**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES** | ) | **ASSIGNMENT OF ERRORS** |
| *Appellee,* | ) | |
| | ) | Before Panel No. 2 |
| v. | ) | |
| | ) | Case No. ACM 39018 |
| Technical Sergeant (E-6) | ) | |
| Ralph G. Morales | ) | Tried by general court-martial at |
| USAF, | ) | Fairchild Air Force Base, WA by the |
| | ) | Commander, Headquarters 18th Air |
| *Appellant*. | ) | Force (AMC) on 9-13 November |
| | ) | 2015. |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

**Issues Presented**

**I.**

**WHETHER THE APPLICATION OF EXECUTIVE ORDER 13696—WHICH ELIMINATED THE "CONSTITUTIONALLY REQUIRED" EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE—WAS (1) AN ABUSE OF THE MILITARY JUDGE'S DISCRETION OR (2) DEPRIVED APPELLANT OF HIS RIGHT TO CONFRONT HIS ACCUSER, TO COMPULSORY PROCESS, OR TO DUE PROCESS OF LAW.**

**II.**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INSTRUCTED THE MEMBERS "IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED YOU MUST FIND HIM GUILTY," WHERE SUCH AN INSTRUCTION IS IN VIOLATION OF *UNITED STATES V. MARTIN LINEN SUPPLY CO.*, 430 U.S. 564, 572-73 (1977).**

## III.

## WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN THE CONVICTIONS HERE.

### Statement of the Case

On 9-13 November 2015, a panel of members with enlisted representation sitting at a general court-martial tried and convicted Appellant, contrary to his pleas, of three specifications of assault in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). The panel acquitted Appellant of three separate assault specifications and one specification of wrongfully communicating a threat in violation of Article 134, UCMJ. The members sentenced Appellant to be reprimanded; to be reduced to the grade of E-4; to be confined for four months and to be discharged from the service with a bad conduct discharge.

### Statement of Facts

The charges and specifications at issue here were preferred against Appellant on 9 March 2015. Charge Sheet; R. 6.1-6.3. They were subsequently referred to a general court-martial on 20 May 2015. *Id*.

During discovery, on 2 June 2015, the defense requested copies of, *inter alia*, the complaining witness's medical and mental health records. App. Ex. V at 10. These requests implicated Military Rules of Evidence (Mil. R. Evid.) 513, which provides a privilege for patients of psychotherapists that allows them to "refuse to disclose a confidential communication made between the patient and a psychotherapist . . . if [the] communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(a), Supplement to Manual for

Courts-Martial, May 15, 2013. There are several exceptions to this privilege listed in subsection (d) of the rule. At the time Appellant made his discovery request, one of the exceptions (listed in Mil. R. Evid. 513(d)(8)) provided that there was no privilege "when admission or disclosure of a communication is constitutionally required." Mil. R. Evid. 513(d)(8), Supplement to Manual for Courts-Martial, May 15, 2013.

On 8 July 2015, the defense moved to compel production of the complaining witness's mental health records. App. Ex. V at 5. The Government responded stating that it had provided the Defense with the material it already possessed and that it was in the process of obtaining further records which it intended to provide to the military judge for *in camera* review. App. Ex. VI at 4.

But both the defense motion and the initial Government response appear to have been made without considering that the President removed the "constitutionally required" exception to the privilege by Executive Order 13696 on 17 June 2015—just fifteen days after the defense made its initial request for the complaining witness's mental health records. Executive Order 13696 at 39. The President's order provided that the amendments listed "shall take effect as of the date of this order" but also explained that nothing in the amendments shall be construed to invalidate any "referral of charges" that had already occurred and that "any referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed." Executive Order 13696 at 1.

Nonetheless, after a closed hearing on the issue, the military judge denied the defense request to conduct an *in camera* review of the mental health records but permitted the defense to file a supplemental briefing that addressed the underlying

unconstitutionality of the President's order. App. Ex. XXXV at 1. The defense did so, and in its motion alleged that the President's executive order was: (1) an unconstitutional deprivation of his Sixth Amendment right to confrontation; (2) a deprivation of his right to Compulsory Process; and (3) a deprivation of his right to Due Process of law. App. Ex. XXXV at 1. Appellant further alleged that the application of the change, which occurred after his court-martial had already begun, constituted an unconstitutional *ex post facto* application of the rule. *Id*.

In contrast to its previous position, the Government opposed the defense's motion. It noted that Congress specifically directed the President to remove the "Constitutionally required" exception to Mil. R. Evid. 513 in the National Defense Authorization Act for fiscal year 2015. App. Ex. XXXVI at 2. And it argued that the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), "explicitly rejects balancing a defendant's Constitutional right against the protections provided by the privilege 'because it would frustrate the aim of the privilege by making its application uncertain . . . .'" App. Ex. XXVI at 3.

