IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Krishil S. Prasad,
Airman First Class (E-3)
United States Air Force,

Appellant

REPLY BRIEF ON BEHALF OF APPELLANT

A.F. Ct. Crim. App. Dkt. No. 39003

USCA Dkt. No. 19-0412/AF

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

DAVID P. SHELDON
Lead Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC
100 M Street SE, Suite 600
Washington, D.C. 20003
Tel: (202) 546-9575
davidsheldon@militarydefense.com
C.A.A.F. Bar No. 27912

MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road,
Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770
mark.j.schwartz7.mil@mail.mil
C.A.A.F. Bar No. 35679

TAMI L. MITCHELL
Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchell@militarydefense.com
C.A.A.F. Bar No. 32231

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Granted Issue

WHETHER THE AIR FORCE COURT ERRED IN ITS FIRST REVIEW OF APPELLANT'S CASE BY AFFIRMING THE FINDINGS OF GUILT FOR SPECIFICATIONS 1 AND 3 OF CHARGE I WHEN IT FOUND PREJUDICIAL ERROR AS A RESULT OF A *HILLS* VIOLATION.

Statement of the Case

A1C Prasad timely filed a petition for review, invoking this Court's jurisdiction pursuant to Article 67(a)(3), UCMJ. This Court granted review of his case on November 26, 2019. *United States v. Prasad*, 2019 CAAF LEXIS 822 (C.A.A.F. Nov. 26, 2019). The Government filed its answer brief on January 27, 2020. Appellant hereby submits this reply brief.

Summary of the Argument

The Government concedes: (1) there was error (Gov. Br. at 6); (2) the error was of constitutional magnitude (Gov. Br. at 9); and (3) the Government, not Appellant, has the burden of proving the error was harmless beyond a reasonable doubt (Gov. Br. at 8). Therefore, the only issues are whether: (1) this Court is convinced the error was harmless beyond a reasonable doubt, and (2) whether the Air Force Court of Criminal Appeals (AFCCA) applied the correct test for determining whether the error was harmless beyond a reasonable doubt. A review of this case demonstrates that, although the AFCCA used the term "harmless beyond a reasonable doubt," it did not actually use that test.

In arguing for this Court to affirm the AFCCA's decision, the Government makes the same mistakes the AFCCA made—focusing on the sufficiency of the evidence to argue that the military judge's erroneous instruction on propensity evidence is enough to prove harmless beyond a reasonable doubt. Furthermore, the AFCCA made the same mistake as the Army Court of Criminal Appeals (ACCA) did in *United States v. Guardado*, 75 M.J. 889 (A. Ct. Crim. App. 2016), *rev'd*, 77 M.J. 90 (C.A.A.F. 2017). This case presents this Court with an opportunity to provide further guidance to appellate courts in testing for prejudice resulting from *Hills* violations.

Argument

An error is not harmless beyond a reasonable doubt if there is "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *Neder v. United States*, 527 U.S. 1, 15-16 (1999); *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "Under the 'reasonable probability of a different outcome' standard, '[t]he question is not whether the defendant would more likely than not have received a different verdict…, but whether…he received a fair trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Romano*, 46 M.J. 269, 272 (C.A.A.F. 1997). Therefore, "[a] 'reasonable probability' of a

different result is… shown when the [erroneous instruction] 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678); *Romano*, 46 M.J. at 272. If there is *any* reasonable possibility the error contributed to the findings, the error is not "harmless beyond a reasonable doubt." *Dominguez Benitez*, 542 U.S. at 81-82 (quoting *Bagley*, 473 U.S. at 682); *Neder*, 527 U.S. at 15-16; *Tovarchavez*, 78 M.J. at 462 (emphasis added). AFCCA's decision was erroneous for three reasons.

1. The majority of the AFCCA analyzed for error in the same way that the ACCA analyzed error in *Guardado*, 75 M.J. 889—comparing the strength of the evidence relating to the acquittals to the strength of the evidence related to the convictions, and concluding that the acquittals were sufficient to render the error harmless (JA 14-19). However, as this Court noted in *Guardado*:

> We are not convinced that any harm that resulted from allowing propensity evidence from one specification was necessarily extinguished by an acquittal of that same specification. It simply does not follow that because an individual was acquitted of a specification that evidence of that specification was not used as improper propensity evidence and therefore had no effect on the verdict. It is conceivable that the panel found that Appellant committed the other three charged offenses 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, members could still have believed that it was more likely than not that Appellant sexually assaulted [others] and used that evidence for propensity purposes, thus violating Appellant's presumption of innocence. Such an outcome is exactly the type of result we sought to guard against in *Hills*.

