IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Master Sergeant (E-8) **JOHN T. LONG** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150160 USCA Dkt. No. 21-0085/AR

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

Granted Issues

I. WHETHER THE ARMY COURT ERRED IN CONCLUDING THE IMPERMISSIBLE USE OF CHARGED SEXUAL MISCONDUCT AS PROPENSITY EVIDENCE WAS HARMLESS BEYOND A REASONABLE DOUBT.

II. WHETHER APPELLANT'S CONVICTION FOR RAPE OF A CHILD WAS LEGALLY SUFFICIENT WHERE THE GOVERNMENT PRESENTED NO EVIDENCE OF THE CHARGED SEXUAL ACT.

III. WHETHER THE ARMY COURT ABUSED ITS DISCRETION IN REASSESSING THE SENTENCE.

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 (UCMJ), 10

U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

On April 17, June 19, October 16, November 6 and 17, and December 19, 2014; and January 22 and 30, February 18-21 and 23-26, and December 14-15, 2015, appellant, Master Sergeant (MSG) John T. Long, was tried at Fort Bragg, North Carolina, before a military judge sitting as a general court-martial. Contrary to his pleas, appellant was convicted of abusive sexual contact with a child (three specifications), indecent liberties with a child (two specifications), rape of a child, sexual abuse of a child, sodomy with a child under the age of twelve, assault consummated by a battery upon a child under sixteen years, indecent acts with a child (two specifications), and child endangerment, in violation of Articles 120, 125, 128, and 134, UCMJ; 10 U.S.C. §§ 920, 925, 928, and 934 (2006); and Article 120b, UCMJ, 10 U.S.C. § 920b (2006 and Supp V 2012). (JA034-038).

The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for sixty years, and to be discharged from the service with a dishonorable discharge. (JA204). The convening authority approved the adjudged sentence. (JA039).

On October 26, 2018, the Army Court set aside Specifications 2 and 3 of Charge I; Specifications 4, 9, 10, and 11 of Charge II; and the Specification of

Additional Charge II in light of *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017). *United States v. Long*, 2018 CCA LEXIS 512 (Army Ct. Crim. App. Oct. 26 2018) (mem. op.) (JA007-JA019). The Army Court also set aside and dismissed Specifications 5 and 6 of Charge II due to factual insufficiency. (JA019). The Army Court affirmed the findings of guilty for Specification 5 of Charge I, Specification 8 of Charge II, and the Specification of Charge IV. (JA019).

The Army Court also set aside the sentence and authorized the convening authority to: (1) order a combined rehearing on Specifications 2 and 3 of Charge I; Specifications 4, 9, 10, and 11 of Charge II; and the Specification of Additional Charge II (the "set-aside specifications") and the sentence; (2) dismiss the set-aside specifications and order a rehearing on the sentence only; or (3) dismiss the set-aside specifications and reassess the sentence, affirming no more than a dishonorable discharge, confinement for forty years, and reduction to E-1. (JA019).

On May 31, 2019, this Court dismissed appellant's petition without prejudice due to the possibility of a rehearing. *United States v. Long*, 79 M.J. 99 (C.A.A.F. 2019), *reconsideration denied*, 79 M.J. 184 (C.A.A.F. 2019).

On February 12, 2020, the convening authority elected to dismiss the set-aside specifications. He approved the dishonorable discharge, confinement for

forty years, and reduction to the grade of E-1: the same sentence the Army Court authorized if he elected to dismiss the set-aside specifications in lieu of ordering a rehearing. (JA046).

On October 21, 2020, the Army Court found that, in light of *United States v. Gonzalez*, 79 M.J. 466 (C.A.A.F. 2020), it erred in its previous opinion by providing the convening authority the third option on remand. The Army Court "incorporated by reference" its 2018 decision on the merits, re-affirmed the findings of guilty for Specification 5 of Charge I, Specification 8 of Charge II, and the Specification of Charge IV, and "reassessed" the sentence to a dishonorable discharge, confinement for forty years, and reduction to the grade of E-1. (JA002-006).

Summary of Argument

In this pre-*Hills*[1] case, appellant was convicted of raping AL by penetrating her with his penis and acquitted of the alternate charge of penetrating her with "an object." AL, however, failed to testify that any sex act occurred, let alone that appellant penetrated her with his penis.

The most likely reason why the military judge found appellant guilty of penetrating AL with his penis, rather than an object, was because the government pointed to the charged rape of NB and argued that charged offense showed

[1] *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).

appellant's propensity to rape AL in a similar manner, that is, with his penis while choking her. Aside from this improper use of propensity, the government's only corroboration came from NB—the alleged victim of the very rape the government impermissibly used as propensity evidence—whose testimony was flatly contradicted by other witnesses. Moreover, none of the paltry "corroboration" the government provided could supply the evidence AL failed to provide herself: that she had been raped, and that appellant's penis caused the penetration. Given the government's propensity argument, the limitations of AL's testimony, and the dearth of corroboration, it cannot be said that the government's use of propensity evidence did not contribute to appellant's conviction. Nor can it be said that appellant's conviction for penetrating AL *with his penis* is legally sufficient, where the only evidence for that sexual act was the government's improper use of charged propensity evidence.

Appellant's case is one of the rare cases where the Army Court abused its discretion in reassessing the sentence, rather than ordering a sentence rehearing. Nine of appellant's ten child sex offense convictions were dismissed on appeal, yet the Army Court concluded this was neither a change in the penalty landscape nor the gravamen of appellant's offenses. Further, there is a presumption that the Army Court's most recent sentence reassessment was influenced by the ultra vires sentence "reassessment" it performed during its initial Article 66 review, and this

presumption was not rebutted when it arrived at exactly the same forty-year sentence the initial Army Court panel "reassessed." The failure to dispel the specter of improper influence from the initial decision in this case, coupled with the improper *Winckelmann* factor analysis, makes this a rare case where the Army Court abused its discretion in reassessing the sentence.

Statement of Facts

1. In this pre-*Hills* "nightmare" propensity case, the military judge leaves open the extent to which the government can use charged offenses as propensity evidence.

Appellant was charged with a long list of sex offenses against multiple members of his family—his "victim tree," as the government repeated during closing argument. (JA027-033, 169, 171, 174). Among the alleged victims were appellant's ex-girlfriend, NB, and their daughter, AL.

