23 January 2017

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Panel No. 2
Technical Sergeant (E-6) RALPH G. MORALES, USAF, *Appellant.*	)	ACM 39018

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

The United States generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

The facts necessary to the disposition of this matter are set forth in the Argument section below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE DEFENSE MOTION TO COMPEL THE PRODUCTION OF THE VICTIM'S MENTAL HEALTH RECORDS BECAUSE APPELLANT FAILED TO DEMONSTRATE A REASONABLE LIKELIHOOD THAT THE RECORDS WOULD YIELD EVIDENCE ADMISSIBLE UNDER AN EXCEPTION TO M.R.E. 513.

Standard of Review

A military judge's ruling on whether to conduct an *in camera* review of and release material covered by M.R.E. 513 is reviewed for an abuse of discretion. *See* United States v. Clark, 62 M.J. 195, 200 (C.A.A.F. 2005) and United States v. Chisum, __ M.J. ___ (A.F. Ct. Crim. App. 2016). Similarly, a military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. United States v. Harrow, 65 M.J. 190, 201 (C.A.A.F. 2007) (citing United States v. McCollum, 58 M.J. 323, 335 (C.A.A.F. 2003)). "An abuse of discretion occurs when the trial court's findings of

fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007)). However, when no objection is made, this Court reviews a military judge's rulings in this regard for plain error. United States v. Eslinger, 70 M.J. 193, 197-98 (C.A.A.F. 2011). To determine whether a right has been forfeited or waived, the reviewing court must consider whether the trial defense counsel's failure to object "constituted an intentional relinquishment of a known right." United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

Law and Analysis

a. Appellant Forfeited, if not Waived, Any Objection Based on the Application of Executive Order 13696. Regardless, Appellant was Arraigned After the Executive Order Came Into Effect.

When an appellant intentionally waives a challenge, it is extinguished and may not be raised on appeal. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Recently, our superior Court reaffirmed this principle when it held "[w]hen an error is waived...the result is that there is no error at all and an appellate court is without authority to reverse a conviction on that basis." United States v. Chin, 75 M.J. 220, 222 (C.A.A.F. 2016). As recognized by Appellant, trial defense counsel did not object to the application of Executive Order

13696 based on the savings clause on the first page of the Order. (App. Br. at 3.) As a result, this Court should consider this issue waived. *See* United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005) (it is not necessary that a party makes every possible argument to support an objection, but it is necessary to state the specific ground for an objection in order for it to be preserved). Moreover, even if Appellant did not waive this objection, he cannot meet his burden of showing that the application of the Executive Order to his case represents plain error. "Appellant has the burden of demonstrating: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011).

As explained by our superior Court long ago, the savings clause on the first page of the Executive Order "divide[s] military procedure in several phases," and "that if one divisible step ha[s] been completed under previous regulations, it [is] valid and effective." United states v. Nichols, 6 C.M.R. 27, 32 (C.M.A. 1952). *See also*, United States v. Roberts, 75 M.J. 696, 700 (N-M. Ct. Crim. App. 2016) (holding 2015 version of M.R.E. 404(a) which eliminated good military character of an accused applied to a proceeding because accused was arraigned on or after 17 June 2015). Although charges were referred in this case on 20 May 2015, arraignment occurred on 21

July 2015.[1] (R. at 6.) Therefore, like the accused in Roberts, Appellant was arraigned on or after 17 June 2015, thus the changes announced in the Executive Order applied to him and there was no error.

b. Appellant Conceded that the Production of the Victim's Mental Health Records Did Not Fall Under Any of the Enumerated Exceptions of M.R.E. 513.

After initially requesting the production of the victim's mental health records in writing and via a closed session hearing, the military judge denied the motion to compel Ms. Y.M.'s mental health records for *in camera* review. (R. at 47-56.) The military judge permitted trial defense counsel to file a supplemental briefing addressing the alleged "unconstitutionality" of Executive Order 13969. (App. Ex. XXXV.) In both the closed session and again in the supplemental briefing, Appellant conceded that none of the enumerated exceptions on 15 July 2015 to M.R.E. 513 applied in this case. (R. at 47-56; App. Ex. XXXV.) Therefore, the military judge did not abuse his discretion when he denied the production of the mental health records for *in camera* review.

