the alleged incident that morning. JA at 347, 397, 433. On September 20, 2014, Appellant messaged SrA JD. JA at 352, 354. He said, "I just want you to know that yes I do take full responsibility for what happened that night. We were drunk and one thing lead [sic] to another. If I could take that night back I definitely would." JA at 352-53, 400, 580. SrA JD did not report the alleged incident until May 2016 when he arrived at Kadena AB and reported to his unit, to which Appellant was also assigned. JA at 347, 349-51, 406.

The military judge convicted Appellant of sexual assault of SrA JD as charged in Specification 5. JA at 574.

The Military Judge's Mil. R. Evid. 404(b) Ruling

Before trial, the parties litigated the defense motion to sever Specifications 1-3 from Specifications 4 and 5. JA at 584. The government argued that the offenses could be used under Mil. R. Evid. 404(b) as evidence of a pattern or common plan of engaging in sexual conduct with friends after they had been drinking alcohol and were asleep or trying to fall asleep. JA at 652.

To decide the severance motion,[3] the military judge applied the three-part test in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989) and determined that the evidence of each offense alleged in Specifications 1-3 was evidence of a common plan or scheme under Mil. R. Evid. 404(b) for the offenses alleged in Specifications 4 and 5 and vice versa.[4] JA at 695. In *Reynolds*, this Court's predecessor, the Court of Military Appeals, established a three-part test to determine the admissibility of evidence under Mil. R. Evid. 404(b): 1) Does the evidence reasonably support a finding by the factfinder that appellant committed other crimes, wrongs, or acts?; 2) Does the evidence of the other act made a fact of consequence to the instant offense more or less probable?; and 3) Is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403? *Id*. at 109. Finally, the evidence is inadmissible if it fails to meet any of these three standards. *Id*.

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[3] The military judge denied the defense motion to sever the offenses. JA at 695.
[4] A change in military judge occurred between the pretrial Article 39(a) sessions and the trial. JA at 155.

The military judge found that the evidence satisfied all three prongs. JA at 695. Regarding the second prong, the military judge stated that the evidence could be used to show a common plan. *Id*. He explained:

> In this case, the common factors were the relationship of the alleged victims to the accused (friends), the circumstances surrounding the alleged commission of the offenses (after a night of drinking when the alleged victim was asleep or falling asleep), and the nature of the misconduct (touching the alleged victims' genitalia). The nature of the misconduct alleged in specification 5 is different than the other allegations but is alleged to have occurred in connection with the alleged touching of SrA [JD]'s genitalia. This court finds that each specification is relevant and probative as to the other specifications regarding the accused's common plan to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep.

Id.

During an Article 39(a), UCMJ, session to discuss instructions on findings, Appellant's defense counsel (DC) essentially asked the second military judge to reconsider the first military judge's ruling on Mil. R. Evid. 404(b) evidence. JA at 445. The TC opposed the DC's request and maintained that the charged acts were evidence of a common scheme or plan. JA at 447. The military judge declined to disturb the previous judge's ruling because of "finality of rulings" but stated that, for purposes of Mil. R. Evid. 404(b), he would consider the evidence for a scheme instead of a common plan. JA at 448.

The CCA's Decision

The CCA found that the military judge abused his discretion in concluding that the evidence of sexual contact in Specifications 1-3 made more probable a fact of consequence for Specifications 4 and 5 and *vice versa*. JA at 20-21. The court explained:

> In Specifications 1-3, Appellant acted secretively while his friends slept, whereas, in Specifications 4 and 5, Appellant initiated sexual contact with SrA JD while SrA JD was awake and aware of Appellant's presence and Appellant communicated Appellant's desire to engage in sexual activity with SrA JD. The common factors between Specifications 1-3 and Specifications 4-5 were that Appellant attempted sexual activity with a male Airman after the Airman had been drinking and lain down to sleep. Considering that Appellant lived in a house with several male Airmen and regularly socialized and drank alcohol with these and other male Airmen, we find the acts charged in Specifications 1-3 and the acts charged in Specifications 4-5 shared some common factors but were insufficiently similar to prove a common plan or scheme.