Before trial, the government provided notice of its intent to offer evidence of the charged offenses involving AL and two other alleged child victims as propensity evidence pursuant to Military Rule of Evidence (MRE) 414.[2] (JA207-209). The government also provided notice of its intent to offer evidence of the charged sexual offenses involving adults, including NB, as propensity evidence pursuant to MRE 413. (JA047, 205-208).

[2] The charged offenses involving these alleged victims were Specifications 1-3 of Charge I, Specifications 4-11 of Charge II, and The Specification of Additional Charge II. (JA027-033).

The military judge agreed that resolving the propensity issues raised in this case would have been "a nightmare" with a panel, and were "[p]retty confusing" even in a judge-alone trial. (JA048). Ultimately, he made rulings limiting his consideration of the MRE 413 evidence involving two alleged adult victims (TR and ML); however, he never ruled on whether he would consider any of the other charged misconduct as propensity evidence as indicated in the government's notices. (JA048, 051-054).

2. The alleged rape of NB.

In Specification 3 of Charge II, the government alleged that between October and December of 2009, appellant raped NB, his then-girlfriend. (JA032). NB testified that she and appellant had an on-and-off again sexual relationship over the years and occasionally lived together. (JA056-063). In 1998, NB gave birth to appellant's daughter, AL. (JA063).

By 2009, appellant and NB were living together in Clarksville, Tennessee, with AL and AL's sixteen-year-old half-brother, TW. (JA078, 081). NB testified that appellant began having "rough" sex with her around the end of that year. (JA071). NB testified that on these occasions, appellant would get on top of her and choke her with his hands around her neck while penetrating her vagina with his penis. (JA072-077).

3. The New Year's Eve Incident.

The government also charged appellant with raping AL on New Year's Eve 2009. In Specifications 7 and 8 of Charge II, the government alleged in the alternative that appellant either penetrated her genital opening with "an object" or with his penis on this occasion. (JA032).

AL testified that on New Year's Eve, appellant purchased alcohol from the liquor store where NB was working that night. (R. at 1437). He brought the alcohol home, and AL and TW began doing shots with him over the course of the night. (JA098-099). Due to the alcohol, AL started acting "crazy" and at one point fell down a flight of stairs, injuring herself. (JA099, 114).

After falling down the stairs, AL testified she went to her room and fell asleep in bed. (JA099).[3] She allegedly woke with appellant on top of her as he "started to choke [her]." (JA100). Then she "passed out," and awoke to him "choking [her] again." (JA100). The next thing she remembered was waking up in her bed the next morning. (JA100). She never testified that she saw or felt appellant penetrating her vagina with anything, let alone his penis as charged in Specification 8 of Charge II, even when she was awake during the alleged choking. (JA099-100).

[3] TW testified that he and appellant had to carry AL up the stairs to her room. (JA 143-144).

AL testified that the next morning, she felt pain in her "vagina and butt," and described finding blood "everywhere" and "just all over – like all over my vagina and butt." (JA100-101). She also testified that it burned when she went to the bathroom. (JA100-101). She described multiple "bruises" across her neck and "hand marks" on her leg. (JA101).

NB confirmed that she was working at the liquor store that night but went to a relative's house instead of returning to appellant's house after work. (JA078-080). When she returned to appellant's house the next morning, she found AL in her bed with vomit (not blood) "everywhere." (JA081-083). NB was very mad because there was vomit throughout the house and her children had been drinking, so, understandably, she started screaming at everybody. (JA082, 086). She testified that AL was crying, sick from drinking, and had bruises on her neck and legs. (JA087).

TW testified that he was also drinking heavily that night. (JA140-141). He helped appellant carry AL to her bedroom because she was "being drunk," "acting belligerent," and "fell down the stairs." (JA142-143, 148-149). Then he went to his own bedroom and fell asleep for the night. (JA143). Unlike NB, he did not recall seeing any bruises on her neck and legs, but he testified that he would have noticed bruising on her neck if she had any. (JA149-151).

Mr. Greg Hoogendorn, a combat medic who lived in appellant's basement but was not present on New Year's Eve, testified that he returned home at 1000 hours on New Year's Day. (JA152, 154-156). He ran into AL and had a conversation with her that morning lasting several minutes. (JA156). Like TW, Mr. Hoogendoorn did not observe any bruises or other injuries on AL's neck or legs. (JA156).

Finally, Ms. Shanice Brown, a friend of the family and live-in babysitter, testified that she saw AL "a couple days" after New Year's Eve. (JA160-161). Like TW and Mr. Hoogendoorn, she also did not see any evidence of neck or leg bruises. (JA161).

There were no other witnesses to what happened in AL's bedroom that night. AL herself was unable to recall how she hid the blood that was "all over." (JA101, 118-119). No one saw any of the blood that AL claimed was "everywhere." That includes NB, who testified that she was looking closely enough at AL's legs to see the alleged bruising. (JA087). No one—again, including NB—heard AL say anything about the burning sensation or her vaginal pain the next morning. No one sought medical treatment for AL's alleged injuries. There was no forensic, medical, documentary, or photographic evidence of AL's alleged vaginal or anal injuries. AL did not report this incident until the summer of 2012, when she walked to the police station with her sister, JL. (JA137).

AL and JL testified that in the summer of 2012, appellant discovered a video of them physically abusing their younger sibling, YH, as well as scantily-clad pictures and videos they had taken of themselves. (JA133-135, 1447-49). Appellant was very angry, and called a family meeting where he displayed the photos and videos to everyone and confiscated their phones. (JA135, 107-109). They were humiliated, but AL felt particularly angry because she believed she was punished harsher than JL for no reason. (JA121, 124). JL testified that not long after this family meeting, she and AL decided to file a police report against appellant for sexually abusing them.[4] (JA137).

4. The government's midtrial propensity argument to the factfinder.

At the close of the government's case-in-chief, the defense moved to dismiss Specifications 7 and 8 of Charge II pursuant to Rule for Court-Martial (RCM) 917 because there was no evidence AL was penetrated by appellant's penis or by any other object. (JA163-164).

The government responded,

> With regard to Specification 7 and 8…these are charged obviously with regard to the same event. There has been *– there has been evidence presented which may be linked to the actions which occurred with regard to [AL] through the M.R.E. 413 analysis, to help the fact finder to determine what occurred beyond what evidence [AL]*

[4] Between the family meeting in late July and the report in August, JL testified that she attended a family reunion in Washington, DC, and they moved to a different apartment. (JA137).

