IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **JUVENTINO TOVARCHAVEZ** United States Army, Appellant	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150250 USCA Dkt. No. 18-0371/AR

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

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Issue Presented

WHETHER THE ARMY COURT ERRED, FIRST, IN FINDING THAT THIS COURT OVERRULED SUB SILENCIO[*] THE SUPREME COURT HOLDING IN *CHAPMAN v. CALIFORNIA*, 386 U.S. 18, 24 (1967), AND THIS COURT'S OWN HOLDINGS IN *UNITED STATES v. WOLFORD*, 62 M.J 418, 420 (C.A.A.F. 2006), AND IN *UNITED STATES v. HILLS*, 75 M.J 350, 357 (C.A.A.F. 2016), AND, CONSEQUENTLY, IN TESTING FOR PREJUDICE IN THIS CASE USING THE STANDARD FOR NONCONSTITUTIONAL ERROR.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On February 27, and April 6-7, 2015, a panel of officer and enlisted members sitting as a general court-martial convicted appellant of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012), and acquitted him of one specification of the same offense.

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[*] This phrase is more accurately *sub silencio* in Latin, and the Court may wish to adopt that spelling; the other spelling seems to be a mistake owing to the British pronunciation of Latin words. Counsel apologize for the confusion.

The panel sentenced SPC Tovarchavez to be confined for two years, to be reduced to the grade of E-1, to forfeit all pay and allowances, and to be discharged from the service with a dishonorable discharge. The military judge credited SPC Tovarchavez with fourteen days against the sentence to confinement. On March 30, 2016, the convening authority approved the sentence as adjudged. (JA 33).

On September 7, 2017, the Army Court ordered a post-trial evidentiary hearing to determine whether trial defense counsel had been ineffective. (JA 11-12). Following this hearing, the Army Court affirmed the findings and sentence on June 19, 2018. (JA 30).

Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, filed a Petition for Grant of Review on September 14, 2018. On October 17, 2018, this Court granted appellant's petition for review.

Statement of Facts

1. Summary of the Charges

Appellant was charged with two specifications alleging he sexually assaulted a fellow Soldier, SPC JR, on separate occasions. (JA 39). The first sexual assault allegedly occurred in appellant's truck while he and SPC JR were at the beach on September 5, 2014. (JA 45-54). The second assault – of which appellant was ultimately convicted – allegedly occurred five days later (September 10, 2014) in

SPC JR's barracks room. (JA 55-67). In September 2010, SPC JR was in a rocky long-distance relationship with another man (RP). (JA 42-43, 46, 124-25).

The day following SPC JR's first sexual encounter with SPC Tovarchavez, SPC JR's best friend (SPC CF) observed "hickies" on SPC JR's neck, purportedly placed there by SPC Tovarchavez. (JA 84, 86, 124). Specialist JR feared her boyfriend would learn of the affair. (JA 85). This led SPC JR and appellant to text one another extensively on September 7, 2015, discussing whether to continue to conceal evidence of their liaison or to disclose it to RP. (JA 55-56, 87-90).

Specialist JR went to the Army Criminal Investigation Division (CID) on September 15, 2014, and made her allegations against appellant. (JA 106). She told a CID agent that as a result of what happened with SPC Tovarchavez, she did not want to be intimate with anyone. (JA 107). She also told the agent that she had never cheated on anyone in her whole life. (JA 108). On or about September 7, 2016, a few days before her interview with CID, SPC JR had engaged in sexual activity with an unknown third party. (JA 107-08). Specialist JR denied that this constituted cheating. (JA 109).

2. Appellant's Court-Martial.

Before trial, SPC JR spoke with her friend SPC CF. In that conversation, SPC JR revealed that two different male DNA samples were found on her cervix. (JA 125-126). Specialists JR and CF joked about this revelation. (JA 126-27).

Specialist JR also informed SPC CF that she had sex with SPC Tovarchavez twice, and that she had sex with another male after the second incident with appellant, not after the first sexual encounter with appellant. (JA 127).

At the conclusion of the prosecution and defense cases, the military judge noted that SPC Tovarchavez was charged with two sexual assault offenses and that he would instruct the panel on Military Rule of Evidence [hereinafter M.R.E.] 413 as interpreted by the Army Court at that time. (JA 134-35).

The military judge instructed the panel:

> If you determine by a preponderance of the evidence the offense in Specification 1 [September 5, 2014] occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of that offense, you may nonetheless then consider the evidence of that offense for its bearing on any matter to which it is relevant in relation to Specification 2 [September 10, 2014] of The Charge.