The military judge agreed. He noted that the *Jaffee* court recognized that "the privilege may not be absolute" but agreed with the Government that the Court rejected the balancing component of the privilege that the lower courts had used. App. Ex. XXXVII at 1. He went on to hold that the changes to Mil. R. Evid. 513 did not facially violate Appellant's Constitutional rights and that *Jaffee* did not "require after the fact trial court determinations of statements protected by" the psychotherapist-patient privilege. *Id*. at 4. His ruling did not address the fact that the President's order allowed actions that had already begun to continue as though the amendments to the rule had not been made. *See*,

*id.*

After the close of evidence, the Defense requested that the Military Judge supplement the Air Force Benchbook instruction on reasonable doubt. R. at 617. Trial Counsel had no specific objection to the proposed instruction, but the Military Judge decided that the court would "stick with the standard Air Force Benchbook instruction with regard to reasonable doubt . . . ." R. at 618. In accordance with this ruling, the Military Judge instructed the members that:

> A reasonable doubt is a conscientious doubt based upon reason and common sense and arising from a state of the evidence. Some of you may have served as jurors in civil cases or as members of an administrative board where you were told that it is only necessary to prove that a fact is more likely true that not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence, you are *firmly convinced* that the accused is guilty of any offense charged, you *must* find him guilty.

R. at 630-31 (emphasis added). The Military Judge had previously given this same instruction superfluously to the members during *voir dire*. R. at 256.

Further facts necessary to resolve the assigned errors are detailed in the brief below.

## Argument

## I.

**WHETHER THE APPLICATION OF EXECUTIVE ORDER 13696—WHICH ELIMINATED THE "CONSTITUTIONALLY REQUIRED" EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE—WAS (1) AN ABUSE OF THE MILITARY JUDGE'S DISCRETION OR (2) DEPRIVED APPELLANT OF HIS RIGHT TO CONFRONT HIS ACCUSER, TO COMPULSORY PROCESS, OR TO DUE PROCESS OF LAW.**

A. Standard of review:

The question of whether the President's order deprived Appellant of his Constitutional rights is a question of constitutional law reviewed *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2008). State and federal rulemakers generally have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). Despite this latitude, rules that exclude evidence may be unconstitutionally arbitrary or disproportionate if they infringe "upon a weighty interest of the accused." *Id*.

B. Law and Argument:

The military judge's application of the new version of Mil. R. Evid. 513 was both an abuse of his discretion and an infringement upon Appellant's weighty constitutional interests.

**1. The Military Judge abused his discretion when he applied the new version of Mil. R. Evid. 513 to Appellant's court-martial.**

The Military Judge should not have applied the new version of the rule here because the old rule was in effect when Appellant's court-martial began. Charges in Appellant's court-martial were referred before the change in the rule was implemented

therefore his court-martial was an "action" that had already begun. By the order's own terms, the application of the new version of the rule was not mandatory—it specified that actions which had already begun could proceed as though the changes had not been prescribed. Executive Order 13696 at 1. Here, the Military Judge's decision to apply the new rule after the Defense had relied upon the old rule in making its initial request hamstrung the defense. The Government had already conceded that the trial court should conduct an *in-camera* review of the medical records and turn over any documents that would be material to the defense. *See* App. Ex. VI at 4. Under these circumstances, the trial judge's decision to apply the new rule was an abuse of discretion because it was "outside the range of choices reasonably arising from the applicable facts and the law" in light of the fact that the Executive Order itself says that application of the new rule was not mandatory in actions that had already begun. *United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014)(quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). This is a subtle but important point. Even if the Military Judge was correct in his substantive ruling regarding the Constitutional and *ex-post facto* issues presented by the new rule, his decision to apply it when he did not have to in a situation where it harmed the defense was an abuse of discretion.

This is especially so given the Military Judge's failure to justify his action. The Military Judge did not put the legal reasoning that led him to apply the newer more restrictive version of the rule on the record. Because he did not, his decision to ignore the portion of the Executive Order that made the imposition of the new rule optional should be granted less deference. As the CAAF has explained, if a "military judge fails to place his findings and analysis on the record, less deference will be accorded." *Flesher*, 73 M.J.

at 312. This is because the reviewing court "cannot grant the deference . . . generally accord[ed] to a trial judge's factual findings because" there are no factual findings to review and the court does not "have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . . ." *Id*.

**2. Neither Congress nor the President has the power to remove the "Constitutionally Required" exception from the rule.**

Notwithstanding the above, the President's removal of the "constitutionally required" exception violated Appellant's constitutional rights and was a nullity. The Supreme Court addressed the extent to which state and Federal rule makers can "establish rules excluding evidence from criminal trials" in *United States v. Scheffer,* 523 U.S. 303, 308 (1998). At issue was whether Mil. R. Evid. 707, which categorically prohibited the introduction of the results of polygraph examinations, unconstitutionally abridged an accused defendant's right to present a defense where the defendant sought to introduce a favorable polygraph examination. The Court held that the rule did not because: it served several legitimate interests; it did not prohibit the defendant from taking the stand and testifying on his own behalf; and it merely barred the defendant from "introducing expert testimony to bolster his own credibility." *Id*. at 309-10. But Justice Thomas explained that although rule makers have "broad latitude" to establish rules, they cannot establish rules that are "arbitrary" or "disproportionate to the purposes the rules are designed to serve." *Id.* at 308. Moreover, the exclusion of evidence is "unconstitutionally arbitrary or disproportionate . . .where it [infringes] upon a weighty interest of the accused." *Id*. The exclusion of constitutionally required evidence in favor of a categorically unrestricted psycho-therapist patient privilege is an act which violates these principles.