> *herself was able to present.* So the government believes that penetration of something has been established by [AL]'s testimony herself.
>
> She has testified to what she last remembers, and then when she wakes up, the very particularized location of pain, the very particularized location of blood – and that being in her vagina. It hurt when she peed. It was a feeling she had never felt before and hasn't felt since. Based upon that, the government believes that the Court can make an inference, *as well as the use of the M.R.E. 413 [NB] discussion, with regard to [AL]*.
>
> [AL] describes in particular the accused has his hands around her neck and he is on top of her and she blacks out. *That description is very similar, if not very similar, to that which [NB] describes when the accused would be penetrating her while strangling her*. So based upon that analysis as well, the Court can conclude what was occurring there, also, obviously – and the fact that [AL] can testify to how she woke up and where she was in pain where she saw blood.

(JA165-166) (emphasis added).

After this explicit request that the military judge use the charged rape of NB under MRE 413 to prove appellant was likely to have raped AL in the same manner, the military judge found that there was sufficient evidence and denied the defense RCM 917 motion without explaining his reasons. (JA167). Immediately following the ruling, the government asked, "For purposes under R.C.M. [sic] 414, is the government allowed to argue the underlying facts as part of the story or not?" (JA167). The military judge responded, "Yes." (JA167).

5. The "victim tree."

In closing argument, the government used a "victim tree" to link together the complaining witnesses. (JA169, 171, 174). In addition to repeatedly emphasizing the "victim tree," the government highlighted the similarities between the charged sex offenses: "a theme that will be carried through this entire charge sheet and that is that [appellant] is a man who assumes yes and then waits to be proven wrong." (JA170). The government characterized appellant as "not a man who takes no for an answer" and "not a man who listens to anything, or anyone, and certainly not his family." (JA180).

The government described NB's branch of the "victim tree" as appellant's "wrapp[ing] his hands around her throat" while simultaneously having sex with her while on top of her. (JA176). Turning to the alleged New Year's Eve rape of AL, the government parroted the same language by describing how his hands were "wrapped around her neck." (JA178).

The military judge acquitted appellant of the rape of NB (Specification 3 of Charge II) and the rape of AL with an "object" (Specification 7 of Charge II), but found appellant guilty of the rape of AL with a penis (Specification 8 of Charge II). (JA182). The military judge also found appellant guilty of nine other sex offenses against AL and two other alleged child victims, JL and SC. (JA182-183).

6. The Army Court sets aside all but one sex offense against appellant.

In its initial Article 66 review, the Army Court "accepted [the government's] concession" that *Hills* error affected all of the sex offenses for which appellant was convicted, including the rape of AL. (JA014-015, 024). The Army Court then set aside or dismissed all sex offenses except the alleged rape of AL, because it concluded that the error was harmless beyond a reasonable doubt for that specification only. (JA025). Specifically, the Army Court reasoned that government's propensity arguments were minimal and there was "overwhelming" evidence of the rape, primarily the evidence that AL had been drinking that night and NB had claimed to see bruising the next morning. (JA025).

The Army Court remanded the case to the convening authority to determine whether to have a rehearing on the set-aside charges, the sentence only, or to reassess the sentence and affirm no more than forty years of confinement. (JA025). The convening authority elected the latter option, and reassessed the sentence to forty years.

When the case returned to the Army Court after the convening authority's action, it conducted a "de novo" factual and legal sufficiency review and considered appellant's contention that the *Hills* error was not harmless beyond a reasonable doubt for the rape of AL. (JA004). However, it simply "incorporated

by reference" the analysis from its first Article 66 review and concluded no relief or further discussion was warranted. (JA004).

Additional facts necessary to resolve the granted issues are included below as necessary.

I. WHETHER THE ARMY COURT ERRED IN CONCLUDING THAT THE IMPERMISSIBILE USE OF CHARGED SEXUAL MISCONDUCT AS PROPENSITY WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

The Army Court's acceptance of the government's concession that *Hills* error occurred with respect to the alleged rape of AL makes that determination the law of the case. *See United States v. Ruppel*, 49 M.J. 247, 253 (C.A.A.F. 1998). This Court reviews de novo whether the constitutional *Hills* error was harmless beyond a reasonable doubt. *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020).

Law

The use of charged sex offenses as evidence of an accused's propensity to commit other charged sex offenses violates "the presumption of innocence and right to have all findings made clearly beyond a reasonable doubt, resulting in constitutional error." *Hukill*, 76 M.J. at 222. Since the *Hills* error is constitutional, the government has the burden of proving the error was harmless "beyond a reasonable doubt." *Id.*

"Harmless beyond a reasonable doubt" is an exacting standard that is met only when a court is "confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). "[W]here it is merely 'certainly possible' that the accused was convicted solely based on properly admitted evidence, this Court will not conclude that a *Hills* error was harmless." *Prasad*, 80 M.J. at 29-30 (quoting *United States v. Guardado*, 77 M.J. 90, 94-95 (C.A.A.F. 2017)). Instead, the government must present "overwhelming" evidence of guilt. *Prasad*, 80 M.J. at 29-30.

This Court's post-*Hills* cases illustrate the government's heavy burden. In *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018), this Court noted the government had not met its burden where the alleged victim's testimony was "largely uncorroborated by eyewitness testimony or any conclusive documentary or physical evidence." However, it affirmed one specification in that case where the government introduced significant corroboration of the victim's sodomy allegation: photographs of her injuries and the broken door the accused kicked into her, testimony from unbiased witnesses that confirmed her distraught demeanor and injuries immediately thereafter, and the accused's statement confirming the victim's account (except for the sodomy itself). *Id*. In other words, the uncontroverted evidence from unbiased witnesses and photographs, combined with

admissions from the accused, was such powerful corroboration of the victim's allegations that this Court was convinced beyond a reasonable doubt the improper propensity played no role in the accused's conviction.

An accused's admissions can shore up a government's case. But even an accused's admission does not necessarily make an error harmless beyond a reasonable doubt if the accused's statements are capable of multiple interpretations. Compare *United States v. Hazelbower*, 78 M.J. 12 (C.A.A.F. 2018) (harmless where the independent evidence included the accused's "admissions of rape") with *Prasad*, 80 M.J. at 32 (not harmless where the texts could be viewed either as a confession or an apology for inappropriate, but not criminal, behavior) and *Tovarchavez*, 78 M.J. at 469 (same).

