IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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, 450 (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.

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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, 450 (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) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On 27 February and 6-7 April 2015, a general court-martial composed of officer and enlisted members convicted appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012).[1] (JA 34).

The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. (JA 34). The convening authority deferred automatic and adjudged forfeitures of pay and allowances and the adjudged reduction until Action. (JA 33). At Action, 30 March 2016, the convening authority waived the forfeitures of pay and allowances for six months and credited appellant with fourteen days of confinement, but otherwise approved the sentence as adjudged. (JA 33).

On 7 September 2017, after initial review, the Army Court remanded the case for a *DuBay* hearing regarding a separate assignment of error. (JA 11). Once the record of trial was returned to the Army Court, it specified one issue and subsequently granted appellant's motion to file supplemental briefings on another

[1] Appellant was also acquitted of one specification of sexual assault in violation of Article 120, UCMJ. (JA 34).

issue. (JA 14). Following briefs by both parties, the Army Court affirmed the findings and sentence on 9 July 2018. (JA 30).

Appellant filed a Petition for Grant of Review on 14 September 2018. This Court granted appellant's petition on 17 October 2018. Appellant submitted his brief on 16 November 2018.

Statement of Facts

On 5 September 2014, Specialist (SPC) JR received a text message from appellant who was a friend from her company, asking her to hang out at the beach with him. (JA 52). The two sat on the bed of appellant's truck and talked. (JA 55). Appellant tried to kiss SPC JR, but she turned her face away from him. (JA 55-56). A month prior, appellant had tried to kiss SPC JR and she told him that she did not want to kiss him. (JA 56). Appellant told SPC JR he wanted to show her something further down the road, but did not specify what it was, and assured her that he was not going to touch her again. (JA 57).

After driving to a more secluded area of the beach, appellant tried to kiss SPC JR again and she leaned away. (JA 58-59). Appellant then tried to pull down her pants. (JA 59). When rebuffed, he asked SPC JR why she did not want to have sex with him. (JA 59). While he was doing this, SPC JR was trying to hold her pants up, but she eventually gave up and appellant pulled down her pants and

penetrated her vagina with his penis. (JA 59-60). After the sex act occurred, SPC JR started crying and told appellant that she wanted to go home. (JA 60).

On 10 September 2014, appellant texted SPC JR, asking if he could return her tough box that he had from training they attended together. (JA 65). Specialist JR let appellant into the common room of her barracks and went into her room to get her credit card and keys. (JA 71). Appellant followed SPC JR into her bedroom without permission, closed the door, and tried to kiss her. (JA 71-72). Specialist JR turned her head away and asked appellant to stop and told him that she was not going to do anything with him. (JA 73).

Appellant pushed SPC JR onto her bed, kept trying to kiss her, and attempted to pull her pants down. (JA 73-74). Specialist JR kept turning her head away and was trying to hold her pants up. (JA 74). Eventually, appellant succeeded in pulling down SPC JR's pants and he penetrated her vagina with his penis. (JA 75). When he was done, appellant told SPC JR that if she kissed him, then he would get off of her. (JA 76). She tried to resist but eventually gave in since it seemed the only way to get appellant off of her. (JA 76).

The following day, SPC JR told two friends and her parents about the sexual assault. (JA 77). Her father called the Criminal Investigation Command (CID) and SPC JR received a medical exam. (JA 78). As part of the CID investigation, SPC JR texted appellant, confronting him about his actions against her. (JA 81).

Appellant responded, saying that he made a mistake by crossing the line and that he was sorry. (JA 82, 177).

During the court-martial, the military judge provided a standard Military Rule of Evidence [hereinafter M.R.E.] 413 instruction to the panel. (JA 163). The military judge advised the panel that if they determined by a preponderance of the evidence the offense alleged in Specification 1[2] occurred, they could consider that offense for its bearing in relation to Specification 2.[3] (JA 163). Defense did not object to this instruction. (JA 150, 156).

