IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **JUVENTINO TOVARCHAVEZ** United States Army, Appellant	REPLY 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:

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.

Argument

Contrary to the government's characterization, this issue is not "confusing." (Appellee Br. at 7). The government has simply repeated the Army Court's failure to apply harmlessness beyond a reasonable doubt, as articulated in *Chapman*, by interposing the non-constitutional standard established by Article 59(a), UCMJ.

For constitutional error, *Chapman's* harmless beyond a reasonable doubt test *displaces* the statutory definition of prejudice under Article 59(a), UCMJ. *See United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011)(stating "Regardless of whether there was an objection or not, "[i]n the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.") *Chapman* also prohibits the use of an alternative definition (such as the language found in Article 59(a), UCMJ, another federal statute, or a state constitution) to determine prejudice for constitutional error. In spite of this, the government and the Army Court ask this Court to depart from harmlessness beyond a reasonable doubt in favor of a competing definition.

This Court has consistently used *Chapman*'s test to determine if appellants have suffered material prejudice to their substantial rights when *Hills* was not settled at the time of the court-martial:

1. *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018): As in this case, *Hills* had not been decided at the time of Williams' court-martial and trial defense counsel did not object to the military judge's propensity instructions. On appeal, the Army Court applied harmlessness beyond a reasonable doubt. *United States v. Williams*, 2017 CCA LEXIS 24, *3-4 (A. Ct. Crim. App. January 12, 2017). This Court also applied a harmless beyond a reasonable doubt when measuring prejudice under the third prong of plain error, stating "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,'" citing *Hills*, 75 M.J. at 357. *Williams*, 77 M.J. at 462-63. This was a reiteration of the harmless beyond a reasonable doubt standard outlined by this Court in *Hills*: "'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.'" 75 M.J. at 357 (quoting *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) and *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)).

2. *United States v. Hoffman*, 77 M.J. 414 (C.A.A.F. 2018): As in this case, *Hills* was not settled at the time of the court-martial. The Army Court erroneously did not apply harmlessness beyond a reasonable doubt because it found appellant had waived the *Hills* error. *United States v. Hoffman*, 76 M.J. 758, 767 (A. Crim. Ct. App. 2017). This Court rejected the Army Court's waiver conclusion, and explicitly applied "harmless beyond a reasonable doubt," as required by *Chapman*. *Hoffman*, 77 M.J. at 414.

3. *United States v. Guardado*, 77 M.J. 90 (2017): As in this case, *Hills* was not decided at the time of the court-martial. *Id*. at 93. On appeal, the Army Court applied harmlessness beyond a reasonable doubt, as required by *Chapman*. *United*

States v. Guardado, 75 M.J. 889, 891, 893, 899 (A. Ct. Crim. App. 2016). This Court used the *Chapman* test to determine material prejudice to a substantial right:

> The question we must answer is whether this instructional error materially prejudiced Appellant's substantial rights. […] There are circumstances where the evidence is overwhelming, *so we can rest assured that an erroneous propensity instruction did not contribute to the verdict* by "tipp[ing] the balance in the members' ultimate determination."

Guardado, 77 M.J. at 93-94 (quoting *Hills*, 75 M.J. at 358) (emphasis added).

Should this Court disagree with appellant, and find there is a distinction between a preserved and unpreserved constitutional error, this Court should nevertheless not veer from *Chapman* in this case. Where the law was unsettled at the time of trial, and an objection at trial would have been futile and fruitless, this Court should treat the error as preserved. The underlying reasoning for applying a higher burden for appellants in a plain error review are inapplicable in such cases. *See Puckett v. United States*, 556 U.S. 129, 134 (2009)("In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court--remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.") An appellant cannot sandbag the court if the law at the time of trial was not settled.

In conclusion, the harmless beyond a reasonable doubt standard applied in *Chapman* remains "a familiar standard to all courts." *Chapman*, 386 U.S. at 24; *see also United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). For error of constitutional dimension, this Court should continue to apply harmlessness beyond a reasonable doubt as the test for whether an appellant's substantial rights were materially prejudiced.

Conclusion

Wherefore, SPC Tovarchavez requests this Honorable Court 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 January 11, 2019.

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