The extent to which propensity is argued to the factfinder is another important consideration in whether it had an impact on the findings. In *Prasad*, for example, this Court's prejudice analysis considered the government's closing argument, in which the trial counsel "exploited" the confusion surrounding the propensity instruction and the negative inferences to be drawn from the propensity evidence. 80 M.J. at 33. Specifically, the trial counsel argued, "And that's the lens through which you have to view this entire court (sic). [The accused] has a propensity not to stop when someone says, no." *Id*. Partly due to this

"exploitation" of propensity before the factfinder, this Court found the error was not harmless beyond a reasonable doubt. *Id*.

Beyond considering the evidence and its presentation to the factfinder, this Court has also looked to the findings to assess whether the error had an impact on the verdict. If an accused is convicted of sex offenses against different victims after using improper propensity evidence, there is an indication that the error impacted the findings. *See Prasad*, 80 M.J. at 33-34. However, this is not dispositive. As the Court noted in *Guardado*, "[i]t 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." 77 M.J. at 94. The factfinder "could still have believed that it was more likely than not that Appellant sexually assaulted [alleged victims for which he was acquitted] and used that evidence for propensity purposes, thus violating Appellant's presumption of innocence." *Id.*

Finally, in judge-alone cases tried before *Hills*, the ordinary presumption that a military judge knows and follows the law absent any contrary indication, is "not helpful to the government" with respect to whether the error occurred and whether the error was prejudicial. *Hukill*, 76 M.J. at 222. Prior to *Hills*, the common understanding of MREs 413 and 414 was that charged misconduct could be used as propensity evidence for other charged offenses. *Id.* (citing Dep't of the

Army, Pam. 27-9, Legal Services, Military Judges' Benchbook, ch. 7, para. 7-13-1 n. 3.2 (Sept. 10, 2014)). Thus, in pre-*Hills*, judge-alone cases, where there is no indication the military judge declined to use propensity evidence, it is certainly plausible that the military judge—through no fault of his or her own—used propensity in a constitutionally-impermissible manner. *Id*.

Argument

Since the Army Court in its initial review accepted the government's concession that the prosecution committed *Hills* error with respect to the alleged rape of AL, the only question before the Court is whether the error was harmless beyond a reasonable doubt. It was not. As the trial counsel argued to the factfinder, propensity was the *primary* evidence that a rape occurred as charged.

1. The government exploited improper propensity to the factfinder out of necessity because it could not otherwise prove the charged sexual act.

AL never testified that appellant penetrated her with anything, let alone his penis, during the alleged assault. She was alert and awake during parts of the alleged assault, but even then, she never said she felt or observed appellant penetrating her with anything. (JA099-100).

Recognizing AL could not testify to the "sexual act" element, the government was compelled to argue propensity to the military judge, sitting as the trier of fact. During the RCM 917 motion, the trial counsel argued the military judge could use NB's allegation of rape as propensity evidence to show he must

have raped AL in similar fashion: with his penis, while choking her. (JA165-166). The government admitted this "MRE 413 analysis" was necessary "to help the fact finder to determine what occurred beyond what evidence [AL] herself was able to present." (JA165). The government could not have been any clearer that it needed the military judge to consider propensity evidence to show not only that penetration occurred, but what caused the penetration.

If there was any question about whether the government's argument may have "contributed" to the conviction, this Court need look no further than the military judge's findings. The government charged this rape in the alternative: either appellant raped AL with his penis or with "an object." (JA165). The military judge, having heard this propensity argument about how he could find the rape occurred by penile penetration, convicted appellant only of penetrating AL with his penis. (JA182). In the absence of any specific evidence that appellant penetrated AL with his penis, the only plausible explanation for why he chose the specific specification over the general was because he was influenced by the government's propensity argument. After all, the military judge was operating in a pre-*Hills* era, where the common understanding of MRE 413/414 was that the government could use charged offenses as propensity evidence, and he never ruled that he would *not* consider the evidence for its propensity purposes.

2. Propensity was a key component of the government's closing argument.

Of course, the RCM 917 motion was not the only time the military judge countenanced the government's impermissible propensity argument without comment. The government's closing argument was built around a theme that appellant had made a "victim tree" out of his family members, including AL. (JA169). The trial counsel argued that the "theme that will be carried *through this entire charge sheet* [is] that [appellant] is a man who assumes yes and then waits to be proven wrong." (JA170) (emphasis added). The government asked the military judge, "And what does Master Sergeant Long always do? He assumes a yes…If you assume yes, *it doesn't really matter if she's awake, or asleep, or drunk, or some other things we'll get into* because you start with yes—because that's his MO." (JA173) (emphasis added).

The Army Court gave little weight to these arguments in assessing prejudice. It reasoned that these arguments were inapplicable because "assuming yes" (i.e., acting without consent) was not relevant to the charged rape of AL, or because the trial counsel was not explicitly referring to AL when he made those comments. (JA024). That is a strained reading of the government's argument. Considering the government's argument as a whole, it was clear the prosecution sought to use charged offenses to paint appellant as person who does what he wants to his family

members, regardless of whether they consented or, as in AL and the other children's charges, were capable of consenting.

The government also used remarkably similar language when describing the alleged rape of NB and AL. The trial counsel described how appellant "wraps his hands around [NB's] throat" as he penetrated her with his penis. (JA176). Then the trial counsel used the same word—"wrapping"—to describe the alleged rape of AL. (JA178). Using identical language in this way only reinforced the connection between these offenses that the government made during its improper propensity argument during the RCM 917 motion.

The government's exploitation of improper propensity evidence during the RCM 917 motion and during closing arguments is not just evidence that an error occurred. Every time the government repeated the argument to the factfinder, it increased the likelihood it would be used for an improper purpose.

3. The government's "corroboration" of AL's testimony was not just unreliable—it shed no light whatsoever on whether the sex act occurred in the manner charged.

The Army Court focused primarily on two pieces of "corroboration" to conclude the government's evidence of rape was "overwhelming": (1) TW and NB's testimony that AL was drinking with appellant that night and was upset the next morning, and (2) NB's testimony that she saw bruises on AL the next morning. (JA023-024).

The uncontroverted evidence that AL had been drinking on New Year's Eve with appellant and TW sheds little, if any, light on whether appellant raped AL. On the contrary, AL's drinking might explain why she was upset and unwilling to talk to NB the next morning: not because she had been raped, but because she was hungover, sick, and being "scream[ed] at" by her irate mother. (JA082, 086). In fact, it was NB who said AL was "still kind of intoxicated and hungover" with vomit "everywhere." (JA081-083). Evidence capable of multiple interpretations is not the sort of "overwhelming" corroboration that makes a constitutional error harmless beyond a reasonable doubt. *See Prasad,* 80 M.J. at 30. Certainly, it cannot supply evidence of a rape that AL never testified about.