Summary of Argument

"Where [constitutional] instructional error is preserved, we test for harmlessness. However, if the accused fails to preserve the instructional error by an adequate objection or request, we test for plain error." *United States v. Williams*, 77 M.J. 459, 462 (C.A.A.F. 2018) (alteration in original) (internal citations omitted). "[T]o establish plain error an appellant must demonstrate (1) error, (2) that is clear or obvious at the time of appeal, and (3) prejudicial." *Id*. (citing *United States v. Guardado*, 77 M.J. 90, 93 (C.A.A.F. 2017)).

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[2] Specification 1 was the assault on 5 September 2014, for which appellant was acquitted. (JA 39).
[3] Specification 2 was the assault on 10 September 2014, for which appellant was convicted. (JA 39).

Recent jurisprudence dictates that a *Hills* violation per se establishes the first two prongs of the plain error test; that is, (1) error, and (2) clear or obvious.[4] However, confusion exists regarding the third prong of prejudice. *Hills* was a case of preserved constitutional error because defense counsel objected to the MRE 413 instruction.[5] But, the question squarely raised by this case asks what is the correct "prejudice" test for a panel instruction that implicates constitutional error that was not preserved." (JA 15).

Recent case law seemingly created a different analysis based upon whether a *Hills* error was preserved or not, regardless of whether it was one of constitutional magnitude. Consequently, recent developments suggest that the proper test to apply when the Courts of Criminal Appeals (CCAs) analyze prejudice is the plain error test of substantial prejudice to a material right.[6] That said, the question remains: does an appellant only prevail when he proves prejudice in that he was materially prejudiced to a substantial right, or can an appellant prevail if the

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[4] *See Guardado*, 77 M.J. at 93 ("Given our holdings in *Hills* and *Hukill*, the military judge's M.R.E. 413/414 instruction constituted clear or obvious error under the law as it exists today.").
[5] *United States v. Hills*, 75 M.J. 350, 352 (C.A.A.F. 2016).
[6] *See Williams*, 77 M.J. at 462 (announcing that the Court would review the military judge's propensity instruction where appellant failed to object for plain error).

government fails to prove that the error was not harmless beyond a reasonable doubt?

In this case, the Army Court relied on CAAF's most recent *Hills*-related opinion, *United States v. Williams*,[7] to conclude that where there is unpreserved constitutional error, the third prong of the prejudice test should be whether an appellant was materially prejudiced to a substantial right, and not whether the government can prove the error was harmless beyond a reasonable doubt.[8] The Army Court's conclusion appears reasonable. Regardless, the government notes that the current landscape is confusing, because many cases appear to apply the harmless beyond a reasonable doubt standard regardless if the error was preserved.

Standard of Review

Which standard of review to apply is a question of law that is reviewed de novo by an appellate court. *United States v. Evans*, 75 M.J. 302, 304 (C.A.A.F. 2016) (referencing Steven Alan Childress & Martha S. Davis, Federal Standards of Review § 15.02, at 15-14 n.74 (4th ed. 2010) (explaining that de novo review "applies to 'the legal question of which standard of review to apply.'")).

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[7] 77 M.J. 459 (C.A.A.F. 2018).
[8] *United States v. Tovarchavez*, ARMY 20150250, 2018 CCA LEXIS 371, at *19-21 (Army Ct. Crim. App. 19 July 2018) (mem. op.) (found at JA 13-32 [hereinafter cited using the JA]).

Instructional errors are reviewed by an appellate court de novo. *Hills*, 75 M.J. at 357.

Law and Argument

The Army Court determined that two different standards may be applicable when analyzing a *Hills* error under this Court's current jurisprudence. (JA 15). In a broad sense, CCAs generally scrutinize prejudice utilizing two distinct methods: (1) material prejudice to a substantial right of the accused; or (2) harmless beyond a reasonable doubt.[9]

The test for material prejudice to a substantial right is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different."[10] The test for harmless beyond a reasonable doubt is "whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or

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[9] *But see United States v. Adams*, 44 M.J. 251, 253 (C.A.A.F. 1996) (citation omitted) (affirming appellant's conviction without defining which prejudice test it used because "Whatever test is applied, the error was not prejudicial to this appellant . . . Accordingly, [the CAAF] need[s] not decide whether the court below applied the correct test for prejudice."); *accord id*. (Cox, J., concurring) ("Over the years, I have come to believe that it is difficult, if not impossible, to draw a meaningful distinction between 'harmless beyond a reasonable doubt' and 'materially prejudices the substantial rights.' I remain open to be convinced that there is a difference. Nevertheless, I agree these errors were harmless by any standard.").