Id.

In a footnote, the CCA addressed the government's argument that "'each specification involved Appellant taking advantage of his friends when they were asleep or almost asleep after drinking alcohol.'" *Id*. at n.9. The court explained:

> Indeed, there is commonality in relationship (Airmen who were assigned to the same unit and sometimes worked together), ages of victims (young adult males), circumstances of the acts (nighttime sexual activity after drinking alcohol and sleeping or falling asleep in the same general location as Appellant), and the sexual nature of the acts. However, we caution that many

> incidents share these common factors but do not result in sexual abuse or assault. And, on these facts, we cannot conclude that the factors were sufficiently distinctive to establish a common plan or scheme under Mil. R. Evid. 404(b) and Mil. R. Evid. 403—particularly when the charged acts were themselves infrequent and the "common" factors were enduring (e.g. friendship) and recurring (e.g. drinking alcohol) over a prolonged period of time (e.g. as long as two years).

Id.

After concluding that the military judge's application of the second *Reynolds* prong to the evidence of each of the five specifications as a plan or scheme common to all five specifications was clearly unreasonable and a clear abuse of discretion, the CCA tested the error for prejudice under *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007) and determined that the error in admitting evidence of sexual conduct for Specifications 1-3 to prove Specifications 4-5 was harmless because it did not have a substantial influence on the findings or materially prejudice Appellant's rights.[5] JA at 37. The lower court explained:

> As to Specifications 4 and 5, we conclude the erroneous ruling did not have a substantial influence on Appellant's convictions of these offenses. The testimony of SrA JD established convincing proof of all the elements of the abusive sexual contact and sexual assault offenses involving SrA JD. The Government's case was also supported by Appellant's admission taking "full

[5] Because the CCA found the evidence factually insufficient in Specification 1 and because the military judge acquitted Appellant in Specification 2, the lower court tested the prejudice of the erroneous admission of the evidence in Specifications 4-5 only for Specification 3. JA at 20, n.14.

> responsibility" for what happened. The Defense largely conceded that Appellant engaged in sexual conduct with SrA JD but sought to show that either SrA JD consented or that Appellant labored under an honest and reasonable mistake of fact a to consent. The cross-examination of SrA JD challenged his claim of lakc of consent and tried to bolster Appellant's mistake of fact as to consent. Because the critical issue was not whether Appellant engaged in the charged acts or, for Specification 4, whether Appellant intended to gratify his sexual desire, the erroneous admission of plan or scheme evidence of Specifications 1-3 was not dispositive for the findings on Specifications 4-5. With respect to the materiality and quality of the evidence of acts underlying Specifications 1-3, they, again, were dissimilar, even if the military judge erred in finding a common plan or scheme, and thus not logically material to the Government's proof on Specifications 4-5. The evidence of Appellant's intent to gratify his sexual desire underlying Specifications 1-3 was of little consequence to litigation of consent and mistake of fact in Specifications 4-5.

JA at 37-38.

Additional facts necessary to resolve the issue presented are contained in the argument below.

SUMMARY OF ARGUMENT

The Air Force CCA erred in concluding that the military judge's erroneous decision to admit evidence of sexual contact in Specifications 1-3 as a common plan or scheme under Mil. R. Evid. 404(b) to prove Appellant's guilt for Specifications 4-5, and *vice versa*, was harmless. The error was not harmless beyond a reasonable doubt and should be tested for prejudiced as a constitutional

error under *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), and *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017) rather than under the nonconstitutional error framework of *Harrow*. However, should this Court conclude that the Mil. R. Evid. 404(b) error in this case is nonconstitutional in nature, the military judge's error was not harmless under the four-pronged *Harrow* test.