NB's claim she saw bruises on AL's neck and legs the next morning was unreliable and sharply controverted. NB was not a neutral, disinterested witness, but one of appellant's accusers. In fact, it was NB's allegations of rape that the prosecution used as propensity to prove AL's rape. NB's testimony simply does not carry the same weight as the testimony from the neutral and unbiased witnesses who corroborated the victim's account in *Williams*. 77 M.J. at 464. Also unlike in *Williams*, NB's testimony about the bruising was directly contradicted by both TW and Mr. Hoogendoorn, neither of whom saw any bruises or other injuries on AL that morning. (JA149-150, 155-156).

Even if there were bruises, there were multiple alternative explanations for these supposed injuries. AL herself testified that she had fallen down a flight of stairs while drunk and that she was behaving rambunctiously that night, either of which might have explained any bruises NB saw or why AL told NB she was "hurting all over." (JA99-100, 114). TW testified that he and appellant had to carry AL upstairs into her bedroom because she was acting "crazy" and "belligerent." (JA143-144). Again, evidence capable of multiple plausible interpretations is not the "overwhelming" corroboration that renders a constitutional error harmless beyond a reasonable doubt. *See Prasad*, 80 M.J. at 30.

The government's only evidence that could raise an inference of penetration—AL's testimony that blood was "everywhere" and her vagina hurt (JA100-101, 118-119)—*was completely uncorroborated*. If anything, it was actually undermined by NB's testimony that AL complained her butt, not vagina, hurt that morning. (JA088). Further, if blood was "everywhere" as AL testified, NB likely would have found it in her bedding or clothing. Yet, NB, who was apparently looking closely enough at AL's legs to see bruises, never mentioned seeing any blood—only vomit.

Finally, the Court cannot lose sight of AL's motive to fabricate or exaggerate her allegations against appellant. Not long before she and JL went to

the police, appellant had thoroughly humiliated her in front of her entire family by showing everyone scantily clad pictures she had taken of herself, and videos of her torturing her younger sister. (JA107-109, Pros. Ex. 27). This was apparently so humiliating AL began calling herself a "whore." (JA126). Appellant also confiscated her phone, and disciplined her harshly and, in her eyes, unfairly. (JA125). Undoubtedly, this traumatic event gave AL a reason to exaggerate or fabricate claims against appellant. When as here, the defense establishes the alleged victim has a plausible motive to fabricate, the government's case is all the weaker—and there is greater likelihood that the propensity evidence played some role in the conviction. *Prasad*, 80 M.J. at 31.

In total, the evidence appellant raped AL by penetrating her with any object, let alone his penis, is far from "overwhelming." The evidence that could raise an inference that penetration occurred—the vaginal pain and bleeding—was entirely uncorroborated, just like the convictions this Court set aside in *Williams* because they were "largely uncorroborated by eyewitness testimony or any conclusive documentary or physical evidence." 77 M.J. at 464. Furthermore, the "corroboration" evidence, weak as it was, says *nothing* about whether the sex act occurred in the manner the government specifically charged. Where the military judge chose to convict appellant of penetrating AL with his penis, and acquitted

him of penetrating with any other object, it cannot be said that the use of propensity evidence did not contribute to appellant's conviction.

II. WHETHER APPELLANT'S CONVICTION FOR RAPE OF A CHILD WAS LEGALLY SUFFICIENT WHERE THE GOVERNMENT PRESENTED NO EVIDENCE OF THE CHARGED SEXUAL ACT.

Standard of Review

Legal sufficiency is reviewed de novo. *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). The test for legal sufficiency is whether a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, when considering the evidence in the light most favorable to the prosecution. *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Law

In order to sustain a conviction for rape of a child under the version of Article 120, UCMJ, in effect at the time of appellant's alleged misconduct, the government must prove that appellant committed "a sexual act with a child who has not attained the age of 12 years." Article 120(b)(1), UCMJ; 10 U.S.C. §920(b)(1) (2006 & Supp II); *Manual for Courts-Martial, United States*, (MCM), Part IV, ¶ 45.b.(2)(A) (2008 ed.). A "sexual act" is "contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs

upon penetration, however slight." Article 120(t)(1)(A), UCMJ; 10 U.S.C. §920(t)(1)(A) (2006 & Supp II).

Argument

After excising the erroneous propensity evidence, it is clear the government failed to prove beyond a reasonable doubt that appellant penetrated AL's vulva *with his penis*. Accordingly, the evidence is legally insufficient to sustain a conviction for Specification 8 of Charge II.

Put simply, there was no evidence appellant penetrated AL with his penis. AL never testified appellant penetrated her with his penis. In her account, after drinking heavily and falling down the stairs, she was sent to her room by appellant. At that point, she went to sleep. (JA099). The next thing she claimed to remember was appellant on top of her and choking her. (JA100). Then she allegedly "passed out" and awoke again to find him on top of her, choking her. (JA100). Then she allegedly fell asleep and did not wake up again until the next morning. (JA100).

AL did *not* testify that appellant was having sex with her during these periods when she was awake and appellant was allegedly choking her. In fact, she never said that she observed or felt appellant penetrate her with anything – let alone his penis. She did not even testify whether appellant was clothed. AL's testimony simply provided no direct evidence that appellant penetrated AL *with his penis*.

The remainder of the record is devoid of any other evidence that appellant's penis caused the penetration. No one was present in the bedroom to observe what happened. There was no photographic, video, forensic, medical, or admission-based evidence of penetration. Tellingly, the Army Court twice affirmed appellant's conviction without identifying a single shred of evidence showing appellant's penis caused the penetration. (JA002-025)

If all inferences are drawn in favor of the government, and every word of AL's testimony is believed, there is–at most–circumstantial evidence of penetration by an unknown source, in the form of alleged vaginal pain and bleeding. However, it requires further inference to conclude that the penetration was caused by one particular source, namely appellant's penis.

The military judge convicted appellant of penetrating AL with his penis, and acquitted him of penetrating her with an object. (JA182). Accordingly, the conviction must be supported by evidence that appellant's penis–not some other object, like a finger–was the instrument of the penetration. The government was unable to meet this burden at the close of its case without using improper propensity evidence, and that remains the fact of the case.

