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	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150160 USCA Dkt. No. 21-0085/AR

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

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

1. The government has not pointed to "overwhelming" corroboration of AL's testimony.

In *United States v. Upshaw*, ___ M.J. ____, 2021 CAAF LEXIS 278 (C.A.A.F. Mar. 24, 2021), this Court tied together some of the common threads in its jurisprudence on what amount of evidence renders a *Hills*[1] error harmless beyond a reasonable doubt. Applying the analysis from *Upshaw*, it is clear the government has failed to show the error was harmless beyond a reasonable doubt in this case.

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

In *Upshaw*, this Court concluded that an alleged victim's immediate, credible claim of sexual abuse might make the assault "certainly possible" or "considerably more than just a he said/he said situation." *Upshaw*, slip. op. at 14. However, in contrast to the overwhelming evidence of guilt in *Williams*, which consisted of uncontroverted physical evidence of damaged property and "medical confirmation" of non-sexual injuries consistent with the victim's description of the assault itself, this Court concluded the evidence was not "overwhelming" in part due to the absence of physical evidence supporting the alleged victim's account. *Upshaw*, slip. op. at 13-14 (citing *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018)).

The common thread between *Upshaw*, *Williams*, and other cases this Court has decided about prejudice is that it is difficult for the government to show the *Hills* error "did not contribute" to the conviction, without uncontroverted evidence from a source other than the alleged victim that matches the victim's account of the assault itself. That is why evidence such as admissions from the accused or DNA evidence capable of multiple interpretations—one of which being consistent with the defense theory—has not been enough. *See, e.g.*, *United States v. Prasad*, 80 M.J. 23, 30-32 (C.A.A.F. 2020) (accused's Snapchat messages could simply be an apology for inappropriate behavior); *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (DNA could be consistent with consensual encounter);

United States v. Hukill, 76 M.J. 219, 220 (C.A.A.F. 2017) (evidence controverted as to whether accused confessed to the assault).

Here, the government points to no evidence corroborating AL's testimony regarding the circumstantial evidence of penetration; namely, the blood she claimed was "all over" and the vaginal pain she felt the next morning. The government simply asserts AL's testimony is enough. (Appellee's Br., 16-17) ("Moreover, AL's testimony clearly established Appellant's guilt."). This Court has rejected the notion that a victim's testimony alone, however credible, is enough to show an error was harmless beyond a reasonable doubt. *Upshaw*, slip. op. at 10 (citing *United States v. Guardado*, 77 M.J. 90 (C.A.A.F. 2017)). Further, AL's demeanor the next morning is less indicative of appellant's guilt than the alleged victim's immediate and emotional outcry of sexual abuse in *Upshaw*. AL may have been upset because she was hungover, sick, and being berated by her mother. More importantly, AL never told anyone for years about the vaginal blood or pain—that is until she became enraged with appellant for broadcasting her own inappropriate behavior to her entire family.

In total, the government spends no more than half a page laying out what it claims to be "overwhelming" evidence against appellant: AL had been drinking the night prior with appellant and TW, and NB claimed she saw bruises the next morning. (Appellee's Br., 16). There is no dispute AL had been drinking that

night, but that says nothing one way or the other about whether appellant raped her, or that he did so with his penis. The evidence of bruising was nowhere near as compelling as the "medical confirmation" in *Williams*. It came from NB, a biased witness whose allegations were being used as propensity evidence to prove AL's rape, and was contradicted by TW and Mr. GH. And even if there were bruises, they could have been caused by her "belligerent" behavior that night, her fall down a flight of stairs, or when appellant and TW had to carry her up the stairs into bed. Such evidence, being capable of multiple interpretations, is not enough to say the error was harmless beyond a reasonable doubt.

The government has failed to show that its use of propensity evidence played "no role" in appellant's conviction, where the circumstantial evidence of penetration was completely uncorroborated, AL had a motive to fabricate, and the sole evidence of her injuries after the alleged rape was contradictory and inconclusive.

2. The prosecution relied heavily on propensity arguments.

The government claims the trial counsel's argument was "descriptive to Appellant's actions to each individual person he assaulted and in each individual situation." (Appellee's Br. 19). Not so. The "victim tree" metaphor was used to show the interconnected nature of appellant's alleged victims, not just who was related to whom. This interconnectedness, or as the trial counsel put it, the "theme

that will be carried *through this entire charge sheet*," was that appellant "is a man who assumes yes and then waits to be proven wrong." (JA170) (emphasis added). Elsewhere, the trial counsel described what he meant when he said appellant is a "man who assumes yes," and it clearly applied to the alleged rape of AL: "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). In context, the trial counsel's reference to "assuming yes" was clearly intended to convey appellant was a serial sex abuser of family members, regardless of their capacity or ability to consent.