[10] *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (announcing the test for material prejudice to a substantial right).

sentence."[11] With the foregoing definitions in mind, in this case, the Army Court analyzed prejudice under plain error applying the first standard–material prejudice to a substantial right of the accused.[12]

I. The Army Court Did Not Find That This Court Overruled Sub Silencio, or Otherwise, Previous Case Law.

A. The Army CCA Never Found That This Court Overruled Sub Silencio *Chapman v. California*.

As an initial matter, appellant asserts the Army Court "assum[ed] [that] this [c]ourt had implicitly abandoned its necessary application of *Chapman*."[13] (Appellant's Br. 8). Appellant further dedicates six pages of his brief to explain how Supreme Court precedent should be applied to military law, a concept with which the Army Court is no doubt wholly familiar. (Appellant's Br. 8-13).

Appellant's vigorous reliance on *Chapman* is misplaced. Insofar as appellant uses *Chapman* to allege that it is the controlling test for any *Hills* violation, with no distinction made between those preserved and unpreserved, it may be distinguishable. First, it is unclear whether appellant preserved the issue in

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[11] *United States v. Kreutzer*, 61 M.J. 293, 300 (C.A.A.F. 2005) (citation omitted) (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)).
[12] Notably, while the dissent in the Army Court's opinion stated that the majority decision created a dispute where there was none between the parties, the government's brief before the Army Court that discussed harmless beyond a reasonable doubt was filed before this Court's decision in *Williams*, 77 M.J. at 459.
[13] *Chapman v. California*, 386 U.S. 18 (1967).

Chapman, whereas in *Hills*, the error was objected to at trial.[14] Appellant did not preserve the issue in the instant case.[15]

Second, *Chapman* is not necessarily on point because that case seemed more concerned with defining the standard of "harmless beyond a reasonable doubt" rather than if that standard is to be applied regardless of whether the error was or was not preserved.[16] While the government observes that *Chapman* squarely addressed errors of constitutional magnitude, it did not explicitly indicate that its analysis was mandated whether the error was preserved or not. Thus, the government respectfully posits that a distinction is appropriate.

Finally, *Chapman* did not define (nor did it ever address) prejudice as it applies under the plain error standard.[17] In his concurring opinion, Justice Stewart

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[14] *Hills*, 75 M.J. at 352. Arguably, *Hills* referenced *Chapman* not because it provided the definitive test for prejudice under plain error but rather, because it provided the definition of harmless beyond a reasonable doubt once the CAAF already stated that the error was preserved and of constitutional magnitude. *See id*., 75 M.J. at 353 (alteration in original) (citation omitted) (quoting *Chapman*, 386 U.S. at 24) (internal quotation marks omitted) ("An error is not harmless beyond a reasonable when there is a reasonable possibility that the [error] complained of might have contributed to the conviction.").

[15] JA 150, 156.

[16] *See Chapman*, 386 U.S. at 24 ("In fashioning a harmless-constitutional-error rule . . . . We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

[17] *See id*. at 18-26 (formulating a harmless error rule to be applied when constitutionally implicated protections were violated at trial).

noted "[t]he differing values which [constitutional rights] represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another."[18] Moreover, the dissent indicated that the harmless beyond a reasonable doubt standard would not necessarily apply the same way in every case with a constitutional error.[19] Accordingly, even *Chapman* suggests that harmless beyond a reasonable doubt is not applicable merely because an error has a constitutional dimension.

B. The Army Court Explicitly Affirmed That the Cases Cited in Appellant's Assignment of Error Remain Good Law.

Similarly, and again contrary to appellant's assertion, the Army Court did not find that this Court overruled its own holding in *United States v. Wolford*.[20] In fact, the Army Court specifically noted the conflict and elected to follow the more recent precedent:

> To the extent this standard contradicts the standard announced in *Wolford*, *Paige*, *Harcrow*, or other cases cited by the dissent, we think it best to follow the CAAF's more recent precedent. While *we agree that these cases remain "good law" until the CAAF says otherwise*, we are stuck between what the CAAF stated over a decade ago and what they wrote last term.