ARGUMENT

THE MILITARY JUDGE'S ERRONEOUS ADMISSION OF EVIDENCE REGARDING SPECIFICATIONS 1, 2, AND 3 AS A COMMON PLAN OR SCHEME FOR SPECIFICATIONS 4 AND 5, AND *VICE VERSA*, WAS NOT HARMLESS.

Standard of Review

Where there are constitutional dimensions at play, the erroneous admittance of evidence must be tested for prejudice under the harmless beyond a reasonable doubt standard. *Hills*, 75 M.J. at 357-58 (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)); *Hukill*, 76 M.J. 219 at 222 (citing *Chapman v. California*, 386 U.S. 18, 22-24 (1967). 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. *Hills*, 75 M.J. at 357 (quoting *Wolford*, 62 M.J. at 420) (quotation marks and citation omitted). An error is not harmless beyond a reasonable doubt when there is a reasonable

probability that the error complained of might have contributed to the conviction. *Id*. (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quotation marks omitted).

Law and Analysis

The Error was Constitutional in Nature

The Due Process Clause of the Fifth Amendment provides than an accused is presumed innocent until proven guilty. U.S. CONST. amend. V; *Hills*, 75 M.J. at 356 (citing *In re Winship*, 397 U.S. 358, 363 (1970); *see also Coffin v. United States*, 156 U.S. 432, 453-54 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). 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. *Id*. (citing *In re Winship*, 397 U.S. at 364) (internal quotation marks omitted).

In *Hills*, this Court explained, "While [a Mil. R. Evid. 413] error is . . . usually nonconstitutional in nature, here, the error involved using charged misconduct . . . and violated Appellant's presumption of innocence and right to have all findings made clearly beyond a reasonable doubt, resulting in

constitutional error." 75 M.J. at 356 (citing *United States v. Solomon*, 72 M.J. 176, 182 (C.A.A.F. 2013)). This is because "[i]t 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." *Id*.

Appellant's case presents the precise problem under Mil. R. Evid. 404(b) that *Hills* and *Hukill* presented under Mil. R. Evid. 413.[6] While a Mil. R. Evid. 404(b) error is usually nonconstitutional in nature, here, as in *Hills* and *Hukill*, the factfinder must first apply a preponderance of the evidence standard to charged conduct of similar crimes in a sexual offense case and then to apply a standard of beyond a reasonable doubt to the same charged conduct. The error meant that there were two different burdens of proof for the same evidence which violates Appellant's right to be convicted only be proof beyond a reasonable doubt. Such a construct violates Appellant's fundamental notions of justice under the Due Process Clause. *See id*. at 357; *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017). Therefore, contrary to the CCA's analysis, the prejudice must be analyzed as constitutional error.

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[6] Although the evidence at issue was admitted at trial under Mil. R. Evid. 404(b), the CCA found that it was not proper Mil. R. Evid. 404(b) evidence. JA at 20-21. The true character of the evidence was propensity evidence. Thus, this Court may find it more appropriately to review harmlessness under *Hills* and *Hukill* as though it were Mil. R. Evid. 413 evidence.

In *Hukill*, this Court concluded that the same constitutional concerns exist in a military judge-alone trial where the military judge uses charged sexual conduct as propensity evidence under Mil. R. Evid. 413. 76 M.J. at 222. Because "there are constitutional dimensions at play, the erroneous admittance of evidence must be tested for prejudice under the harmless beyond a reasonable doubt standard." *Id*. (citing *Chapman*, 386 U.S. at 22-24).

The Error Was Not Harmless Beyond a Reasonable Doubt

An error of constitutional dimension requires reversal unless the government can prove there was no reasonable probability that the error contributed to the verdict. *Id*. (citing *Chapman*, 386 U.S. at 22-24; *Kreutzer*, 61 M.J. at 298). Stated differently, the error is unimportant in relation to everything else the factfinder considered on the issue in question, as stated in the record. *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018) (citation omitted). The government cannot meet this standard.