(JA 136). He continued, "You may also consider the evidence of such other sexual offense for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses." (JA 136).

A few moments later, the military judge also instructed the panel that "[e]ach offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense." (JA 137).

Specialist Tovarchavez was sentenced on April 7, 2015, more than a year before this Court's decision in decision in *United States v. Hills*, 75 M.J. 350

(C.A.A.F. 2016). Appellant was convicted of sexual assaulting SPC JA on September 10, 2014, but acquitted of doing so on September 5, 2014. (JA 34).

3. Proceedings before the Army Court.

This case came before the Army Court twice. (JA 1 and 13). In both decisions, the Army Court found the military judge's instruction "was for all substantive purposes identical to the instruction that the [C.A.A.F.] found to be error in [*Hills*]." (JA 8 and 15).

The Army Court majority acknowledged the prejudice test applied in *Hills* was harmlessness beyond a reasonable doubt, (JA 16), and that under *Wolford*, this standard applies to both preserved and unpreserved constitutional error "[a]bsent a precise affirmative waiver …." (JA 17). The majority decision also acknowledged that *Wolford* remains good law, and that it could not imply it was overruled. (JA 17 n.6). Despite this, the Army Court refused to apply this standard in this case. (JA 18). The Army Court asserted that this Court had abandoned that test in various post-*Hills* plain error decisions. (JA 18-26).

The Army Court instead applied the statutory standard of "whether the error materially prejudiced the substantial rights of appellant" per Article 59(a), UCMJ. (JA 22). The majority concluded the *Hills* error in this case, although not harmless beyond a reasonable doubt, did not materially prejudice a substantial right of SPC Tovarchavez. (JA 25-26).

Summary of Argument

This case is controlled by the Supreme Court decision in *Chapman v. California*, 386 U.S. 18 (1967), which established harmless beyond a reasonable doubt as the test for prejudice when constitutional error was not preserved at trial. In this case, as in *Chapman*, the constitutional error was not firmly established by controlling precedent until the appeal of the criminal trial. As a result, the sole question for properly applying harmlessness beyond a reasonable doubt in this case is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 18 U.S. at 23 (citing *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

The Supreme Court also forbade lower courts from departing from the test announced in *Chapman* in favor of a competing definition of harmless error. The High Court chose not to "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman*, 386 U.S. at 21. Like the various states, the military justice system must abide by *Chapman*'s definition of prejudice for propensity instructional error because, as noted in this Court's decisions in *Hills*, *Hukill*, *Guardado*, *Williams*, and *Hoffman*, such an error implicates constitutional rights.

The Army Court erred in assuming this Court had implicitly abandoned its necessary application of *Chapman*. The Army Court's conclusion was incorrect in light of this Court's repeated, and very recent, demonstration that it remains bound by *Chapman* for unpreserved constitutional error.

Issue Presented

WHETHER THE ARMY COURT ERRED, FIRST, IN FINDING THAT THIS COURT OVERRULED SUB SILENCIO THE SUPREME COURT HOLDING IN *CHAPMAN v. CALIFORNIA*, 386 U.S. 18, 24 (1967), AND THIS COURT'S OWN HOLDINGS IN *UNITED STATES v. WOLFORD*, 62 M.J 418, 420 (C.A.A.F. 2006), AND IN *UNITED STATES v. HILLS*, 75 M.J 350, 357 (C.A.A.F. 2016), AND, CONSEQUENTLY, IN TESTING FOR PREJUDICE IN THIS CASE USING THE STANDARD FOR NONCONSTITUTIONAL ERROR.

Standard of Review

The question of what law controls resolution of a claimed constitutional violation is one of law, which this Court reviews de novo. *United States v. Pack*, 65 M.J. 381, 382-83 (C.A.A.F. 2007) (citing *United States v. Cabera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007)).

Law

It is axiomatic that Supreme Court precedents and this Court's precedents are binding on a Court of Criminal Appeals. "In the absence of a superseding statute or an intervening decision from this Court or the Supreme Court of the

United States, [this Court's decisions are] absolutely binding on the Court of Criminal Appeals." *United States v. Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996) (citations omitted); *see also Hutto v. Davis*, 454 U.S. 370 (1982); *United States v. Jones*, 23 M.J. 301, 302 (C.M.A. 1987). This is regardless of whether a subsequent decision could be construed as calling earlier decisions into question. *Davis*, 76 M.J. at 229 n.2 (citing *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005)); *see also Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (reiterating the same for Supreme Court precedent)).