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[18] *Id*. at 44 (Stewart, J., concurring).
[19] *See id*. at 48 (Harland, J., dissenting) ("Even assuming that the Court has the power to fashion remedies and procedures binding on state courts for the protection of particular constitutional rights, I could not agree that a general harmless-error rule falls into that category.").
[20] 62 M.J. 418 (C.A.A.F. 2006).

(JA 22 n.13) (emphasis added). In its ruling, the Army Court stated that the cases cited by appellant nevertheless remain good law. (JA 22).

The Army Court never held that this Court overruled previous case law. To be sure, the Army Court said, "we do *not* view the CAAF as having overruled *Wolford* in *Davis*." (JA 17 n.5) (emphasis in original). The conflict arose because the Army Court tried to apply the appropriate test for prejudice, where this Court has previously identified seemingly differing tests for the same error, as addressed in Part II below.[21] The Army Court attempted to harmonize these opinions by focusing on preserved versus unpreserved error. (JA 23-24).

C. The Army CCA Properly Distinguished *Wolford*.

To the extent that the Army Court did not follow *Wolford*, the government concurs with and adopts the reasoning set forth in the Army Court's majority opinion. (JA 17). The Army Court distinguished *Wolford* for three reasons. (JA 17). One, "*Wolford* is not controlling when it comes to assessing forfeited *Hills*

[21] Furthermore, in what appears to be a show of good faith, the Army Court nevertheless provided its analysis and reasoning under both standards, material prejudice to a substantial right and harmless beyond a reasonable doubt, in the event that it erred in applying the test it used. (JA 26) ("But to the extent we are wrong, we have also considered whether the evidence is strong enough to convince us that the error was harmless beyond a reasonable doubt. We do this for purposes of transparency, and so that our superior court can make quick work of this opinion if we have erred.").

errors." (JA 17). Second, *Wolford* stood against this Court's precedent calling for plain error review. (JA 17). Finally, this Court has applied plain error in cases of forfeited *Hills* errors. (JA 17).

II. *Hills, Wolford, Paige, Humphries,* and *Riggins* Articulated Different Standards of Review for Constitutional Errors.

A. *Hills* and *Wolford* Applied Harmless Beyond a Reasonable Doubt.

Hills stated, "[i]f 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."[22] While *Hills* was a case addressing a preserved error of constitutional magnitude, *Wolford* involved an instructional error that was not preserved (the definition of child pornography).[23]

Thus, based solely upon these two cases, one could intimate that the standard would always be harmless beyond a reasonable doubt where constitutional instructional errors are concerned, regardless whether defense counsel preserved the issue. However, additional cases subsequent to *Hills* discussed in Part III, below introduced alternative analyses that made the guideline for testing for prejudice less clear.

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[22] *Hills*, 75 M.J. at 357 (citations omitted) (internal marks omitted).
[23] *Compare, id*. at 352 (explaining the military judge granted the government's M.R.E. 413 motion over defense's objection), *with Wolford*, 62 M.J. at 420 (stating defense counsel did not object to the military judge's instructions).

B. *United States v. Paige*[24] Introduced An Additional Prong Into the Prejudice Analysis.

Although *Paige* was decided before *Hills*,[25] its application of plain error created additional analysis. *Paige* did not involve a constitutional error regarding a propensity instruction.[26] Rather, this Court reviewed prejudice within the context of an alleged constitutional error through comments on an appellant's right to not testify under the Fifth Amendment.[27]

As in *Wolford*, the alleged error in *Paige* was not preserved.[28] In announcing its standard of review, this Court delineated the appropriate test absent objection is plain error, requiring an appellant to establish (1) error (2) plain, clear, or obvious, and that (3) "the error *resulted in material prejudice to substantial rights*." *Paige*, 67 M.J. at 449 (emphasis added).