**3. The Military Judge's reliance on *Jaffee* was an error.**

The Military Judge came to the erroneous conclusion that the President could excise the "constitutionally required" exception here because he did not properly consider *Scheffer* and failed to recognize that *Jaffee*, which his ruling relied on, was a civil vice criminal case. The Military Judge ruled that the defense did not establish a due process violation in light of the "applicable precedent dealing with deference to Congressional determinations as to due process," and that the change to Mil. R. Evid. 513 did not "facially violate the accused's right to confrontation." App. Ex. XXXVI at 4. He further ruled that there was no *ex-post facto* violation, but he did not address the defense's contention that the order violated Appellant's right to compulsory process. Likewise, he did not address the guidance the Supreme Court gave in *Scheffer*. Under *Scheffer*, the application of an evidentiary rule of exclusion that does not yield to situations where evidence is "constitutionally required" cannot stand. Indeed, the point of *Scheffer* is that evidentiary exclusions must yield to constitutional rights where the exclusion is arbitrary or disproportionate to the interest served by the exclusion. *Scheffer*, 523 U.S. at 308.

*Jaffee v. Redmond*, 518 U.S. 1 (1996), did not properly consider the issue presented here. *Jaffee v. Redmond* was a civil proceeding in which the issue before the Supreme Court was whether a psychotherapist-patient privilege existed at all under Federal Rule of Evidence 501. Federal Rule of Evidence 501 allows "federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Id*. at 9. At the time, the lower circuits were split on the question of whether to recognize a psychotherapist patient privilege under the rule. *Id*. at 7. The Supreme Court settled the split by holding that the rule does encompass such a privilege.

*Id*. at 9-10. And while it admittedly rejected a balancing component of the privilege in the civil context, it left the determination of the contours and reach of the privilege for a future day. *See*, *Id*. at 17-18. But that does not matter. The *Jaffee* Court's rejection of the balancing component of the psycho-therapist patient privilege that the Court recognized in Federal Rule of Evidence 501 does not control here, *Scheffer* does.

*Scheffer* was decided two years after *Jaffee* and dealt specifically with the authority of Congress and the President to enact rules for courts-martial that exclude evidence. And although the *Scheffer* court held that the polygraph exclusion rule at issue was permissible, it left no doubt that the evidentiary rules enacted for courts-martial must yield to the constitutional rights of an accused where they arbitrarily or disproportionately affect the weighty interests of the accused. That was the case here and will be the case in any other court-martial where, as here, a critical witness for the Government has undergone therapy and there has been a showing sufficient to support a finding the witness may have made admissions relevant to the accused's defense.

**4. *In-camera* review of the victim's mental health records was required by the Constitution.**

The defense proffered enough evidence here to make the mental health records discoverable for the purpose of conducting an *in-camera* review. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Supreme Court held that a statutorily created privilege could not be applied to bar the criminal defendant from *discovering* all the evidence protected by the privilege. *Id*. at 43. At issue in *Ritchie*, were the child victim's treatment records at Child and Youth Services (CYS) which were privileged under Pennsylvania statute. *Id*. When Pennsylvania CYS refused to comply with a subpoena to produce the records in question, Petitioner Ritchie moved to compel their production. *Id*. at 43-44.

The trial judge refused and Ritchie was convicted. *Id*. On appeal, Ritchie claimed that the failure to disclose the contents of the file violated the Confrontation Clause. The Supreme Court of Pennsylvania agreed and concluded that the trial court order violated both the Confrontation and the Compulsory Process clauses of the Constitution. In its view, Ritchie, "through his lawyer, [was] entitled to review the entire file to search for any useful evidence." *Id*. at 46. On review, the Supreme Court held that the lower court erred in holding that the failure to disclose the file violated the Confrontation Clause but was, nonetheless, a violation of Ritchie's right to compulsory process and due process of law. *Id*. at 54, 57.

The Court noted that it is "well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Id*. (citing *United States v. Agurs*, 427 U.S. 97, 96 (1976); *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). And it explained that because the Pennsylvania legislature contemplated at least some use of the records, it could not conclude that the statute prevented disclosure in criminal prosecutions. *Id*. at 58. But it did not agree with the lower court's ruling that Ritchie's lawyer should be allowed to rifle through the entire file. *Id*. at 60. Instead, the Court concluded that the competing interests could be satisfied by "requiring that the . . . files be submitted only to the trial court for *in camera* review." *Id*. at 60.