Yet, the prosecution's use of propensity in *closing argument* is really just the icing on the cake. The prosecution's most flagrant exploitation of improper propensity occurred during the RCM 917 motion hearing when the trial counsel asked the military judge to use it to determine whether appellant penetrated AL with his penis or with an object. The fact that the prosecution made the most explicit propensity arguments during the RCM 917 motion, rather than in closing argument, does not change the fact that it exploited improper propensity before the factfinder. The prosecution did not need to hammer propensity in closing argument because it had already used the sledgehammer in the middle of trial.

Contrary to the government's assertion that there was "no indication the military judge even considered propensity," (Appellee's Br., 20), the military judge

accepted the government's argument without comment and under the then-prevailing understanding of the law that propensity could be used in that manner. The military judge never announced he had disregarded the government's propensity arguments in reaching his verdict. The fact that he found appellant guilty of penetrating AL *with his penis*, rather than an object, after hearing the prosecution admit there was no evidence of penile penetration other than propensity, demonstrates that this evidence played a role in the military judge's findings. Under these circumstances, this Court "cannot be certain that the [military judge's] ultimate determination of guilt was not affected" by the use of propensity. *See Upshaw*, 2021 CCA LEXIS at *14.

3. The military judge's verdict indicates propensity played a role in the convictions.

The government points out that the prosecution's use of propensity for a cluster of charges *not* involving AL did not result in convictions. The government claims this shows propensity evidence and argument were simply unpersuasive to this particular military judge. (Appellee's Br., 21). Of course, this assertion completely ignores the Army Court's conclusion (and the government's concession before the Army Court) that propensity *did* affect the military judge's finding of guilt for nearly all of appellant's other convictions for child sex abuse offenses.[2]

[2] The Army Court dismissed two specifications for factual and legal insufficiency, rather than *Hills* error. (JA016-017).

That is hardly surprising, given the military judge's understanding of the law at the time of trial.

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

The government points to no evidence in the record that appellant penetrated AL with his *penis*, as charged. (Appellee's Br., 23). That's hardly surprising, since the trial counsel admitted during the RCM 917 motions hearing that there was no such evidence, which is why he asked the military judge to use improper propensity to fill in that gap. The government asks this Court to infer not only that penetration occurred, but further that appellant's penis was the source of penetration despite the lack of any evidence whatsoever that appellant's penis was involved. That is a bridge too far given the state of the evidence in the record.

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

In claiming the Army Court did not abuse its discretion in reassessing the sentence, the government faults appellant for "present[ing] no evidence that the three Army [C]ourt judges were inexperienced or otherwise unequal to the task of performing their statutory duties under Article 66." (Appellee's Br., 32). Yet, as this Court held in *United States v. Gonzalez*, the "specter of improper influence" exists, and the presumption of regularity is rebutted, when the persons performing

the sentence reassessment are aware of the prior advisory opinion, and then approve that exact same sentence. 79 M.J. 466, 469 (C.A.A.F. 2020). In other words, the burden is on the government to dispel the specter of improper influence created by the original advisory opinion. And the government has failed to do so in this case.

On the contrary, as even the government admits, the Army Court's most recent opinion fails to state whether it was convinced beyond a reasonable doubt it could reassess the sentence and that forty years of confinement purged the record of error.[3] (Appellee's Br., 28). Then the government engages in the same faulty *Winckelmann*[4] factor analysis as the Army Court by conflating "penalty landscape" with "penalty exposure" and disregarding the fact that the gravamen of appellant's *affirmed* convictions (a single incident on New Year's Eve) is far different from the gravamen of his *adjudged* convictions (a serial child sexual predator whose misconduct spanned six years). (Appellee's Br., 30-32).

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[3] The government's assertion that the law is unclear whether the "harmless beyond a reasonable doubt" standard applies when determining the specific sentence, (Appellee's Br., n. 3), only *undermines* its claim that the Army Court applied the correct legal standard. If the government is correct that the standard is unclear, and the Army Court fails to state what standard it was applying, this Court cannot know whether the Army Court properly applied the law. At a minimum, that would require a remand for clarification. See *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005).

[4] *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013).

Ultimately, it is the confluence of a number of unusual aspects of this case that made the Army Court's decision to reassess an abuse of discretion. The Army Court conducted its reassessment with knowledge of the putative sentence cap, and by affirming the exact same sentence, it did nothing to dispel the specter of improper influence. It simply strains credulity to believe it was mere coincidence that the Army Court arrived at the exact same forty-year sentence, considering the sheer number of serious offenses dismissed and fundamental transformation of the nature of appellant's convictions. The far more likely explanation is that the Army Court's most recent reassessment was improperly influenced by the advisory opinion. The only cure at this point is to remand for rehearing on the sentence.

Conclusion

For the reasons set forth above, appellant requests this Court grant the relief requested in the Brief on Behalf of Appellant.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Long, Crim. App. Dkt. No. 20150160, USCA Dkt. No. 21-0085/AR, was electronically filed with the Court and Government Appellate Division on May 3, 2021.

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