III. WHETHER THE ARMY COURT ABUSED ITS DISCRETION IN REASSESSING THE SENTENCE.

Additional Facts

The military judge found appellant guilty of twelve offenses against three children—AL, JL, and SC—that occurred on different occasions over the course of six years. Ten of those offenses were sex offenses, and they occurred over the course of six years:

- Offenses involving AL: Indecent acts with a child (Specifications 2 and 3 of Charge I); sodomy with a child (Additional Charge II); rape of a child (Specification 8 of Charge II).

- Offenses involving JL: Abusive sexual contact with a child (Specifications 9 and 10 of Charge II) and sexual abuse of a child (Specification 11 of Charge II).

- Offenses involving SC: Abusive sexual contact with a child (Specification 4 of Charge II), indecent liberties with a child (Specifications 5 and 6 of Charge II).

(JA034-038).

Five witnesses testified for the government during sentencing. JL and her mother, ML, testified about how appellant's alleged sexual abuse of JL affected her and her family. (JA184-187, 200-202). SC testified about how appellant's sex offenses had affected her. (JA193-196). AL and NB testified about how appellant's sodomy, rape, and other sex offenses against AL impacted her. (JA188-192, 197-199).

To justify the fifty-year sentence the trial counsel recommended, the trial counsel echoed the "victim tree" theme from the merits phase of trial by emphasizing the gravamen of appellant's misconduct was his repeated course of conduct against multiple victims over the course of years: "This man is a predator. Given the pattern of his misconduct, there is no other title for him." (JA203). The military judge sentenced appellant to sixty years—ten more than the government requested. (JA204).

In its initial Article 66 review, the Army Court dismissed two specifications, set aside seven others, and set aside the sentence. It then provided the convening authority the option to (1) order a combined rehearing on the set-aside specifications and the sentence; (2) dismiss the set-aside specifications and order a rehearing on the sentence alone; or (3) dismiss the set aside specifications and approve no more than forty years of confinement. (JA019). The convening authority elected the third option, and approved a sentence of forty years of confinement—exactly the sentence the Army Court authorized. (JA046).

The following chart documents the maximum sentence associated with each of the specifications that were dismissed during appeal:

Specification	Offense and alleged victim	MCM Edition	Maximum Confinement
Spec. 2, Charge I	Indecent acts with a child [AL]	2002	7 years
Spec. 3, Charge I	Indecent acts with a child [AL]	2002	7 years
Spec. 4, Charge II	Abusive sexual contact with a child [SC]	2008	15 years
Spec. 5, Charge II	Indecent liberties with a child [SC]	2008	15 years
Spec. 6, Charge II	Indecent liberties with a child [SC]	2008	15 years
Spec. 9, Charge II	Abusive sexual contact with a child [JL]	2008	15 years
Spec. 10, Charge II	Abusive sexual contact with a child [JL]	2008	15 years
Spec. 11, Charge II	Sexual abuse of a child [JL]	2012	15 years[5]
Additional Charge II	Sodomy with a child under 12 [AL]	2002	Life without eligibility for parole

[5] At the time of this offense, the President had not yet promulgated a maximum sentence for sexual abuse of a child under the then-newly enacted Article 120b, UCMJ. The maximum sentence was subsequently set at twenty years by Executive Order 13,643, 78 Fed. Reg. 29559 (May 15, 2013). However, since appellant's offense occurred prior to the effective date of Executive Order 13,643, RCM 1003(c)(1)(B)(ii) applies. *See United States v. Busch*, 75 M.J. 87, 93 (C.A.A.F. 2016). In *Busch*, this Court applied the "custom of the service" to determine the maximum sentence for sexual abuse of a child. The "general usage of the service" would likely have been to charge appellant with abusive sexual contact with a child, as the government did for similar offenses involving JL in Specifications 9 and 10 of Charge II, each of which carried a maximum sentence of confinement of fifteen years.

In effect, all offenses involving JL and SC, in addition to a specification of sodomy and two specifications of indecent acts with AL, were dismissed. Of the years of sexual abuse involving multiple child victims for which he was originally convicted, appellant remains convicted only of the offenses against AL on New Year's Eve 2009.

In its second review, the Army Court concluded that it had erred by setting aside the sentence and "reassessing" a maximum forty-year sentence for the convening authority to approve in lieu of a rehearing. Citing *Gonzalez*, 79 M.J. at 469, the Army Court again determined it could reassess the sentence after conducting the following analysis pursuant to *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2011):

> The remaining convictions were subject to a maximum sentence of confinement for life without the possibility of parole and as such there is no drastic change in the penalty landscape. While multiple charges of both sexual and non-sexual offenses were dismissed, appellant remains convicted of the most serious misconduct. The gravamen of the offenses involved an extremely vulnerable child victim. Appellant targeted his own child with deliberate action to neutralize her in order to violently rape her.

(JA006). The Army Court then affirmed exactly the same forty years of confinement that the original Army Court panel had found appropriate after its "reassessment." (JA006, 019).

Standard of Review

A service court of criminal appeals' (CCA) decision about whether to reassess the sentence or order a rehearing is reviewed for an abuse of discretion. *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006). This Court "will only disturb the [lower court's] reassessment in order to prevent obvious miscarriages of justice or abuses of discretion." *Winckelmann*, 73 M.J. at 15 (internal quotations omitted).

Law

A CCA has discretion on whether to reassess the sentence, but it must be able to reliably conclude that in the absence of error, the sentence "would have been at least of a certain magnitude," and the reassessed sentence must be "no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986); *Winckelmann*, 73 M.J. at 12. "If the error at trial was of constitutional magnitude, the [CCA] must be persuaded beyond a reasonable doubt that its reassessment has rendered that constitutional deprivation harmless." *United States v. Boone*, 49 M.J. 187, 195 (C.A.A.F. 1998) (citing *Sales*, 22 M.J. at 307; *Chapman*, 386 U.S. at 21-24).

In *Winckelmann*, this Court endorsed four non-exhaustive factors for CCAs to consider when assessing whether it can reassess the sentence. In addition to considering the totality of the circumstances, CCAs must consider:

> (1) dramatic changes in the penalty landscape and exposure,
>
> (2) the forum,
>
> (3) whether the remaining offenses capture the gravamen of the criminal conduct included within the original offenses, and whether significant or aggravating circumstances remain admissible and relevant,
>
> (4) whether the remaining offenses are the type with which appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial by the sentencing authority.