Applied here, *Ritchie* demonstrates that the Military Judge erred in not ordering the complaining witness's mental health records produced for *in-camera* review. The Defense proffered enough evidence to reasonably show that the Government's star witness may have made admissions that would be material to the defense during the

course of her mental-health treatment. The complaining witness testified that she was undergoing "mental health counseling" while she lived in Alexandria, Virginia. App. Ex. XXXV at 1. She further admitted that her former boyfriend, the biological father of her son, had physically abused her when they were together. *Id.*; R. at 31-32. And it is clear from the record that the complaining witness continued to see her abuser on a regular basis during the time when Appellant is alleged to have committed these crimes. R. at 427-28. During this time, she did not make any allegations against Appellant, nor did she leave him. The allegations against Appellant were not made until late in 2014—after their relationship soured and she had threatened Appellant via text message to "Just sit back and see where I end up! And mark my words!" then been served with divorce papers. R. at 454-55. Given these facts, it is reasonable to believe that during her therapy the Complaining Witness might have named the biological father of her son as the man who abused her or made other comments that would have been material to the defense. Because of this, the records associated with her therapy should have been produced and examined by the Military Judge for evidence that was favorable to the defense.

C. Conclusion

The Military Judge's refusal to order production of the complaining witness's mental health records for *in camera* review was an abuse of discretion that infringed upon Appellant's right to confront his accuser, his right to compulsory process, and his right to due process of law. Given the executive order's explicit instruction that the deletion of the "constitutionally required" exception need not be imposed in cases that had already begun, the Military Judge should not have imposed the new rule on Appellant's court-martial. But in addition to this, neither the President nor Congress has the ability to

exclude evidence when it is constitutionally required. As a result, the deletion of the "constitutionally required" exception was a nullity. Accordingly, Appellant now prays that this honorable Court will set aside the findings and the sentence here and order a new hearing.

**II.**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INSTRUCTED THE MEMBERS "IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED YOU MUST FIND HIM GUILTY," WHERE SUCH AN INSTRUCTION IS IN VIOLATION OF *UNITED STATES V. MARTIN LINEN SUPPLY CO.*, 430 U.S. 564, 572-73 (1977).**

A. Standard of review:

Instructional errors are reviewed de novo. *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016). A military judge's instructions are evaluated "in the context of the overall message conveyed" to the members. *See United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (quoting *Humanik v. Beyer*, 871 F.2d 432, 441 (3d Cir. 1989)). When there "were no objections to the instructions[,] absent plain error, [the CAAF holds] there was a waiver. To establish plain error appellant must demonstrate: that there was 'error'; that such error was 'plain, clear, or obvious'; and that the error 'affected' appellant's 'substantial rights.'" *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995). "If instructional error is found [when] there are constitutional dimensions at play, [the appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *United States v. Wolford*, 52 M.J. 418, 420 (C.A.A.F. 2006) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F.

2005)).

B. Law and Argument:

"Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). "By instructing the jurors that they must find the defendant guilty if they determined that the evidence placed him at the scene of the crime, [a trial] court [takes] from the jury an essential element of its function." *United States v. Hayward*, 420 F.2d 142, 145 (D.C. Cir. 1969) (emphasis in original). "Instructions to the jury . . . should avoid the use of language that suggests to the jury that it is obliged to return a guilty verdict." *United States v. Mejar-Matrecios*, 618 F.2d 81, 85 (9th Cir. 1980).

By telling the panel that it "must" convict if the evidence left them firmly convinced of guilt, the military judge effectively "directed the jury to come forward with . . . a verdict [of conviction.]" *See Martin Linen Supply Co.*, 430 U.S. at 572-73. In doing so, the military judge suggested to the panel "that it [was] obliged to return a guilty verdict" and thereby took from the panel "an essential element of its function." *See Hayward*, 420 F.2d at 145; *Mejar-Matrecios*, 618 F.2d at 85. This was improper.
A judge "may not direct a verdict for the [government], no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. In enacting Article 51, UCMJ, Congress required a military judge, before any vote is taken on the findings, to instruct panel members of three things the panel must do. First, the panel must presume the accused "to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt." 10 USC § 851(c)(1). If "there is a reasonable doubt as to the guilt of the accused, the

doubt must be resolved in favor of the accused and he must be acquitted." 10 USC § 851(c)(2)(emphasis added). Finally, if "there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt." 10 USC § 851(c)(3)(emphasis added).