77 M.J. at 94. Furthermore, as in *Guardado*, the military judge instructed the panel

members on two different standards of proof—"preponderance of the evidence" and "beyond a reasonable doubt"—that they were required to apply to the same evidence (JA 188). *Id*.

> The instructions in this case provided the members with directly contradictory statements about the bearing that one charged offense could have on another, one of which required the members to discard the accused's presumption of innocence, and with two different burdens of proof—preponderance of the evidence and beyond a reasonable doubt.

Id. (citing *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)). Had the majority of AFCCA considered *Guardado* during its second Article 66, UCMJ review of Appellant's case, its second opinion may have been different. As this Court held in *Guardado*, this Court should also hold the error was not harmless beyond a reasonable doubt in this case.

2. The AFCCA did not consider the impact of trial counsel's closing argument, which was also rendered erroneous as a result of *Hills* and its progeny, in its "harmlessness" analysis. When analyzing a *Hills* error, a factor that should be considered is the extent to which a trial counsel argued for propensity. The more a trial counsel argues "propensity" and "preponderance of the evidence," the greater the "reasonable possibility the error contributed to the conviction."

In this case, the trial counsel relied heavily on propensity during closing argument:

> He ignored five women on multiple occasions…. [] They don't know

each other. Their only connection is being sexually assaulted and contacted by Airman Prasad. [] And he did it five times in 14 months while knowing he was under investigation for the same types of offenses (JA 191).

[The instruction] also says you should consider the accused's age, education and experience along with the other evidence in the case. Other evidence of this case, and we are kind of getting to some, what we call 413 evidence. Other evidence in this case, how about, hey, one woman told me to stop. I kept going. Two women told me to stop. I kept going. Three women told me to stop. I kept going. Four women told me to stop. I kept going. Five women told me to stop. I kept going. How about you learn, that when a woman says, no, she means, no (JA 201).

And this is where we tie in, we start to tie in that propensity evidence, you know, that instruction in there about propensity. It's a -- there is a heading called "spillover instructions." And the judge -- *I think it's the last instruction you have*. And it's sometimes you'll hear it just called 413, it is Military Rule of Evidence 413. So that's kind of my jargon. But, it's propensity evidence. And that's the lens through which you have to view this entire court. *He has a propensity not to stop when someone says, no. Five women told him, no, and he kept going.* [] *The law realizes that people who engage in sexual offenses may have a propensity to commit that crime again and again and again what is what happened here* (JA 210-11, emphasis added).

But, that 413, that propensity evidence, what do we see here again and again? We see another example of the accused not understanding boundaries, not listening to women in this case, no, don't do this, don't touch me. *And if you find by a preponderance of the evidence, okay, which is more likely than not, in fact, even if it's not beyond a reasonable doubt, if you find it more likely than not that he did this, then you can use that evidence in determining that he has a propensity to commit sexual offenses*. And you can use that when you are looking at other crimes in this case, the other charges in this case. And the law allows, for sexual offenses specifically, that members can consider that. And you can consider the fact that he doesn't listen. That he ignores, no (JA 213, emphasis added).

> This pattern of events is not a mistake. The spillover instruction, the 413 instruction as I call it realizes that this is not a mistake. That this is the accused assaulting five women over a 14-month period, when he knew that he was already under investigation for the same types of acts in every situation. He continued to take advantage of the situations, to take it vantage [sic] of these women in vulnerable states, and to try and expand any consent they gave him to do with it what he wanted. And that's a crime. Each individual one is a crime (JA 220).

The trial counsel's reliance on the word "propensity" belies the Government's suggestion that this argument was no different than "an appropriate, non-propensity use of the evidence" under Mil. R. Evid. 404(b), pursuant to *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019) (Gov. Br. at 20-21). First, "propensity" is the complete opposite of "non-propensity." Second, the panel members were not instructed to consider the evidence for an "appropriate, non-propensity purpose." Third, this argument reveals the Government's true motive for using Mil. R. Evid. 404(b) with respect to charged misconduct in sexual assault cases—to admit evidence of and argue "propensity" through the back door of Mil. R. Evid. 404(b) because the front door of Mil. R. Evid. 413 has been firmly and permanently closed. The Government's argument on this point is a red flag that should cause this Court to reconsider its opinion in *Hyppolite.*

Trial counsel's closing argument was improper for another reason—misstating the law:

> In negligence and due care you start to get into legal terms. Due care, what is it? It's what a reasonable person would do. Do you know what a reasonable person would do? Ask. Ask for permission to

> touch. Ask for permission. Ask Airman [KF] if you are laying on the bed with her, is it okay if I put my fingers in your vagina. And if she says, no, then you know. You don't just jam your fingers in there and say, oh, I was trying to get you in the mood (JA 200).