Next, *Paige* seemingly introduced an additional analysis stating, "[o]nce [appellant] meets his burden establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a

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[24] 67 M.J. 442 (C.A.A.F. 2009).
[25] *Compare*, 2009 *with*, 2016.
[26] *See Paige*, 67 M.J. at 444 (considering "whether trial counsel's remarks amounted to an improper comment on [appellant's] exercise [of] his Fifth Amendment right to not testify.").
[27] *Id.*
[28] *See id*. at 448 ("Defense counsel did not object to any of the comments made by trial counsel during his closing argument.").

reasonable doubt." *Id*. (citing *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005)). Thus, *Paige* suggests that an appellant first holds the burden to establish that the forfeited error materially prejudiced a substantial right and only if that step is met is the government required to prove harmless beyond a reasonable doubt.

Adding to the confusion, when the Court conducted its analysis, it did not first assess whether appellant proved the error resulted in material prejudice to a substantial right.[29] Instead, it summarily concluded the error was harmless beyond a reasonable doubt.[30] Indeed, the dissent pointed out that the *Paige* majority adopted its burden shifting language from another case that was derived from dictum in a second case that in turn was based upon a third, neither of which granted review to discuss plain error. *Id*. at 453 (Stucky, J., dissenting).

The dissent further characterized the problem, stating "[b]y conflating the third prong of the plain error standard with the harmless beyond a reasonable doubt test for constitutional error, the majority incorrectly shifts the burden of persuasion from the Appellant to the Government." *Id*. at 454 (Stucky, J., dissenting). Thus, when reading *Paige* in conjunction with *Hills* and *Wolford*, it is apparent that

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[29] *Id*. at 451.

[30] "As such, we determine that these remarks were plain and obvious error. On the facts of this case, however, we conclude that this error was harmless beyond a reasonable doubt." *Id*. (citing *United States v. Moran*, 65 M.J. 178, 186-87 (C.A.A.F. 2007)).

conflict remains within this Court's application of plain error to unpreserved errors.

C. *United States v. Humphries*[31] Applied Material Prejudice to a Substantial Right in its Analysis Despite an Error with Constitutional Implications.

Humphries is another case, decided several years before *Hills*, that announced a standard similar to the one used by the Army Court in this case. *Humphries* involved an error when the charge sheet failed to allege a terminal element of one of the charges.[32] At trial, the appellant did not object.[33] This Court found the error forfeited.[34]

Although this Court found the error implicated appellant's constitutional right to notice under the Fifth and Sixth Amendments,[35] it nevertheless determined appellant's remedy based on plain error.[36] That is, the Court placed the burden upon appellant to prove (1) error, (2) clear or obvious, (3) that "materially

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[31] 71 M.J. 209 (C.A.A.F. 2012) (rev'd on other grounds).
[32] *Id*. at 211 ("[W]e hold that it was error to omit the terminal element of Article 134, UCMJ, from the adultery specification.").
[33] *Id*. ("Appellee did not object to the form of the adultery specification at trial.").
[34] *Id*. (citation omitted) ("It is enough that the error is plain now, and the error was forfeited rather than waived.").
[35] *See id*. at 212 ("[W]hile such a defect affects constitutional rights, it does not constitute structural error subject to automatic dismissal.").
[36] *Id*. at 213 (emphasis added) ("[W]here defects in a specification are raised *for the first time on appeal*, dismissal of the affected charges or specifications will depend on whether there is *plain error*.").

prejudiced a substantial right of the accused."[37] Tellingly, in announcing its use of "material prejudice to a substantial right" application, this Court affirmed "[t]he standard that we apply here is the constitutional [error] standard as it has been articulated by this [C]ourt in plain error cases since [*United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998)]."[38]

Noting, "[t]he statutory basis for this Court's standard is Article 59(a), UCMJ," the CAAF distinguished the unpreserved error in *Humphries* from another case where the error was preserved, and thus, reviewed under the harmless beyond a reasonable doubt standard instead.[39] Therefore, in appellant's present case, the Army Court's determination that a forfeited error of constitutional magnitude should be analyzed for plain error, applying a test of material prejudice to a substantial right, is not beyond the realm of this Court's precedent.