Nowhere in the statute is the military judge required, encouraged, or authorized to instruct panel members that if the panel is firmly convinced the accused is guilty of the offenses charged it must find him guilty. Quite the contrary, following the principle *expressio unius est exclusio alterius*, where Congress has expressly legislated a specific list of actions a panel must take, any other actions the panel must take are excluded and a military judge should not add instructions that materially alter the statute. All of the actions a panel must take in Article 51(c), UCMJ, are for the benefit and protection of the military accused. None of the provisions of Article 51(c), UCMJ, require that a panel must take an action to the detriment of an accused. A plain reading shows that Congress did not legislate that a panel must find an accused guilty, whatever the state of the evidence. By legislating the three things a panel must do in favor of an accused, but never requiring a finding of guilt, Congress constructed military panels closer to federal juries, with an "overriding responsibility … to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

Instructing a panel that it must find an accused guilty—in the same paragraph and on the same footing as instructions on the presumption of innocence, reasonable doubt, and burden of proof—impermissibly expands the class of things a panel must do. Even if Congress could, Congress did not impose a duty or require that a military panel must find

an accused guilty if the panel is "firmly convinced" of the accused's guilt. Where, as here, a military judge invades the field that Congress expressly occupies, the military judge plainly errs when he usurps legislative authority and expands the class of actions a panel must take.

After telling the panel that they must convict Appellant, if convinced beyond a reasonable doubt, the military judge then instructed the members: "[e]ach of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience." R. at 631. At that point, the military judge had instructed the members in a conflicting fashion, that they were required to convict if the government met its burden of proof, but they were also permitted, and indeed required, to vote in accordance with their conscience. While the law presumes members follow the military judge's instructions (*United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994), citing, *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)), we cannot know which instruction was followed when a military judge provides conflicting and erroneous guidance.

By instructing the members in this conflicting fashion, the military judge's beyond-a-reasonable-doubt instruction was constitutionally deficient. *See Sullivan*, 508 U.S. 277-282 (holding a constitutionally deficient reasonable-doubt instruction cannot be harmless error). The Due Process Clause of the Fifth Amendment to the Constitution protects an accused against conviction of a crime except when the Government proves the accused's guilt beyond reasonable doubt. *See, e.g., In re Winship*, 397 U.S. 358 (1970). At the most basic level, Appellant was entitled to a panel that was properly instructed as to reasonable doubt. Article 51, UCMJ, 10 USC § 851(c). More troubling,

when the military judge directed the members to come forward with a verdict of guilty, there was no guarantee that it was a panel and not the military judge rendering a verdict in Appellant's case.

This error was not harmless and requires reversal. While not all constitutional errors in the course of a criminal trial require reversal, some will always invalidate the conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967) "'The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" Id. (quoting *Kreutzer*, 61 M.J. at 298). An error is not harmless beyond a reasonable doubt when "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (internal quotation marks omitted) (quoting *Chapman* 386 U.S. at 24). The question to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict. *Chapman*, 386 U.S. at 24 (analyzing effect of error on "verdict obtained"). The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was attributable to the error." *Sullivan*, 508 U.S. at 279. (emphasis omitted). In cases, such as this one, where an instructional error consists of an improper description of the burden of proof, all findings are vitiated. *Sullivan*, 508 U.S. at 280.

This Court should note that the military judge's error was completely avoidable given the existence of a legally-correct standard instruction in the Military Judge's Benchbook, an Army publication. DA Pamphlet 27-9 (2010). Air Force Instruction

(AFI) 51-201, Administration of Military Justice, 30 July 2015, directs legal practitioners to follow the Military Judge's Benchbook. The military judge should have heeded the common sense caution that "[e]mbellishing the standard formulation is unnecessary and should be avoided." *Commonwealth v. Healy*, 444 N.E.2d 957, 959 (1983). The standard instruction provided in the Military Judge's Benchbook at 2-5-12 follows that guidance, instructing that members "should" convict if the government meets its burden, but not that they "must":

> "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

DA PAM 27-9, Ch 2, §V, para 2-5-12 (2010). (emphasis added)

In the instant case, the military judge departed from the Military Judge's Benchbook's standard instruction 2-5-12. R. at 631. The judge departed in a way which made his reasonable-doubt instructions in this case, both his preliminary instructions on findings and his substantive closing instructions, violate the Supreme Court's holdings on the issue. Had the standard instruction been used, this issue would not exist. Moreover, by deviating from the established instruction, drafted by the Army and incorporated into the Air Force through Air Force Instruction, the military judge created legal inconsistency among the services. Because of the trial judge's use of a non-standard

instruction, Appellant was not afforded trial before a panel which was properly instructed as to the government's burden of proof.

By instructing the panel members that it "must" convict if the government meets its burden, the military judge instructed the panel it did not have the power to disregard instructions on matters of law, in particular, it could not nullify. This violated Appellants legal right to a panel that is authorized to disregard the law. Court-martial members always have the power to disregard instructions on matters of law, in addition to Appellant's right to general verdicts and the prohibition against directed verdicts. *United States v. Hardy*, 46 M.J. 67, 70 (C.A.A.F. 1997).