"Affirmative consent" is nothing more than a SHARP "best practice" that is recommended, but not mandated by Article 120, UCMJ. *See United States v. Washington*, No. 20170329 (A. Ct. Crim. App. Feb. 14, 2019) (summary affirmance), *pet. rev. granted*, 79 M.J. 257 (C.A.A.F. Sep. 16, 2019) (oral argument Jan. 15, 2020) (arguing that the SHARP program's recommendation to stop and "walk away" when someone says 'no," regardless of context, was nothing more than a best-practice likely to confuse the members as to the legal standard of objective reasonableness). Essentially, trial counsel argued that Appellant's violation of SHARP "best practices" amounted to a sexual assault on A1C KF.

3. The evidence was not "overwhelming." The evidence showed A1C KF voluntarily followed Appellant to his room after hugging him, laid in his bed with him, let him massage her, let him unclasp her bra, and let him kiss and suck on her bare breasts. She objected to none of that. "Ignoring" it does not manifest a lack of consent. When Appellant's hand went inside A1C KF's pants, her statement to him, "stop or I'll hit you," *by her own admission*, could be interpreted as a joke (JA 133). In other words, "stop" did not actually mean "stop," it meant, "keep going and see what happens." Only *after* Appellant penetrated A1C KF's vulva with his fingers did she manifest a lack or a withdrawal of consent by "lightly tapping" his

head (JA 132). At that point, Appellant stopped penetrating A1C KF's vulva and returned to kissing her exposed breasts. Again, she did not manifest a lack of consent, which reasonably gave Appellant the impression he could "get her in the mood" for sex. Similarly, when Appellant realized A1C KF was "not enjoying it" and therefore "not in the mood" (JA 119), he stopped rubbing his erection against her. Contrary to A1C KF's and trial counsel's claims, Appellant did not "pin" her hands above her head. Instead, it is just as or more likely her hands went above her head when Appellant attempted to take off her hoodie.

Appellant presented evidence of A1C KF's motive to falsely accuse him of sexually assaulting her—a "compassionate reassignment" to Holloman AFB so that she could get back together with her boyfriend, who had broken up with her because he did not want a long-distance relationship. With respect to the pretext text messages, Appellant's apologies do not unassailably establish his consciousness of guilt." *Tovarchavez*, 78 M.J. at 469. His apologies were no more than an acknowledgement he was a disrespectful jerk, not a criminal. As the Government acknowledges, text messages which can be interpreted as an acknowledgement of inappropriate, but not criminal behavior, are not evidence of consciousness of guilt (Gov. Br. at 12).

Finally, the Government's reliance on *United States v. Hazelbower*, 78 M.J. 12 (C.A.A.F. 2018), is misplaced. *Hazelbower* can be distinguished from

Appellant's case in that each of the rape victims in *Hazelbower* were under the age of 16; Hazelbower was also convicted of child pornography offenses due to receiving nude photographs of one of his victims; and in addition to incriminating text and Skype messages, the Government introduced evidence of uncharged misconduct that showed Hazelbower's *modus operandi* in raping each of his victims. 2017 CCA Lexis 721, *6-10 (A. Ct. Crim. App. Nov. 22, 2017) (unpub. op.). Furthermore, the uncharged misconduct resulted in a sexual abuse criminal conviction in Winnebago County, Illinois. *Id*. at *11.

But for the erroneous propensity instruction, which the trial counsel capitalized upon with improper argument, the panel members, if they had considered only A1C KF's case individually, as they were required to do, may have harbored reasonable doubt and found Appellant not guilty.

Conclusion

For all the aforementioned reasons, this Court should set aside Appellant's convictions and sentence. A rehearing may be authorized.

Respectfully submitted,

DAVID P. SHELDON
Lead Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC
100 M Street SE, Suite 600
Washington, D.C. 20003

MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770

Tel: (202) 546-9575
davidsheldon@militarydefense.com
C.A.A.F. Bar No. 27912

mark.j.schwartz7.mil@mail.mil
C.A.A.F. Bar No. 35679

TAMI L. MITCHELL
Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchell@militarydefense.com
C.A.A.F. Bar No. 32231

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1. This Brief complies with the type-volume limitation of Rule 21 because it contains 3043 words.

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MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770
mark.j.schwartz7.mil@mail.mil
C.A.A.F. Bar No. 35679

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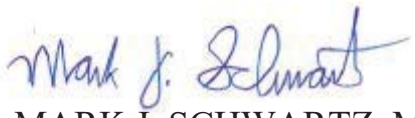
I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on February 3, 2020.



MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road,
Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770
mark.j.schwartz7.mil@mail.mil
C.A.A.F. Bar No. 35679