[1] Appellant did not even move for production of the victim's mental health records until 8 July 2015. (App. X. XXXV.)

c. The Military Judge Correctly Determined that Executive Order 13969 is Facially Constitutional.

M.R.E. 513 was promulgated in response to the Supreme Court's decision in Jaffee v. Redmond, 518 U.S. 1 (1996), where the Court concluded that the "psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." Id. at 11. Under M.R.E. 513, a "patient" can "refuse to disclose and [] prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist." *See* M.R.E. 513(a). A patient is any "person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition." *See* M.R.E. 513(b)(1). Evidence of a patient's records or communications includes patient records that pertain to communications by a patient to a psychotherapist. *See* M.R.E. 513(b)(5). The privilege may be claimed by the patient, the patient's guardian or conservator, or by the psychotherapist or trial counsel on behalf of the patient. *See* M.R.E. 513(c).

Once the privilege is claimed, disclosure of a patient's records is prohibited unless one of seven enumerated exceptions applies. *See* M.R.E. 513(d). In United States v. Klemick, the Navy-Marine Corps Court of Appeals relied on a Wisconsin Supreme

Court interpretation of the psychotherapist-patient privilege stating the threshold showing could not be established through "mere conjecture or speculation." United States v. Klemick, 65 M.J. 576 (N.M. Ct. Crim. App. 2006), citing Wisconsin v. Green, 646 N.W.2d 298, 310 (Wis., 2002).[2] Here, Appellant solely relied on conjecture and speculation to argue that Ms. Y.M.'s mental health records should be reviewed *in camera*. As such, trial defense did not meet their burden for even *in camera* review of Ms. Y.M.'s mental health records. Rather than articulating specific evidence the trial defense counsel and Appellant believed were hidden in Ms. Y.M.'s mental health records, Appellant proposed the exact fishing expedition that M.R.E. 513 was intended to prevent. (*See* App. Ex. XXXV, p. 3) ("Naturally the Defense can only speculate as to the contents of these counseling records.")

Despite the elimination from M.R.E. 513 of the "constitutionally required" exception, Appellant argued that, nevertheless, such records are still required under the Constitution in order to avoid violating an appellant's due process rights, his right to confront his accuser, his right to a fair trial and his right to the effective assistance of counsel. (App. Ex. XXXV.)

[2] This standard was adopted by this Court earlier than the executive order in United States v. Wright, 75 M.J. 501 (A.F. Ct. Crim. App. 2015), in the context of a separate privilege (M.R.E. 502).

Appellant's argument that neither Congress nor the President can eliminate the "constitutionally required" exception is directly contradicted by M.R.E. 502 and 503 (both of which survive even death). The United States Supreme Court has discussed the standard necessary to accomplish *in camera* review under a "constitutionally required" exception to the attorney-client privilege. The Court held that there is no "blanket rule allowing *in camera* review as a tool for determining" whether an exception to the attorney-client privilege exists. United States v. Zolin, 491 U.S. 554, 571 (1989). To prevent "groundless fishing expeditions," the Court required that the party arguing for review make "'a showing of a factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that" an exception applies. Id. at 572 (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)). The threshold showing to obtain *in camera* review may be made with "any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged." Id. at 575. Even if such a showing is made, whether to conduct *in camera* review is still within the "sound discretion" of the judge. Id. at 572.

Additionally, unlike other codified privileges such as M.R.E. 412, 505, and 514, there is no "constitutionally required" exception to M.R.E. 502, no provision allowing for *in camera*

review, nor any dictate of a standard to be used therein. *See*, *e.g.*, Murdoch v. Castro, 609 F.3d 983 (9th Cir. 2010) (holding there is no established Confrontation Clause jurisprudence that would require the disclosure of attorney-client privileged communications between a state's witness and his attorney). Moreover, on the facts of that case involving the attorney-client privilege, the Supreme Court expressly stated it would not consider the question of whether the attorney-client privilege must yield in the face of constitutional rights. Swidler & Berlin v. United States, 524 U.S. 399, 408 n. 3 (1998).