The footnote in *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994) is also unpersuasive as it does not speak to the question of "must" versus "should." Rather, *Meeks* provides one possibility should the Armed Forces revisit the reasonable-doubt instruction. *Id.* at footnote 2. That suggestion originates from the Federal Judicial Center, Pattern Criminal Jury Instruction 17-18 (1987) (instruction 21), quoted from *Victor v. Nebraska*, 114 U.S. 1239 (1994) (Ginsburg, J., concurring in part and concurring in the judgement). In her concurring opinion in *Victor*, Justice Ginsburg discusses the origins of Pattern Criminal Jury Instruction 17-18 and highlights concerns with the efficacy of any reasonable doubt instruction, noting that the Supreme Court cautioned against any attempt to define reasonable doubt. *See, e.g.*, *Holland v. United States*, 348 U.S. 121, 140 (1954) ("attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury"), quoting *Miles v. United States*, 103 U.S. 304, 312 (1881).

Whether or not a reasonable doubt instruction should be given is a larger question. Circuit courts are divided on this issue. "Reasonable doubt is a fundamental concept that does not easily lend itself to refinement or definition." *United States v. Vavlitis*, 9 F.3d 206, 212 (1st Cir. 1993). The meaning of "reasonable doubt" should be left to the jury to discern." *United States v. Cassiere*, 4 F.3d 1006, 1024 (1st Cir. 1989) ("An instruction which uses the words reasonable doubt without further definition adequately apprises the jury of the proper burden of proof." (citations omitted). Neither the Fourth nor the Seventh Circuit provide a definition of "beyond a reasonable doubt." *See, e.g. United States v. Moss*, 756 F.2d 329 (4th Cir. 1985). The Seventh Circuit has stated that "at best, definitions of reasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant's constitutional right to have the government prove each element beyond a reasonable doubt." *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988). The First Circuit and a panel in the Second Circuit have suggested that reasonable doubt does not require further elaboration. *See, e.g. United States v. Jones*, 674 F.3d 88, 94 (1st Cir. 2012); *United States v. Fields*, 660 F.3d 95, 96-97 (1st Cir. 1999), *United States v. Van Anh*, 523 F.3d 43, 58 (1st Cir. 2008); *United States v. Desimone*, 119 F.3d 217, 226-227 (2d Cir. 1997).

However, the question before this Court is not whether there should be a reasonable doubt instruction, but whether it is appropriate to instruct that a panel, convinced of an accused's guilt beyond a reasonable doubt, "should" or "must" return a verdict of guilty. Appellant acknowledges that three circuit courts have affirmed the use of "must" in their jury instructions. *See United States v. Stegmeier*, 701 F.3d 574, 582-83 (8th Cir. 2012); *United States v. Maloney*, 699 F.3d 1130, 1140 (9th Cir. 2012); *United*

*States v. Carr*, 424 F.3d 213, 219-20 (2d Cir. 2005). However, at least one court has held, *inter alia*, that the use of the language "must find the defendant guilty" was improper; a proper instruction required "should." *Billeci v. United States*, 184 F.2d 394 (D.C. Cir 1950).

It is those circuits that have chosen to define reasonable doubt that have affirmed the use of "must" in their jury charge. However, as the First and Seventh Circuits caution, an improper instruction of this fundamental concept has the potential to impair a defendant's constitutional right to have the government prove its case beyond a reasonable doubt. *See Vavlitis*, 9 F.3d at 212; *Hall*, 854 at 1039. This concern is of particular import in the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 40-41 (1942) (holding here is no constitutional right to a trial by jury in courts-martial); *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) (recognizing differences between courts-martial and civilian criminal proceedings and observing that "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."). In the military system, more so even than in the civilian system, it is necessary to provide additional safeguards to ensure that every conviction is supported by proof beyond a reasonable doubt. The necessity to instruct "should" in the military context is analogous to the heightened rights' warnings required for military members suspected of crimes. While *Miranda* warnings alone are sufficient for the civilian community to ensure the voluntariness of a suspect's statement, the military community requires all persons subject to the code warn subjects of the Article 31(b), UCMJ, rights and require military

law enforcement agents warn suspects of both their Article 31(b), UCMJ, rights and their *Miranda-Tempia* rights. *See Miranda v. Arizona*, 384, U.S. 436 (1966); 10 U.S.C. § 831(b); *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

In addition to erroneously providing the "must" convict instructions, the military judge deviated from the standard instruction requiring "evidentiary certainty" for conviction. Specifically, DA PAM 27-9 utilizes the following instruction to define "proof beyond a reasonable doubt":

> 'Proof beyond a reasonable doubt' means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt.

DA PAM 27-9, Ch. 2, §V, para. 2-5.

Conversely, the military judge provided this instruction prior to voir dire:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of an accused's guilt. There are very few things in this world that we know with absolute certainty and, in criminal cases, the law does not require proof that overcomes every possible doubt.
>
> If, based on your consideration of the evidence you are *firmly convinced* that the accused is guilty of the offenses charged, you must find him guilty. If, on the other hand, you think there is a *real possibility* the accused is not guilty, you must give him the benefit of the doubt, and find him not guilty.