1. The harm which resulted from allowing the evidence is not extinguished by an acquittal of that specification.

The military judge acquitted Appellant of abusive sexual contact in Specification 2. JA at 574. It does not follow that because Appellant was acquitted of Specification 2, evidence of that specification was not used as improper propensity evidence and therefore had no effect on the verdict. *See United States v. Guardado*, 77 at 94. It is reasonable to believe that the military

judge found that Appellant committed Specification 2 by a preponderance of the evidence but not beyond a reasonable doubt. While not persuaded of Appellant's guilt to the point of convicting him, the military judge could still have believed that it was more likely than not that Appellant touched SAK's genitalia and used that evidence to convict Appellant in Specifications 4-5, thus violating Appellant's presumption of innocence. In *Guardado*, this Court stated, "Such an outcome is exactly the type of result we sought to guard against in *Hills*." *Id*.

2. The evidence supporting the convictions for Specifications 4 and 5 was not overwhelming.

In *Hills*, *Guardado*, and *United States v. Williams*, this Court found that the military judge's Mil. R. Evid. 413 error was not harmless beyond a reasonable doubt because the evidence in each of those cases was not overwhelming and was not corroborated by eyewitnesses or physical or documentary evidence. 75 M.J. at 358, 77 M.J. at 94; 77 M.J. 459, 464 (C.A.A.F. 2018). Here, the evidence for Specifications 4-5 was not overwhelming and was not corroborated by eyewitnesses or physical or documentary evidence.

The evidence for abusive sexual contact of SrA JD in Specification 4 was not overwhelming. SrA JD testified:

> [Appellant] gets into the bed and I remember him rolling towards me to face me and asking me if I'd ever wanted to experiment with guys, or if I'd ever thought about messing around with other guys, to which I responded, you know, no man. I just want to go to sleep. . . . He

> continued questioning, and it was at that point he reached his hand out and grabbed my penis over his pants and began to massage it. And while he was doing that, he continued to sort of ask me, you know, you've never thought about it before, you know, are you sure? Like he kept pleading to, you know get me to change my mind to which I continued saying, you know, no, man, I just want to go to sleep.

JA at 294-95.

SrA JD's "no" was a specific and direct answer to the question of whether he had previously wanted to engage in or had thought about sexual experimentation with other men. It was not a specific and direct answer to sexual contact with Appellant. Moreover, SrA JD allowed Appellant to massage his penis. He did not swat Appellant's hand away, nor did he say "stop," get out of bed, leave Appellant's house, or call someone. Both the majority and concurring/dissenting opinions determined that the evidence supporting Specifications 1-3 was sufficiently dissimilar to the evidence supporting Specification 4 that the error was harmless. JA at 38, 46. In arriving at this determination, both the majority and concurring/dissenting opinions state that the alleged victims in Specifications 1-3 were asleep and that SrA JD was awake in Specification 4. *Id*. Regarding Specification 3, STK testified that he *woke* to see Appellant's hand reach over the back of the couch to touch his penis over his pants and that he affirmatively swatted Appellant's hand away several times. Thus, STK was awake and not asleep and the evidence in Specification 3 was not sufficiently

dissimilar to the evidence underpinning Specification 4 where SrA JD was awake when Appellant touched his penis over his clothing. Therefore, the government cannot prove beyond a reasonable doubt that the error did not contribute to the verdict in Specification 4.

The evidence for sexual assault of SrA JD in Specification 5 was not overwhelming.[7] SrA JD had zero recollection of the period of time between Appellant touching his penis over his clothing while discussing whether SrA JD had ever thought about sexual experimentation with men and engaging in sexual acts with Appellant while naked. SrA JD did not remember how his body became positioned on the bed with his feet at the head of the bed and how he went from lying on his back to facing downward while Appellant's penis moved in and out of his mouth, nor did he remember Appellant holding his head during the oral penetration or restraining him during the anal penetration. He did, however, remember that he did not physically or verbally resist the oral penetration, Appellant's re-positioning of his body, or the anal penetration. He also remembered that Appellant ceased the anal penetration as soon as he saw SrA JD wince, that either he rolled off Appellant's body or Appellant allowed him to roll off, and that Appellant acknowledged his discomfort by saying that he would "just finish the rest" himself. Because of SrA JD's utter lack of memory for the moment