Ultimately, whether a constitutional right "might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake..." Newton v. Kemna, 354 F.3d 776, 782 (8th Cir. 2004). In a later case, Johnson v. Norris, 537 F.3d 840, 846- 47 (8th Cir. 2008), the Eighth Circuit discussed and concluded that although Davis v. Alaska, 415 U.S. 308 (1974), and Pennsylvania v. Richie, 480 U.S. 39 (1987) "establish that in at least some circumstances, an accused's constitutional rights are paramount to a State's interest in protecting confidential information," those cases "do not establish a specific legal rule that answers whether a State's psychotherapist-patient privilege must yield

to an accused's desire to use confidential information in defense of a criminal case." Id.

In this case, trial defense counsel argued disclosure and examination of Ms. Y.M.'s mental health and family counseling records was required because they could "contain information related to the charged events...[and] could plausibly be expected to contain her recollections of statements made (or perhaps not made) by [Appellant]." (App. Ex. XXXV.) However, there was no meaningful connection drawn between Ms. Y.M.'s relationship with another individual with whom she had a son, and the fact that she was seeking custody of the daughter that she had with Appellant[3], and how these items, even if connected to determining Ms. Y.M.'s credibility, assessing motive to fabricate or exploring inconsistent versions of events, would necessarily manifest in her mental health and family counseling records. In sum, trial defense counsel did not articulate a specific reason as to why piecing the psychotherapist-patient privilege is necessary.

Case law and the analysis of both M.R.E. 513 – especially in light of the Executive Order – make it clear that piercing the psychotherapist-patient privilege should not be taken lightly, and a request by trial defense does not automatically

[3] These were reasons provided by trial defense counsel that purportedly demonstrated why examination of the mental health records *in camera* was necessary. (App. Ex. XXXV.)

require the trial judge to review the records of an alleged victim. A request to pierce that privilege requires more than a statement that records exist and that mental health records could contain evidence regarding the patient's credibility or assist the defense expert consultant in developing discovery, trial strategy, and witness cross-examination. The unsupported assertion that mental health records *may* contain this type of information could be made in any case about any patient and would render M.R.E. 513 completely devoid of any meaning if adopted as the standard for reviewing mental health records *in camera*.

This Court also addressed the idea that conducting *in camera* review of all records requested by defense on the theory that some evidence favorable to the defense may exist in the records and would be therefore required under Brady v. Maryland, 373 U.S. 83 (1963). The Court firmly held that "Brady does not 'require the trial court to make an *in camera* search of the government files for evidence favorable to the accused.'" United States v. Nixon, 2012 CCA LEXIS 438 (A.F. Ct. Crim. App. 2012) (quoting United States v. Michaels, 796 F.2d 1112, 1116 (9th Cir.1986) and United States v. Harris, 409 F.2d 77, 80–81 (4th Cir.1969)). This furthers the argument above that *in camera* review should not be automatic—it requires some showing of necessity.

In contrast to M.R.E. 513, M.R.E. 412 still includes a "constitutionally required" exception. In United States v. Banker, 60 M.J. 216 (C.A.A.F. 2004), our superior Court considered M.R.E. 412, under which, among other things, evidence of an alleged victim's prior sexual relationships or predispositions are inadmissible. Under M.R.E. 412(b)(1)(C), as under the old M.R.E. 513(d)(8), "evidence the exclusion of which would violate the constitutional rights of the accused" is admissible as an exception. The Banker court elaborated on the exception, stating it is designed to protect "the accused's Sixth Amendment right of confrontation and Fifth Amendment right of a fair trial." Banker at 221. Banker suggests that Congress and the President have determined the privilege under M.R.E. 513 is more similar to M.R.E. 502 and M.R.E. 503 than to M.R.E. 412. For both of these privileges, the courts have repeatedly determined that the public interest is better served in protecting the privilege than in piercing it. *See also* United States v. Gaddis, 70 M.J. 248, 254 (C.A.A.F. 2011) (affirming that the constitutional exception in M.R.E. 412 involves whether the exclusion of evidence would violate the defendant's Sixth Amendment rights).