Winckelmann, 73 M.J. at 15-16 (internal citations omitted).

In *United States v. Gonzalez*, 79 M.J. 466 (C.A.A.F. 2020) and *United States v. Wall*, 79 M.J. 456 (C.A.A.F. 2020), this Court considered two cases where the Army Court had set some of the findings of guilty and the sentence, and remanded to the convening authority with the option to order a combined rehearing, a sentence-only rehearing, or to dismiss the set-aside charges and reassess the sentence with a putative sentence cap it had already determined appropriate.

This Court determined that the third option constituted an ultra vires advisory opinion. This Court warned that the advisory opinion on a reassessed sentence "posed a substantial risk" in interfering with the independent decision-making authority of *both* the convening authority and the members of the Army

Court that would hear the case when it returned after the remand. *Wall*, 79 M.J. at 461. This Court held that a "specter of improper influence" arises when the convening authority is aware of the sentence cap, and then approves the exact same sentence. *Gonzalez*, 79 M.J. at 469. Accordingly, this Court remanded both cases to the Army Court to either conduct a fresh reassessment (if it could), or remand to the convening authority for either a combined rehearing or a sentence-only rehearing. *Id*. at 470.

Argument

Three unusual aspects of appellant's case make it uniquely clear that the Army Court abused its discretion in determining it could conduct a sentence reassessment. First, it appears the Army Court applied the wrong standard when it determined it could reassess the sentence. Second, it misapplied the *Winckelmann* factor analysis because the number of serious sex offenses dismissed completely transformed the gravamen of appellant's convictions and penalty landscape, thereby rendering the bulk of the government's aggravating evidence inadmissible. Third, the Army Court was operating with knowledge of an earlier panel's advisory opinion, and its ultimate conclusion that it could reassess the sentence to forty years of confinement—the exact same reassessed sentence cap from the initial advisory opinion—raises an unrebutted specter of improper influence on its ultimate conclusion.

1. The Army Court applied the wrong legal standard when it determined it could "adequately" reassess the sentence.

Since the *Hills* error was of constitutional magnitude, the Army Court had to be convinced *beyond a reasonable doubt* that it could determine the sentence the factfinder would have adjudged, absent the improper use of propensity evidence. *Moffeit,* 63 M.J. at 41; *Boone*, 49 M.J. at 195. It is not clear from the opinion that the Army Court was convinced beyond a reasonable doubt that it could accomplish that task. Unlike the lower court's decision in *Moffeit,* where the CCA expressly stated it was "satisfied beyond a reasonable doubt" that it could determine what sentence the military judge would have adjudged, the Army Court here never cited the "beyond a reasonable doubt" standard in its opinion. 63 M.J. at 41. On the contrary, the Army Court merely "determined, based on the totality of the record, we can *adequately* reassess appellant's sentence." (JA005) (emphasis added).

An "adequate" reassessment is not the same being convinced beyond a reasonable doubt as to what the factfinder would adjudged at trial. This unusual formulation of the "beyond a reasonable doubt" standard indicates the Army Court applied an inappropriately low legal standard when it concluded it could reassess the sentence. It is clear error and an abuse of discretion where, as here, the CCA applies the wrong legal standard in deciding between a reassessment or a rehearing. *See Moffeit*, 63 M.J. at 41 (citing *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005)).

2. The Army Court's *Winckelmann* analysis was fundamentally flawed.

Not only did the Army Court appear to apply the wrong legal standard when it concluded it could reassess the sentence, it also conducted a fundamentally flawed W*inckelmann* factor analysis.

A. The penalty landscape changed significantly.

Regarding the first *Winckelmann* factor, the Army Court concluded that since the maximum sentence remained life without eligibility for parole even after all of the dismissals, there was "no drastic change in the penalty landscape." (JA006). In effect, the Army Court conflated the distinct concepts of "punitive exposure" with "punitive landscape."

In most cases, these concepts overlap. Where dismissals of charges on appeal reduce the maximum sentence from a fixed number of years (say, 30 years) to another fixed number of years (say, 15 years), the change in "punitive exposure" and "penalty landscape" mean the same thing—a reduction of a certain number of years or percentage of the adjudged sentence. However, in cases like appellant's case, where a maximum sentence to an indeterminate number of years (life without parole) remains after dismissing a number of charges, the punitive exposure and landscape are separate and distinct. The maximum punitive exposure remains unchanged, but the landscape has changed because a number of offenses carrying lengthy maximum punishments are no longer on the table.

This Court has previously recognized that a penalty landscape can change significantly, even when the maximum punitive exposure remains unchanged. In *United States v. Eversole,* 53 M.J. 132 (C.A.A.F. 2000), the Army Court dismissed one of several specifications against Sergeant First Class Eversole, but he remained exposed to the same maximum sentence: the jurisdictional maximum of a special court-martial. *Id*. at 133. Although the maximum exposure remained the same, this Court found that the Army Court abused its discretion by reassessing the sentence, rather than ordering a rehearing, in part because of the particularly serious nature of the offense dismissed (aggravated assault). *Id*. at 134.

This case is similar, but on a far greater scale than *Eversole*. Eight of the nine dismissed specifications carried a combined maximum sentence of confinement of *104 years*. The ninth dismissed specification—sodomy of a child under 12—carried a maximum sentence of *life without parole*. It is not mathematically possible to add 104 years to a sentence of life without parole, but it is clear that a significant part of the sentencing landscape the military judge was looking at as he fashioned the sentence, is no longer part of the picture.

The Army Court's finding that there is no "drastic change" in the penalty landscape, just because the maximum punitive exposure remained the same, is a clear misapplication of *Eversole*. The Army Court abused its discretion by disregarding the magnitude of the combined maximum sentence for the nine

dismissed charges—all of which were serious child sex abuse offenses—just because the maximum sentence of life remained on the table.

B. Without a sentence rehearing, there is no way to know how much the now-inadmissible testimony influenced the sentence.

The second and fourth *Winckelmann* factors weigh slightly in favor of reassessment. Although appellant was tried by a military judge, and appellate judges have familiarity and expertise with cases of child sexual abuse, the appellate judges did not have the opportunity to see and hear the witnesses for themselves. The cold words on the page make it exceedingly difficult to ascertain what portion of the sixty-year adjudged sentence was based on the now-inadmissible merits and sentencing testimony from ML, JL, and SC.