D. *United States v. Riggins*[40] Distinguished Between Preserved and Unpreserved Constitutional Errors.

Six months prior to *Hills*, this Court distinguished among preserved constitutional errors and unpreserved constitutional errors. *See Riggins*, 75 M.J. at 85 ("For *preserved* constitutional errors, such as in the instant case, the

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[37] *Id*. at 214.
[38] *Id*. (alteration in original) (quoting *Paige*, 67 M.J. at 449 n. 7).
[39] *See id*. at 214-15 (distinguishing *Humphries* from *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) because the error was preserved).
[40] 75 M.J. 78 (C.A.A.F. 2016).

Government bears the burden of establishing that the error is harmless beyond a reasonable doubt.") (emphasis added) (citation omitted). Thus, just prior to the *Hills* decision, there was at least a distinction made between preserved versus unpreserved constitutional errors, potentially implicating a different standard of review.

III. Post *Hills*, This Court's Precedent Seemingly Established Differing Tests as Applied When Determining Prejudice.

In order to place the issue in context, a brief summary of the post *Hills* line of cases is instructive. The following cases demonstrate an ever evolving landscape and analysis when reviewing alleged errors under *Hills*.

A. *United States v. Lopez*[41]

Subsequent to *Hills*, this Court decided *United States v. Lopez*, and again distinguished between preserved error versus unpreserved.[42] Because appellant never objected to the first assigned error, this Court required the appellant to establish material prejudice in order to satisfy the third prong under a plain error review.[43] However, because appellant did object to the second assigned error, this

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[41] 76 M.J. 151 (C.A.A.F. 2017).

[42] *See id*. at 154 (citations omitted) (internal quotation marks omitted) ("Appellant never objected to this testimony, and when an appellant has forfeited a right by failing to raise it at trial, we review for plain error . . . Appellant thus has the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.").

[43] *See id*. ("Appellant cannot establish material prejudice.").

Court applied an abuse of discretion,[44] again, signaling that there are two different standards of review based upon whether an appellant objected. To be fair, the government notes that in *Lopez*, this Court did not outright declare impermissible lie detector testimony to be of constitutional magnitude, thus leaving the standard of review landscape unclear.

B. *United States v. Oliver*[45]

In May 2017, this Court dealt with another case that was declared "constitutional in nature."[46] "[G]iven the seemingly unsettled nature of the law at the time," this Court found forfeiture, rather than waiver, and proceeded to review for plain error. *Oliver*, 76 M.J. at 274. Despite the alleged error in *Oliver* being a constitutional, forfeited error, this Court stated *appellant* bore the burden to establish (1) error, (2) clear or obvious, and (3) *which resulted in material prejudice to his substantial rights*. *Id*. at 275 (emphasis added). There was no discussion of any burden shift to the government to prove that the error was harmless beyond a reasonable doubt. *Id*. at 274-75.

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[44] *See id*. at 155 (citation omitted) ("Because appellant preserved this error with a timely objection, we review the military judge's admission of this evidence not for plain error, but for abuse of discretion.").
[45] 76 M.J. 271 (C.A.A.F. 2017).
[46] *See id*. at 273 ("The rights at issue when determining whether one offense is a lesser included offense of another are constitutional in nature.").

C. *United States v. Guardado*[47]

Seven months after *Oliver*, this Court again analyzed a constitutional error that was unpreserved under the traditional plain error analysis.[48] This instructive case is perhaps the most on point because it involved an improper *Hills* error, as is the case here. Citing *Hills* and *Hukill*,[49] this Court announced that a military judge's M.R.E. 413/414 instruction would always constitute clear or obvious error, leaving only the third prong of the plain error test for discussion and analysis.[50]

In reviewing the third prong of plain error (i.e. prejudice), this Court announced, "The question we must answer is whether this instructional erro*r materially prejudiced Appellant's substantial rights*," and did not suggest the government bore any burden to prove harmless beyond a reasonable doubt.[51] However, after discussing and analyzing prejudice at length, in conclusion, this Court stated it was not "convinced that the erroneous propensity instruction played *no role in Appellant's conviction*."[52] While this language sounds close to that used

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[47] 77 M.J. 90 (C.A.A.F. 2017).
[48] *Guardado*, 77 M.J. at 93 (citation omitted) ("As Appellant failed to object to the military judge's propensity instruction at trial, we review for plain error.").
[49] *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017).
[50] *Guardado*, 77 M.J. at 93.
[51] *Id*. (emphasis added).
[52] *Id*. at 95 (emphasis added).