If a Court of Criminal Appeals does not apply the precedent of the Supreme Court or of this Court, it has only two alternatives. It may express why the underlying logic of this Court's precedent has changed and urge this Court's reconsideration of its binding precedent. *Davis*, 76 M.J. at 229 n.2 (citing *Allbery*, 44 M.J. at 228 (internal citations omitted)). Alternatively, the service court must distinguish the precedent. *Id*. It is erroneous to do neither and fail to apply this Court's precedent. *Allbery*, 44 M.J. at 228.

Of the possible options, the one that is explicitly prohibited is to assume that an opinion of this Court has been implicitly overruled. "Overruling by implication is disfavored," and "[i]t is this Court's prerogative to overrule its own decisions." *Davis*, 76 M.J. at 229 n.2 (citing *Rodriguez de Quijas*, *supra*)).

Argument

1. This case is controlled by the Supreme Court decision in *Chapman*.

In *Chapman*, a prosecutor in a kidnapping and murder trial argued to the jury that it could infer guilt because the defendants chose not to testify. *Chapman*, 286 U.S. at 19. The trial judge then "charged the jury that it could draw adverse inferences from [the defendant's] failure to testify" as well. *Id*. At the time, the California constitution expressly allowed such an argument and instruction, and there was no objection to either. *Id*.

During the pendency of the appeal in *Chapman*, the United States Supreme Court overturned this provision of the California constitution. *Id*. at 19-20 (citing *Griffin v. California*, 380 U.S. 609 (1969)). *Griffin* was decided before Chapman's case reached the California Supreme Court, so that court found that the argument and instruction in Chapman's trial had violated the right to remain silent under the Fifth and Fourteenth Amendments. *Id*. at 20. However, the California Supreme Court still affirmed the convictions under California's harmless-error provision, which forbade reversal unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." *Id*.

When the United States Supreme Court reversed the California Supreme Court, it announced the definitive test for determining whether a federal constitutional error requires reversal. That test is "whether there is a reasonable

possibility that the evidence complained of might have contributed to the conviction." *Id*. at 23. This test "emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party." *Id*.

2. The Supreme Court forbade lower courts from departing from the test announced in *Chapman* in favor of a competing definition of harmless error.

Before announcing the prejudice test in *Chapman*, the High Court noted that "[a]ll 50 States have harmless error statutes or rules," and the federal government, "through its Congress, established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties,' a standard similar to the test for prejudicial error in military court. *Id*. at 22 (citing 28 U.S.C. § 2111; *cf*. 10 U.S.C. § 859(a) (corrective action warranted if an error "materially prejudice the substantial rights of the accused").

The Supreme Court held the California harmless error standard—and that of any other jurisdiction—is irrelevant when the error is constitutional in nature. The High Court noted the intent of the Founders that the federal courts function as the "guardians" of constitutional rights. *Id*. at 21 (citing James Madison, 1 Annals of Cong. 439 (1789).

In the same vein, military courts have no more discretion than California or any other State to form authoritative laws, rules, and remedies designed to protect servicemembers from constitutional violations. *See id*. The Supreme Court has not carved out an exception to *Chapman* for constitutional errors occurring during

courts-martial. Therefore, the sole test for prejudice, once a constitutional error has been established, is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

The statutory hurdle for establishing prejudice, in California, military and federal courts, is determined by *Chapman* when unpreserved constitutional error arises. *Chapman* makes clear an unpreserved constitutional error "affects the substantial rights" test under 21 U.S.C. § 2111 if it was not harmless beyond a reasonable doubt. *Id*. at 22-23. Likewise, an unpreserved constitutional error that is not harmless beyond a reasonable doubt also materially prejudices substantial rights under Article 59(a), UCMJ. If the Supreme Court views a constitutional error as prejudicial to substantial rights, it is prejudicial across the Union, as well as the armed forces. *See Kreutzer* 61 M.J. at 298-99 (Army Court misconstrued the *Chapman* prejudice question for constitutional error as "whether the error itself had substantial influence on the trial results," instead of "whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.").