The Sixth Amendment provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. In general, this right

encompasses two protections for the accused: "the right physically to face those who testify against him, and the right to conduct cross-examination." *See* Delaware v. Fensterer, 474 U.S. 15, 18-19 (1985) (holding that the accused was not denied his right to effectively cross-examine an expert witness based solely on the fact that the witness could not recall the basis of his expert opinion). As to the latter, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. at 20 (emphasis in original). The right is usually satisfied by giving the defense "wide latitude" at trial to question witnesses. Id. In 1987, a four-Justice plurality relied on this line of reasoning to hold that the prosecution's refusal to disclose a document that the accused claimed would have allowed him to more effectively cross-examine a witness against him did not violate his right to confront the witness. Ritchie, 480 U.S. at 51-55.[4]

Without calling it a balancing test, the Defense is asking this court to weigh the patient's privilege against the accused's constitutional rights, find that the constitutional

[4] The dissent as to the confrontation clause issue in Ritchie, written by Justice Brennan, was joined only by Justice Marshall, with Justice Blackmun in "substantial agreement." Pennsylvania v. Ritchie, 480 U.S. 39, 61-72. Justice Stevens and Justice Scalia did not join an opinion that addressed the confrontation clause issue.

protections are more important, pierce the privilege and release the records. This is exactly the type of action the Supreme Court rejected wholesale in Jaffee[5] and the Fourth Circuit Court of Appeals recently overturned in Kinder v. White, 2015 U.S. App. LEXIS 6681 (4th Cir. Apr. 22, 2015). The Supreme Court recognized that the psychotherapist-patient privilege served both private interests and public ends, and that the likely evidentiary benefit that would result from the denial of the privilege is modest in contrast to the public and private benefits of the privilege. Jaffee, 518 U.S. at 10-11.

While not binding on this court, in Kinder the government's "star" witness had received "extensive psychiatric treatment," including inpatient treatment at four different hospitals, and had been diagnosed with bipolar disorder and schizophrenia. Id. at 2. The defense sought production of the mental health records of the witness. Id. at 3. In ordering the partial disclosure of the psychiatric records, the lower court concluded that there was an exception to the psychotherapist privilege when it is necessary to "…vindicate a criminal defendant's constitutional rights." Id. at 5. The district court found that the defendant was not entitled to the records based upon the Confrontation Clause of the Sixth Amendment but, rather, the

[5] There, the Court expressly rejected the notion of using a balancing test as part of the privilege because doing so would eviscerate the effectiveness of the privilege. Jaffe, 518 U.S. at 17.

court concluded that the accused was entitled to the records based upon the Due Process Clause of the Fifth Amendment. Id. at 5. The district court decided that because the witness was pivotal to the prosecution's case, it was necessary for the defendant to have the records for impeachment purposes in order to fully exercise his Fifth Amendment right to a fair trial. *Id.* The Fourth Circuit Court of Appeals disagreed and overturned the district court's decision.

The Court of Appeals stated that the lower court's conclusion was "demonstrably at odds with Jaffee and basic principles underlying the recognition of testimonial privileges." Id. at 10. Because the privilege is now well-established, it would be both "counterproductive and unnecessary for a court to weigh the opponent's evidentiary need for disclosure any time the privilege is invoked." Id. at 12. Jaffee explicitly rejects balancing the defendant's constitutional rights against the protections provided by the privilege "because it would frustrate the aim of the privilege by making its application uncertain: 'Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance or the patient's interest in privacy and the evidentiary need for disclosure.'" Id. at 12 citing Jaffee, 18 U.S. at 17. Jaffee made clear that the privilege "is not rooted in any constitutional right of privacy but in a

public good which overrides the quest for relevant evidence; the privilege is not subject to a 'balancing component.'" Id. at 13 (citing United States v. Glass, 133 F. 3d 1356, 1358 (10th Cir. Okla. 1998).