[7] Judge Huygen, in her dissenting opinion, indicated that she would have found this specification factually insufficient. JA at 28.

of consent, the government could not prove SrA JD's nonconsent beyond a reasonable doubt. Because SrA JD did not physically or verbally resist the sexual acts with Appellant and because Appellant stopped the sexual acts when he recognized SrA JD's discomfort, the government could not disprove Appellant's honest and reasonable mistake of fact beyond a reasonable doubt.

3. Appellant's statement during the "intervention" was not corroborating evidence for Specifications 1-3.

After Appellant's friends confronted him with imprecise accusations of "we know what you've been doing to us while we're passed out sleeping," he replied, "I know it's a problem. It's something I do when I drink." This vague statement, which was a response to an even more vague accusation, admitted nothing and did not corroborate any of the evidence for Specifications 1-3. The CCA's reliance on Appellant's statement to buttress the conviction for Specification 3 is misplaced and incorrect.

4. Appellant's message to SrA JD was not corroborating evidence for Specifications 4-5.

In September 2014, Appellant messaged SrA JD. He wrote, "I just want you to know that I do take full responsibility for what happened that night. We were drunk and one thing lead [sic] to another. If I could take that night back I definitely would." As with the statement Appellant made during the "intervention," this statement was vague. He did not state that he had engaged in

sexual acts with SrA JD without his consent. As noted by Judge Huygen in her concurring/dissenting opinion, the government charged Appellant in Specifications 4-5 under a bodily harm theory, such that the issue was only SrA JD's consent or lack thereof. *Id*. at 49-50 (Huygen, J., concurring in part and dissenting in part). Appellant's message to SrA JD did not support the government's theory that SrA JD did not consent to Appellant touching his penis over his clothes in Specification 4 and to engaging in oral and anal penetration with Appellant in Specification 5.

5. The TC inextricably linked Specifications 1-3 and Specifications 4-5 in the findings argument.

The opening lines of the TC's findings argument were:

> I know. It's something I do when I drink. These are the words of the accused, Staff Sergeant Ralph Hyppolite, when he was confronted by his best friends for doing things to them in their sleep; confronted by four individuals. He acknowledges, and he comes up with an excuse, Your Honor.
>
> This case is about an NCO who preyed upon his friends, who took advantage of his friends when they were in vulnerable positions, when there [sic] were asleep, had been drinking, were unaware and unable to protect themselves from him. On various occasions, over the course of his time at Seymour Johnson Air Force Base, the accused went after individuals who trusted him the most.

JA at 450.

The TC continued:

> And that is the commonality between these three, *four*, individuals; that the accused actually did do something to them when they were asleep. That's why he said, I know, and that's exactly what makes sense. They don't have to itemize their list of grievances and go through and have some sort of a counseling session that lasts an hour apiece. They told him, we know that you're doing stuff to us in our sleep and it's got to stop, and he admitted that he understood. . . .
>
> They wanted to resolve it at the lowest level to put an end to it. And, they thought that it would work. They thought he would never do it again. Not true. That's not what happened. [SrA JD] is what happened. In August of 2014, the accused saw [SrA JD] asleep and he acted in the exact same manner that he had previously.

JA at 494, 496 (emphasis added).

