

**Thursday, 15 March 2018 (1000)**  
**The United States Navy-Marine Corps Court of Criminal Appeals Courtroom**  
**1254 Charles Morris Street SE, Bldg. 58, Suite 320**  
**Washington Navy Yard, DC 20374**

*United States v. Berger*, NMCCA No. 201500024

**Before Panel 2 of the Court: Chief Judge Glaser-Allen**  
**Judge Fulton**  
**Judge Sayegh**

**For Appellant: Mr. David Sheldon, Esq.; LT Drew Austria, JAGC, USN**

**For Appellee: Maj Kelli O'Neil, USMC**

A military judge sitting as a general court-martial convicted the appellant, pursuant to his plea, of violating a lawful general order by wrongfully possessing a synthetic cannabinoid compound. At the same court-martial, a panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of rape, one specification of sexual assault, one specification of aggravated sexual contact, two specifications of abusive sexual contact, and one specification of assault consummated by a battery. The members sentenced the appellant to 78 months' confinement, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. The convening authority approved the sentence as adjudged, and, except for the punitive discharge, ordered the sentence executed.

Although this court affirmed the findings and sentence, the Court of Appeals for the Armed Forces set aside our decision and remanded the case for reconsideration in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).

The issue to be argued before the court is as follows:

- I. WHETHER THE EVIDENCE IN THIS CASE RENDERS THE MILITARY JUDGE'S INSTRUCTION ON THE PROPER USE OF PROPENSITY EVIDENCE, UNDER MILITARY RULE OF EVIDENCE 413, HARMLESS BEYOND A REASONABLE DOUBT, IN LIGHT OF *UNITED STATES V. HILLS*, 75 M.J. 350 (C.A.A.F. 2016) AND ITS PROGENY, *UNITED STATES V. GUARDADO*, 77 M.J. 90 (C.A.A.F. 2017) AND *UNITED STATES V. LUNA*, 76 M.J. 477 (C.A.A.F. 2017).**