R. 256 (emphasis added). The military judge provided an almost identical instruction prior to deliberations. R. 630-31.

By telling the panel that they must merely be "firmly convinced" of Appellant's guilt, and by further requiring a "real possibility" of innocence, the military judge diluted the Government's burden of proof and impermissibly shifted it to the defense. Although military courts have yet to analyze these specific issues, at least two Federal Circuits have

criticized the "firmly convinced" and "real possibility" language in jury instructions. *See United States v. Porter,* 821 F.2d 968 (4th Cir. 1987)(finding error, although not one which required reversal, from the district court's use of the phrase "[i]f, on the other hand, you think there is a real possibility he's not guilty, you must give him the benefit of the doubt and find him not guilty"); *United States v. McBride,* 786 F.2d 45, 52 (2d Cir. 1986) ("suggesting caution" in the use of the "real possibility" language, "as it may provide a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense."). Admittedly, no federal circuits have found the "firmly convinced" or "real possibility" language necessitates reversal. *See, e.g., United States v. Williams,* 20 F.3d 125, 131-32 (5th Cir. 1994) ("real possibility" language merely explains that jury is "not to acquit a defendant if it can conceive of any possibility that the defendant is not guilty."); *United States v. Taylor,* 302 U.S. App. D.C. 349, 997 F.2d 1551, 1556-57 (D.C. Cir. 1993) ("real possibility" language does not shift burden to defendant). However, the Intermediate Court of Appeals of Hawaii found that the phrase "real possibility" clashed with the presumption of innocence and the nature of reasonable doubt, and ultimately reversed a conviction because use of "firmly convinced" language "diminished the very high standard by which a jury must abide in order to convict." 90 Haw. 113, 129 (Haw. Ct. App. 1998).

C. Conclusion:

The unique concerns described above require this Court to evaluate the propriety of the instructions here and ultimately reject them. This approach will eliminate any concern that military members hear the military judges charge that they "must convict" as an order. Rejecting "must" in favor of "should" guarantees that a panel and not a military

judge returns a verdict in accordance with the enumerated powers in Article 51(c), UCMJ and ensures uniformity among the services, as recommended by this Court in *Meeks*. 10 U.S.C. § 851(c); *Meeks*, 41 M.J. at 157 n.2.

## III.

## THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN CONVICTIONS FOR THE CHARGES AND SPECIFICATIONS.[1]

A. Standard of review:

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, the reviewing court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency looks at "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the elements beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

[1] This assignment of error is raised under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

B. Law and Argument:

The findings and sentence here should be set aside as legally and factually insufficient because the case rests upon the testimony and evidence provided by a person whose motivation to fabricate is discernible from the cold record: Appellant's former wife Ms. YM. This casts reasonable doubt on Appellant's convictions. Ms. YM was demonstrably vindictive. The record suggests that she pinned the blame for abuse she suffered at the hands of another man on Appellant to secure an advantage in the child-custody proceedings associated with their divorce. Accordingly, this Court should set aside the convictions and the sentence here.

Ms. YM dated Mr. AUA for six years before she met Appellant—from 2003 to the summer of 2008. R. at 441. It would be an understatement to say they had a rocky relationship. During the course of their time together, he was physically abusive to her. R. at 427. He would hit her and leave bruises on her arms, face, and body. R. at 442. At one point, he put a gun to her head. R. at 442. Another time, he threatened to kill her. R. at 442. And even though their relationship had ended, Ms. YM and Mr. AUA continued to have constant, regular contact because they shared custody of their biological son, JU. R. at 427. This constant contact continued throughout the time Appellant supposedly abused Ms. YM. In fact, it continued up to and through Appellant's trial. From October 2014 through October of 2015, the two made 153 calls to each other—an average of three calls per week. R. at 427.

Given these facts, it is likely that Mr. AUA continued his abuse of Ms. YM and that she used evidence of that abuse against Appellant to assist in her custody battle when it became beneficial for her to do so. Ms. YM never alleged that Appellant abused her

prior to their custody battle. The allegations arose only after the two separated and Appellant sought sole custody of their biological daughter. Before that, Ms. YM had felt that Appellant was safe and urged a judge in a relocation hearing held in July of 2013 to allow her to move JU from Alexandria, Virginia to Spokane, Washington to live with Appellant and herself as a family. R. at 31. During that hearing, she told the judge that Appellant was a good father and she did not make any mention of abuse. R. at 462-64. She also specifically asked Appellant to testify in support of her case. R. at 31. He did so, and the judge allowed the relocation to occur. One year later, at the annual review hearing pertaining to JU's location, she again testified that she wanted JU to remain living with the family "to include" Appellant. R. at 32.