Toward the end of the findings argument, the TC addressed Mil. R. Evid. 404(b):

> The last thing I want to talk about Your Honor is [Mil. R. Evid.] 404(b), and the fact that you do look at all of these, they stand on their own. Got it. But, you look at them and you see are there commonalities in each of them that are too unusual? You look at the fact the relationships between the accused and his victims, you look at the vulnerable position that each of the victims was in, that they had been drinking, that they had gone to sleep, every single one of them,; that's strange. You look at the fact that the accused took that opportunity to molest them. You look at the fact how he reacted in the situations. [SrA JD]'s a little bit different. Basically, he went as far as he could, right? [SSgt RW] woke up in the middle of it and the accused ran away. [STK] woke up while it was happening and the accused ran away. [SSgt SAK] didn't wake up, so the accused was able to do what he wanted. And [SrA JD] didn't fight back, so he was

> able to do what he wanted. He took it as far as he could with each of these vulnerable men, and that exactly is the scheme that the accused used across all of these men, across all of these instances. And, you can absolutely use those commonalities as you're looking at each of these fact patterns and deciding exactly what happened, as you're deciding if the accused is, in fact, guilty, that's what was going on.

JA at 498-99.

On rebuttal, the TC argued:

> And a scheme, what is a scheme? It's the way you do something, and in this case, the scheme is the way that the accused sexually assaulted his best friends; that's what it is. What do we have? Young males with whom he had developed a relationship, who trusted him, roommates some of them, young males who were made vulnerable by alcohol, by the lateness of the hour, by their trust in this man, when it was only the two of them – that's commonality, only the two of them. . . . The light's always out. The accused sees that opportunity and he takes advantage of it, and he pushes it as far as he can; that is what we have across all of the victims in this case absolutely.
>
> Defense counsel getting angry about the law doesn't change the law. He might not like the fact that his court can look at those commonalities when examining whether a scheme, plan, whatever you call it, exists, but that doesn't change the fact that the court can absolutely look at those commonalities, at those similarities and use it as you determine what happened in this case.

JA at 560-61.

The government wove together the disparate fact patterns of Specifications 1-3 and Specifications 4-5 and urged the military judge to "look at those

commonalities, at those similarities and use it as you determine what happened in this case." In other words, the government specifically argued that the military judge should use Appellant's predisposition for engaging in sexual misconduct with his vulnerable friends after a night of drinking as a through line to his conduct with SrA JD. The TC argued that "[SrA JD] is what happened" because of the allegations in Specifications 1-3. As the CCA correctly found, there was no common plan or scheme between the two sets of specifications but the TC's argument likely contributed to the military judge's verdict.

6. Conclusion

The use of two burdens of proof for the same evidence violates fundamental notions of justice. Consequently, the Mil. R. Evid. 404(b) error is constitutional and the erroneous admission of evidence is tested for prejudice under the harmless beyond a reasonable doubt standard. When considering that the acquittal in Specification 2 does not negate the possibility that the military judge found that Appellant committed that offense by a preponderance of the evidence and used that evidence to convict Appellant of Specifications 4-5, and *vice versa*; the fact that the government's evidence for Specifications 4-5 was not overwhelming and was not supported by corroborating evidence; and that the TC inextricably linked Specifications 1-3 with Specifications 4-5, the government cannot prove beyond a

reasonable doubt that the military judge's error did not contribute to the error. Accordingly, the error was not harmless beyond a reasonable doubt.

For the foregoing reasons, Appellant respectfully requests that this Honorable Court set aside and dismiss Specifications 3-5.

The Error Was Not Harmless Under the *Harrow* Framework

Should this Court conclude that the Mil. R. Evid. 404(b) error is not constitutional in nature, the error was not harmless under the four-pronged *Harrow* test. *See United States v. Jeter*, 2019 CCA LEXIS 1, *27-28, __ M.J. _ , (N-M. Ct. Crim. App. Jan. 3, 2019) (unpub.) (holding that *Hills* does not apply to evidence admitted pursuant to Mil. R. Evid. 404(b)).

Where there is nonconstitutional error in the admission of evidence, this Court determines whether the evidence had a substantial influence on the fact finder's verdict in the context of the entire case. *Harrow*, 65 M.J. at 200 (citing *Kotteakos v. United States*, 328 U.S. 750, 764-65, (1946); *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005)).

To determine whether the evidence had a substantial influence on the military judge's verdict in the context of the entire case, this Court considers four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Id*. (citing *Berry*, 61 M.J. at 98).