Furthermore, Appellant's reliance on the minimum standards generally applied to normal discovery, and as articulated in United States v. Scheffer, 523 U.S. 303, 308 (1998), is misplaced. The standard of "relevant and necessary," generally applied to discovery in R.C.M. 703(f), ceased to apply to the victim's mental health records when Ms. Y.M. invoked the psychotherapist-patient privilege of M.R.E. 513. Even the higher standard of materiality articulated in R.C.M. 701(a)(2)(B) does not apply, since R.C.M. 701(f) makes clear that nothing in R.C.M. 701 trumps any protections or privileges in the Military Rules of Evidence. If disclosure was required based on normal standards of discovery, the psychotherapist-patient privilege would be meaningless. Therefore, the patient's mental health records should only be disclosed if the Military Judge determines that an exception under M.R.E. 513(d) applies; this was impossible, of course, because Appellant cited to no applicable exception.

Trial defense counsel made only broad references in its motion as to how the mental health records of Ms. Y.M. were relevant, and such references were based on mere conjecture

rather than a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to M.R.E. 513. To release mental health records of patients under the low standard sought by Appellant would be in direct contrast to the "public interests" protected by the creation of M.R.E. 513, its revision as well as its federal counterpart.

Military appellate courts have relied on Ritchie and similar cases in holding that the accused has no constitutional right to unrestricted discovery. *See* United States v. Rivers, 49 M.J. 434, 437 (C.A.A.F. 1998); Schmidt v. Boone, 59 M.J. 841, 856 (A.F.Ct. Crim. App. 2004) (vacated on technical grounds).

At best, Appellant has implied that, in general, mental health records are likely to contain information weighing on a person's credibility, perception or motive to lie. A reasonable, if not factual, showing is required to conclude that disclosure of such information would be permitted to be released under some exception to M.R.E. 513. Instead, the trial defense counsel's motion was precisely the type of fishing expedition that the Supreme Court warned of in Zolin. In no way did the trial defense counsel proffer any evidence that would constitute "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege" in this victim's

records specifically. Therefore, *in camera* review of the records was not necessary to rule on the motion the military judge correctly denied it. The military judge did not err, and Appellant's first assignment of error should be denied.

II.

THE MILITARY JUDGE DID NOT COMMIT ERROR, PLAIN OR OTHERWISE, BY INSTRUCTING 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."

Statement of Facts

In his preliminary instructions to the court members, the military judge instructed:

> If, based on your consideration of the evidence, you're firmly convinced that the accused is guilty of the offense 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. at 256.)

As part of his findings instructions, the military judge repeated this charge. The entirety of the reasonable doubt instruction given prior to findings reads as follows:

> A "reasonable doubt" is a conscientious doubt based upon reason and common sense, and arising from the 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 than 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. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give him the benefit of the doubt and find him not guilty.

(R. at 1186-87.)

Trial defense counsel requested that the military judge use the instruction from the Army Benchbook rather than the Air Force one; the military judge stated:

> Notwithstanding the fact that there is no objection [from the government], the court is going to stick with the standard Air Force [B]enchbook instruction with regard to reasonable doubt, which includes a reference to the burden of the accused does not hold. The fact it addresses the burden of proof belonging to proof and persuasion, belonging exclusively to the government, the court is not going to modify the standard Air Force [B]enchbook instruction with regard to reasonable doubt and will give the instruction as has been included in the draft to the parties. It does address the burden, as well as the definition of reasonable doubt. So the defense request is denied...

(R. at 618.)

Standard of Review

Whether a court-martial panel was properly instructed is a question of law reviewed de novo. United States v. Medina, 69 M.J. 462, 465 (C.A.A.F. 2011) (*citing* United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008)).

Law and Analysis

The reasonable doubt instruction given by the military judge in this case is taken from the Federal Judicial Center's Pattern Criminal Jury Instructions, 17-18 (1987) (Instruction 21). United States v. Meeks, 41 M.J. 150, 157 n.2 (C.M.A. 1994); (App. Br. at 22.). It is the standard reasonable doubt instruction included in the Air Force court-martial script in the Air Force Electronic Benchbook.[6] As recognized by this Court in its decision in United States v. McClour, this instruction "is – and has been for many years – an accepted reasonable doubt instruction used in Air Force courts-martial." United States v. McClour, ACM 38704 (A.F. Ct. Crim. App. 11 Feb. 2016) (unpub. op.)