An even more difficult task is assessing the weight of AL and NB's sentencing testimony, which was based on both the affirmed rape and the dismissed sodomy incident. Yet that is precisely what the appellate judges on the Army Court would have had to do in order to be convinced *beyond a reasonable doubt* that it could fashion a sentence that purged the record of the constitutional *Hills* error. In a case where so much of the government's case became irrelevant, these factors do not outweigh the remaining *Winckelmann* factors.

C. The bulk of the government's case is inadmissible, and the remaining convictions no longer capture the gravamen or nature of appellant's criminality.

The third *Winckelmann* factor weighs so heavily in appellant's favor as to eclipse all others. At trial, appellant was convicted of sexually abusing multiple children in his family over the course of six years. In the sphere of sexual offenses, the difference between one and more than one conviction is itself a material factor in sentencing. The government's case was that appellant was a "predator" with a pattern and "victim tree" with many branches. Although the Army Court emphasized how the rape of AL was "the most serious misconduct," the prosecution at trial emphasized the sheer number of offenses and victims, rather than focusing on one offense in particular. In other words, the breadth and seriousness of his misconduct against *multiple* child victims was the gravamen of the government's case, and the reason for the trial counsel's fifty-year sentence recommendation. The theme and theory of the government's case was that appellant was a serial predator over a long period of time, not that his actions against AL were singularly offensive.

Now, appellant stands convicted of misconduct occurring on a single occasion against a single victim on New Year's Eve 2009. Gone are the serious sexual abuse offenses involving SC and JL. Gone, too, is the sodomy specification

with AL that carried a maximum sentence of life without parole.[6] As a result, the bulk of the government's evidence during the merits and during pre-sentencing is no longer admissible. Even the weight of AL's testimony in sentencing is unclear because the sodomy and indecent acts offenses involving her were subsequently dismissed. Since "significant or aggravating circumstances addressed at the court-martial" are no longer admissible, this *Winckelmann* factor outweighs the others in appellant's favor.

The dismissal of so many serious child sex offenses involving multiple alleged victims and incidents over a six-year time span makes this one of those unique cases where it is impossible to reliably reassess the sentence. The only way to accurately determine what sentence the sentence of error is through a sentencing rehearing, where the factfinder can see and hear the witnesses without being influenced by the significant amount of inadmissible and irrelevant evidence woven throughout the record.

[6] In addition to being convicted of sodomizing AL, appellant was also convicted of committing indecent acts with her by "touching her genitalia with his hand" (Specification 2 of Charge I) and "forcefully grabbing her hand and placing it on his penis" (Specification 3 of Charge I) during this incident. (JA034).

2. The Army Court's initial ultra vires sentence reassessment influenced the convening authority and the subsequent panel's decision to reassess.

In its initial review, the Army Court committed the same error as in *Wall* and *Gonzalez* when it "reassessed" the sentence and created a sentence cap, after setting aside the sentence. In *Gonzalez,* this Court warned this sort of advisory opinion created a "substantial risk of interfering with the convening authority's independent decision-making authority" regarding what sentence would purge the record of error and was appropriate. 79 M.J. at 469. The "specter" of improper influence exists and warrants reversal where, armed with that knowledge, the convening authority reassesses the sentence to exactly what the Army Court "pre-assessed" for him. *Id*. Though left unsaid in *Gonzalez* and *Wall,* the improper influence undoubtedly extends to his analysis of whether the sentence is capable of reassessment in the first place.

Just as a convening authority can be influenced—consciously or subconsciously—by the advisory opinion, so too can appellate judges. As this Court remarked in *Wall*, "the CCA's 'reassessment' was more than just an advisory opinion. It sent a message to both the convening authority *and members of the CCA who would sit on the case when it returned after remand*." 79 M.J. at 461 (emphasis added). This Court then rejected "any suggestion that the panel that reviews Appellant's case in the future is authorized to give it any less than the full

consideration of the appropriateness of the sentence as required by Article 66(c), UCMJ." *Id*. at n. 2.

Although this Court in *Wall* and *Gonzalez* authorized the service court to conduct a sentence reassessment on remand, the implied task was to dispel any specter that the advisory opinion had any impact on their subsequent reassessment. And in fact, in both *Wall* and *Gonzalez* on remand, the CCAs effectively dispelled any such notion by arriving at a different conclusion than the initial advisory opinion. *United States v. Wall*, 2020 CCA LEXIS 340, at *3 (Army Ct. Crim. App. Aug. 24, 2020) (JA224-225); *United States v. Gonzalez*, 2020 CCA LEXIS 336, at *4 (Army Ct. Crim. App. Sep. 14, 2020) (JA226-227).

That did not happen in this case. Just as in its initial review, the Army Court concluded it could reassess the sentence and then arrived at precisely the same reassessed sentence. The Army Court noted that its factual and legal sufficiency review of the case was "de novo," and acknowledged that the original decision to "conduct[] a sentence reassessment and remand[]. . . with a cap on sentence to the convening authority" was error. (JA004). However, it never expressly stated that it had disregarded the initial panel's forty-year reassessment. And even if the Army Court had expressly disclaimed the prior forty-year reassessment, no reasonable person would believe it was mere coincidence that the Army Court arrived at exactly the same forty-year sentence as the original panel, given how

many charges had been dismissed. Accordingly, what this Court is left with is a lingering specter of improper influence from the initial advisory opinion. That, combined with the Army Court's apparent use of the wrong standard of review and faulty *Winckelmann* factor analysis, makes this the rare and unusual case where the Army Court's decision to reassess the sentence was an abuse of discretion.

Conclusion

Appellant requests this Court dismiss the finding of guilty for Specification 8 of Charge II due to legal insufficiency, or in the alternative, set aside that Specification because the *Hills* error was not harmless beyond a reasonable doubt. Regardless of how this Court handles that Specification, it should set aside the sentence and authorize a rehearing because a sentence reassessment is not possible in this unusually complex case.

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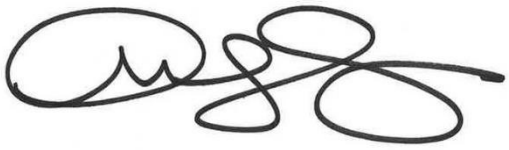

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 10,759 words.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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Certificate of Filing and Service

I hereby certify that a copy of the foregoing Brief on Behalf of Appellant in the case *United States v. Long*, USCA Dkt. No. 21-0085/AR, was served electronically on the Court and the Government Appellate Division on March 24, 2021.

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