Contrary to the Army Court majority, "material prejudice to a substantial right" under a plain error analysis is compatible with applying a constitutional standard of prejudice. To condition the application of *Chapman* on first satisfying a separate test under Article 59(a), UCMJ, would thwart the Supreme Court's

explicit standard for unpreserved constitutional error. *Chapman* barred individual States and jurisdictions from applying their own harmless error tests as a precondition to *Chapman's* harmless beyond a reasonable doubt test. Likewise, the Army Court cannot require appellants to first demonstrate substantial prejudice to a material right before reaching the *Chapman* question in a case of unpreserved constitutional error.

3. This Court has consistently applied *Chapman* to propensity instructional error because it implicates federal constitutional rights.

Propensity instructional errors demand *Chapman*'s application, as this Court has consistently found them to be constitutional errors. As this Court clearly stated in *Hills*, the use of a charged offense as propensity evidence under M.R.E. 413 prejudices an accused's constitutional right to be presumed innocent until proven guilty. *Hills*, 75 M.J. at 356-58 (citing *Chapman*, 386 U.S. at 24); *see also Hukill*, 76 M.J. at 222 (citing *Chapman*, 386 U.S. at 22-24). Consequently, instructions that address any such propensity evidence, if plainly and obviously in error, are tested under the constitutional standard for prejudice: that is, harmless beyond a reasonable doubt. *Hills*, 75 M.J. at 358 (finding propensity instructions were not harmless beyond a reasonable doubt); *Guardado*, 77 M.J. at 93 (citing *Hills*, 75 M.J. at 358); *United States v. Wilson*, 77 M.J. 459, 464 (C.A.A.F. 2018) (stating in a plain error analysis, "we simply cannot be certain that the erroneous propensity

instruction did not taint the proceedings or otherwise 'contribute to the defendant's conviction or sentence.' *Hills*, 75 M.J. at 357.").

In *Hoffmann*, like *Chapman*, and this case, the constitutional error (*Hills*) was not settled law at the time the instructional error occurred and there was no objection to it at trial. The Army Court in *Hoffman* [*sic*], as in this case, found that the propensity instruction was plain and obvious error under *Hills*, but incorrectly held that trial defense counsel had waived the error. 76 M.J. at 767, 770.

In *Hoffman* [*sic*], as in *Kreutzer* and in this case, the Army Court failed to apply the *Chapman* test of harmlessness beyond a reasonable doubt, instead requiring appellant to first demonstrate material prejudice to a substantial right *before* he could reach the *Chapman* harmless beyond a reasonable doubt test. *Id*. at 770-71.

This Court reversed the Army Court's decision in *Hoffmann*, 77 M.J. 414, 414-15 (C.A.A.F. 2018). This Court concluded:

> (1) Appellant did not waive the error resulting from the improper propensity instructions as we do not construe the failure to object to what was the settled law at the time of as an intentional relinquishment of a known right, (2) the error was not harmless beyond a reasonable doubt.

Id. at 414 (citing *Guardado*, *supra*).

4. The Army Court erroneously relied on *Lopez* and *Molina-Martinez*.

As the High Court noted in *Chapman*, not every error raised concerning instructions will constitute an error of constitutional magnitude. *Chapman*, 386 U.S. at 21-22. This Court has demonstrated as much in *Lopez*.

The Army Court erred in using the plain error standard applied by this Court in *United States v. Lopez*, 76 M.J. 151 (C.A.A.F. 2017). In *Lopez*, this Court applied the Supreme Court's standard for prejudice from *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), in analyzing a trial judge's evidentiary ruling for plain error. *Lopez*, 76 M.J. at 154. However, neither the error at issue in *Lopez* nor in *Molina-Martinez* was a constitutional error. *See Lopez*, 76 M.J. 151 (examining erroneous admissibility of evidence); *Molina-Martinez*, 136 S.Ct. 1338 (examining an incorrect sentence under the Federal Sentencing Guidelines).

Moreover, the Army Court did not distinguish *Wolford*. In fact, the first thing the Army Court noted about *Wolford* was that it required a finding that the error was harmless beyond a reasonable doubt, regardless of whether the error had been preserved at trial. (JA 17-18). As a result, there is nothing to distinguish it.

Conclusion

Wherefore, SPC Tovarchavez requests this Honorable Court reverse the decision of the Army Court and return this case to the Judge Advocate General of the Army to set aside the finding and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Tovarchavez, Crim App. Dkt. No. 20150250, USCA Dkt. No. 18-0371/AR was electronically filed brief with the Court and Government Appellate Division on November 16, 2018.

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