for a harmless beyond a reasonable doubt standard, the Court specifically noted that it analyzed whether the error materially prejudiced a substantial right.[53]

D. *United States v. Robinson*[54]

Finally, in another post *Hills* decision, *Robinson* applied plain error to an unpreserved instructional error by the military judge.[55] The Army Court determined the error appeared "to be one of constitutional magnitude." (JA 21). *Robinson* cited to *Guardado* in announcing the plain error rule.[56] *Robinson* adopted the same test used in *Lopez* (*infra* Part III, A.) to determine prejudice.[57] That is, appellant bore the burden to show "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different."[58]

Moreover, the only discussion regarding a government burden to prove harmless beyond a reasonable doubt arose under an unrelated issue in the context

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[53] *Id*. at 93 (citations omitted) (internal quotation marks omitted) ("The language of R.C.M. 920(f) … and the great weight of our precedent clearly call for plain error review when an appellant fails to preserve an instructional error . . . This court has repeatedly held that plain error occurs when . . . the error materially prejudiced a substantial right of the accused.").
[54] 77 M.J. 294 (C.A.A.F. 2018).
[55] *Id*. at 299 ("Because Appellant did not object to the military judge's instructions at trial, we review for plain error.").
[56] *Id*. (citing *Guardado*, 77 M.J. at 93 and *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017)).
[57] *See id*. (citation omitted) ("We review for plain error . . . [a]ppellant bears the burden of establishing . . . the error materially prejudiced a substantial right.").
[58] *Id*. (alteration in original) (quoting *Lopez*, 76 M.J. at 154).

of preserved error alleging that the military judge erred by failing to admit constitutionally required evidence.[59] "Thus, to the extent that the CAAF's decision in *Guardado* may be susceptible to multiple interpretations, in *Robinson*, the CAAF itself interpreted *Guardado* to require a plain error analysis." (JA 22).

IV. The Army Court Relied on This Court's Most Recent Precedent to Determine the Appropriate Test for Prejudice.

This Court's decision in *Williams* specifically addressed a M.R.E. 413 instructional error and delineated between a constitutional instructional error that is preserved versus an instructional error that is not.[60] In *Williams*, because appellant failed to preserve the error, this Court reviewed for plain error.[61] However, when enumerating the three prongs of the plain error test, this Court did not define "prejudicial."[62]

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[59] *See id*. (citations omitted) ("[W]e will assume without deciding that it was error for the military judge to exclude this evidence, and we will solely address whether the error was harmless beyond a reasonable doubt . . . . [p]ursuant to this analysis, the Government bears the burden of establishing harmlessness beyond a reasonable doubt.").

[60] *See Williams*, 77 M.J. at 462 (alteration in original) (quoting *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017)) ("Where [constitutional] instructional error is preserved, we test for harmlessness. However, if the accused fails to preserve the instructional error by an adequate objection or request, we test for plain error.").

[61] *See id*. (citing *Guardado*, 77 M.J. at 93) ("As Appellant's motion in limine was not yet ripe and he did not renew his objection when afforded the opportunity to do so, we review for plain error.").

[62] *Id*.

The Court's subsequent discussion included language signifying that the prejudice analysis involved "whether such error prejudiced Appellant's substantial rights,"[63] an analysis seemingly derived from Article 59(a), UCMJ.[64] However, in its conclusion, the opinion used language that sounds perhaps more like harmless beyond a reasonable doubt than material prejudice to a substantial right, stating "[W]e hold that the military judge's M.R.E. 413 instruction was not harmless."[65]

In fact, the Army Court found this phrase most significant when concluding the appropriate test for prejudice is simple harmlessness.[66] (JA 23). Despite the Army Court's conclusion to the contrary, the government notes that the Supreme Court seemingly used "harmless" and "harmless beyond a reasonable doubt" interchangeably in *Chapman*.[67] Similarly, this Court used the singular word

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[63] *Id*. at 463.
[64] *See Tovarchavez*, 2018 CCA LEXIS 371, at *4 (asking "In this case of forfeited error, does this court determine whether the error was harmless under Article 59(a), UCMJ? Or, as the forfeited error is constitutional, do we determine whether the error was harmless beyond a reasonable doubt?").
[65] *Williams*, 77 M.J. at 464.
[66] "The CAAF did not state it was unable to determine the instruction was harmless beyond a reasonable doubt. The omission of the phrase 'harmless beyond a reasonable doubt' would not appear to be oversight; it would be the whole enchilada." (JA 23).
[67] *See Chapman*, 386 U.S. at 24 ("Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless . . . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

"harmless" when announcing that an error was not harmless beyond a reasonable doubt when it decided *Hukill*,[68] a case with preserved propensity error.