Ms. YM's allegations of abuse arose a few months after that second hearing. On or about 1 November 2014, Appellant discovered a series of text messages on her phone that made him believe she was having an affair. R. at 445. The messages were between Ms. YM and a person labeled as a woman on Ms. YM's phone. R. at 35; Def. Ex. B; R. at 447. But these messages were not actually from a woman. They were from a man named JB. Ms. YM put him in her phone as under a woman's name to hide his true identify from Appellant. R. at 35. And although she denied having a romantic relationship with JB, (R. at 35) the salacious nature of the messages along with the fact that she went out of her way to see him when she was in his town for an unrelated custody hearing give the lie to that claim. Def. Ex. B, R. at 448.

The day Appellant discovered the text messages, he confronted Ms. YM with them. R. at 450. Ms. YM testified that Appellant was upset, but admitted that he did not hit her—something that one might expect Appellant to do if he were indeed abusive. R. at

450. Instead, he told her to get out of the house and he took her ID card away. R. at 451. When she left, Ms. YM took her son JU with her and tried to take the couple's biological daughter, AM. Appellant would not let her. R. at 451. He told her that his daughter was staying with him. R. at 451.

Shortly after she left the residence without AM, Ms. YM went to a kiosk in the mall and traded in her phone. R. at 36. Ostensibly, this was because she needed money to get to Virginia. R. at 36. But she only received $150.00 for the phone and there was no evidence presented that Appellant took away any of her financial means. R. at 36. The data on that phone would have been lost but for the fact that the "iCloud backs up the information on the old phone, and puts it on the new one." R. at 37. It appears, however, that she was worried about what might be found on the phone as she had previously googled how to delete text messages. R. at 453. Likewise, the forensic analysis of the new phone showed that she also googled "adultery laws in Washington State with child custody" and "adultery laws in Virginia with child custody." R. at 450.

A few days after their separation, armed with her new cell phone, Ms. YM sent Appellant a warning. She texted him "Just sit back and see where I end up! And mark my words!" R. at 454-55. After that, she filed a custody case for primary custody of their biological daughter. R. at 455. At trial, she admitted that the result of Appellant's court-martial would have an impact on those custody proceedings. R. at 458.

Around this time Ms. YM's new story emerged. She contacted the Air Wing's family advocacy program and alleged that Appellant had been abusing her. On 21 November 2014, her victim advocate told her that Air Force Office of Special Investigations (AFOSI) wanted to discuss the allegations with her. R. at 209. The next

day, it appears she contacted her son and told him to delete the text messages on his phone. *See* R. at 196, 210. Four days after that, AFOSI interviewed her. App. Ex. LXII. She now claimed that Appellant had physically abused her throughout the course of their relationship beginning as far back as December of 2009. *Id*. This overall sequence of events—which begins with Ms. YM asking for a judge to allow her son to live in a family with Appellant then ends with allegations of abuse that arose only after Appellant discovered her affair and filed for custody of their daughter—is suspicious enough on its own to cast reasonable doubt on the findings of guilt here.

But this suspicious sequence does not stand alone. It is compounded by the fact that Ms. YM was neither honest nor reliable as a witness. She was counseled for losing money at work and for her improper use of her government credit card. R. at 28-29. She admitted to writing portions of a statement for a witness in her child custody case. R. at 186-87. And it appears that she was actively coaching witness testimony by telling witnesses what to put into the letters of support they wrote for her. *See* AE LIII, where she told a witness "don't put in the letter that I ask you for money! That might show I am not stable." Her machinations did not stop there. In addition to the above:

- She actively deleted potential evidence as shown by analysis done on her cell phone that suggests she selectively deleted seven emails and five text messages from her abusive ex-paramour AUA. R at 428.

- She admitted to lying under oath. R. at 461.

- She submitted evidence during a custody proceeding that seemed to depict Appellant was abusing his daughter when in fact the injuries to their daughter were accidental. R. at 468-469.

- She appears to have lied about moving away after the abuse occurred as shown by the ATM receipts provided by the defense. Def. Ex. A.

C. Conclusion:

Ms. YM's tales of abuse should not be believed. The allegations she made arose in a manner and at a time that betrays her ulterior motives. The record is full of evidence that casts reasonable doubt both on Ms. YM's character and the convictions here. It includes: (1) evidence of Ms. YM's dishonesty; (2) evidence that she coached testimony of witnesses; (3) evidence that she tampered with or deleted text messages, emails, and phone records that might have served to exonerate Appellant or demonstrate her bias; (4) evidence that her opinion of Appellant changed to suit her needs; (5) evidence that she lied about having an affair; (6) and evidence that suggests she was regularly seeing her former husband—a man who she admitted abused her and once put a gun to her head (R. at 442)—during the same time that Appellant is alleged to have committed the crimes here. Taken as a whole, this evidence allows for only one course of action. Accordingly, Appellant prays this honorable Court will set aside his convictions as legally and factually insufficient.

Respectfully submitted,

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Appendix 1 – Executive Order 13696

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 23 December 2016.

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