When a fact was already obvious from testimony at trial and the evidence in question would not have provided any new ammunition, an error is likely to be harmless. *Id*. (quoting *United States v. Cano*, 61 M.J. 74, 77-78 (C.A.A.F. 2005); *see also United States v. Santos*, 59 M.J. 317, 322 (C.A.A.F. 2004)). Conversely, an error is more likely to be prejudicial if the fact was not obvious from the other evidence at trial and would have provided new ammunition against an appellant. *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018) (citing *Harrow*, 65 M.J. at 200)).

1. The government failed to prove beyond a doubt that SrA JD did not consent to Appellant touching his penis over his clothing in Specification 4 and to oral and anal penetration in Specification 5 and failed to disprove Appellant's honest and reasonable mistake of fact as to consent for both offenses.

The military judge's erroneous ruling had a substantial influence on Appellant's convictions in Specifications 4-5. As discussed above, the government failed to prove beyond a reasonable doubt the element of consent in those offenses and failed to disprove beyond a reasonable doubt that Appellant's mistake of fact was honest and reasonable.

Next, the defense case was exceptionally strong. The cross-examination of SrA JD established that: he said "no" to thoughts of experimenting with men and not to sexual activity with Appellant; that he did not physically or verbally manifest a lack of consent to Appellant touching his penis through his clothes; that there was a discrete break in time between the acts of Specifications 4-5; that he

held his head over Appellant's penis; that he rearranged his body of his own power; and, that Appellant ceased the sexual activity when he expressed discomfort.

2. The evidence of Specifications 1-3 was immaterial and of low quality.

The evidence in Specifications 1-3 involved alleged victims who resisted Appellant's sexual contact, whereas in Specifications 4-5, SrA JD did not manifest any resistance, whether physical or verbal, to Appellant's touch. SrA JD had zero recollection of what happened or how much time had transpired between Appellant touching his penis through his clothes and Appellant orally penetrating him. Thus, SrA JD's total memory failure was evidence that he was unaware at the moment that oral penetration began, just as the alleged victims in Specifications 1-3 were asleep or unaware. Moreover, Specification 5 was charged as an offense involving bodily harm, which necessarily entailed nonconsent, as contrasted with Specifications 1-3, where the government alleged that the victims were asleep or unaware. As Judge Huygen explained in her dissenting opinion, "Despite the obvious difference in charging theories, the military judge found a common plan or scheme between Specifications 1-3 and Specification 5, and that finding leads me to conclude the evidence of Specifications 1-3 substantially influenced the judge's verdict on Specification 5. Thus, the judge's error to admit, for a Mil. R. Evid.

404(b) purpose, the evidence of Specifications 1-3 for Specification 5 was not harmless." JA at 50 (Huygen, J., concurring in part and dissenting in part).

3. Conclusion

Should this Court determine that the military judge's Mil. R. Evid. 404(b) error was nonconstitutional in nature, the error was not harmless under the four-pronged *Harrow* test. The government's case for Specifications 4-5 was weak because the government did not prove beyond a reasonable doubt that SrA JD did not consent to the charged acts. Similarly, because of the strength of the defense case, the government could not disprove Appellant's honest and reasonable mistake of fact beyond a reasonable doubt. The evidence for Specifications 1-3 was weak and immaterial to prove Specifications 4-5. Finally, as discussed above, the TC inextricably linked Specifications 1-3 and Specifications 4-5 in the findings and rebuttal arguments. The Mil. R. Evid. 404(b) evidence had a substantial influence on the fact finder's verdict in the context of the entire case. Therefore, the error was not harmless.

WHEREFORE, Appellant respectfully requests that this Court set aside and dismiss Specifications 3-5.

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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on February 26, 2019 and that a copy was served via electronic mail on the Air Force Appellate Government Division on February 26, 2019.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitation of Rule 24(c) because this Brief contains 7,092 words. Additionally, this Brief complies with the typeface and type style requirements of Rule 37.

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Dated: February 26, 2019