In light of *Guardado*, *Robinson*, and *Williams*, the Army Court reasonably determined that "the appropriate prejudice analysis for unpreserved error–even error of constitutional magnitude–is whether the error materially prejudiced the substantial rights of appellant." (JA 22 (citing Article 59(a), UCMJ)). Moreover, if the standard test for all *Hills* errors is declared harmless beyond a reasonable doubt, regardless of forfeiture, the need to advocate and preserve the issue at the trial level is wholly erased.[69]

Jurisprudence in the wake of *Hills* has been an evolving landscape. The Army Court identified and attempted to harmonize perceived discrepancies when crafting its opinion in this case. (JA 13-29). In coming to its conclusion, the Army Court understandably stated, "we are stuck between what the CAAF stated over a decade ago and what they wrote last term." (JA 22). Consequently, the government respectfully asserts that the appropriate prejudice analysis for *Hills*

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[68] 76 M.J. at 223 (emphasis added) ("The presumption [that the military judge knows and follows the law] cannot somehow rectify the error or render it *harmless*.").

[69] *Cf. Humphries*, 71 M.J. at 214 (quoting *Dominguez-Benitez*, 542 U.S. at 82) ("Where an error of law materially prejudices a substantial right, either this Court or the CCA may notice the error, keeping in mind the need 'to encourage timely objections and reduce wasteful reversals.'").

related unpreserved errors of constitutional dimension is plain error which uses a material prejudice to substantial rights of the accused when analyzing prejudice.

When dealing with forfeited constitutional error, it is reasonable to apply a standard less than harmless beyond a reasonable doubt, as evidenced by *Williams*.[70] The more stringent test, harmless beyond a reasonable doubt, should be available to those who actually preserve the error at trial. To be sure, even those errors that are not preserved, when tested for material prejudice, are still subject to a test of consequence because in order to support a conviction, the government nevertheless is required to show that there was no material prejudice to a substantial right of the accused.

Indeed, as the dissent in *Paige* noted, "Although the Supreme Court has not spoken directly on this issue, is has suggested that the plain error test need not be changed to accommodate non-structural constitutional errors . . . If the error alleged is constitutional, the standard is the same; it just becomes easier for the appellant to meet his burden of showing a reasonable probability that, but for the error, the result of the proceeding would have been different." *Paige*, 67 M.J. at 454 (Stucky, J., dissenting) (internal citations omitted).

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[70] *See Williams*, 77 M.J. at 463 ("Having found error, we must determine whether such error prejudiced Appellant's substantial rights.").

"In a plain error case, as opposed to one in which the error is preserved, the burden of persuasion never shifts to the government; it remains with the appellant, although the government has the opportunity to argue why the error is not prejudicial." *Id*. (Stucky, J., dissenting). Following this rationale, if this Court determines that under a *Hills* error, even one of constitutional magnitude, forfeiture applies and the plain error test for prejudice is that of material prejudice to a substantial right, the accused is not without remedy.[71] The remedy available is just not the highest possible as a result of his failure to preserve the issue.

[71] *Cf*. *Humphries*, 71 M.J. at 214 (alteration in original) (citation omitted) ("In our view the statutory text of Article 59(a), UCMJ, with the high threshold of 'material[] prejudice' to a 'substantial right' and discretion to redress error, when considered in light of the principles the Supreme Court has articulated in its consideration of a different rule, preserved the 'careful balance . . . between judicial efficiency and the redress of injustice.'").

Conclusion

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (**efiling@armfor.uscourts.gov**) and contemporaneously served electronically on appellate defense counsel, on December 17, 2018.

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