Appellant offers no explanation as to why the instruction constituted error, especially in light of the fact that our superior Court suggested the adoption of this very instruction in Meeks, 41 M.J. at 157 n.2, and in light of the fact that no federal court has ever held this specific instruction to be

[6] Available online at: https://www.jagcnet.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=49C01E1BE32A5FF885257B48005712E2.

reversible error. United States v. Mejia, 597 F.3d 1329, 1340 (D.C. Cir. 2010).

In Meeks, our superior Court suggested that the Armed Services "reexamine their reasonable doubt instruction," and specifically identified the exact instruction given in this case as "one possibility." Meeks, 41 M.J. at 157 n.2. Although this recommendation was essentially dicta contained in a footnote, the recommendation is still persuasive. It is difficult to understand how using an instruction could be error, when the military's superior Court has suggested the use of the very same instruction. Furthermore, both this Court and the Navy-Marine Corps Court of Criminal Appeals (NMCCA) have upheld the propriety of this instruction. United States v. Sanchez, 50 M.J. 506, 509 (A.F. Ct. Crim. App. 1999); United States v. Jones, 46 M.J. 815 (N-M. Ct. Crim. App. 1997).

In her concurrence in Victor v. Nebraska, Justice Ginsburg described the Federal Judicial Center's Pattern Criminal Jury Instruction 21 as being "clear, straightforward, and accurate." Victor v. Nebraska, 511 U.S. 1, 26 (1994) (Ginsburg, J., concurring in part and concurring in judgment). She further stated, "[t]his model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensively." Id. at 27.

Moreover, many federal circuits have either endorsed the

use of the Federal Judicial Center's Pattern Criminal Jury Instruction 21, or at the very least found its use not to be reversible error. United States v. Gibson, 726 F.2d 869, 873-74 (1st Cir. 1984), cert. denied, 466 U.S. 960 (1984); United States v. McBride, 786 F.2d 45, 52 (2d Cir. 1986) *rev. on other grounds;* United States v. Mahabir, 1997 U.S. App. LEXIS 13058, 13-14 (4th Cir. 1997) (unpublished table opinion);[7] United States v. Hunt, 794 F.2d 1095, 1100-1101 (5th Cir. 1986); Harris v. Bowersox, 184 F.3d 744, 751-52 (8th Cir. 1999) cert. denied, 528 U.S. 1097 (2000); United States v. Artero, 121 F.3d 1256, 1258 (9th Cir. 1997) cert. denied, 522 U.S. 1133 (1998); United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995); Mejia, 597 F.3d at 1340 (D.C. Cir. 2010).

Given the support for the Federal Judicial Center's Pattern Criminal Jury Instruction 21 by this Court, our superior Court, NMCCA, Justice Ginsburg, and at least eight federal circuits and the existence of no federal case law finding it to be reversible error, the military judge's decision to give the instruction was not error. This assignment of error should be easily denied.

[7] In United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987), the Fourth Circuit, expressing its general disdain for any attempt to define reasonable doubt, found the instruction to be error, in that it introduced "unnecessary concepts of being 'firmly convinced' of guilt and a "real possibility of innocence." However, the Court granted no relief, because it found that the error "did not affect the substantial rights of the accused" because the "instructions taken as a whole properly described the prosecution's burden and the protection the law affords the accused." Id. In Mahabir, the Fourth Circuit has apparently changed course and has now been persuaded by Justice Ginsburg's concurrence and other Fifth and Tenth Circuit opinions that the instruction is proper. Mahabir, 1997 U.S. App. LEXIS 13058 at 13.

Even if the challenged instruction otherwise rose to the level of constitutional error, this Court can test any such error in the instruction for prejudice. Neder v. United States, 527 U.S. 1, 8 (1999) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis") (internal citations omitted). *See also* Porter, 821 F.2d at 973 (evaluating perceived error in the reasonable doubt instruction and finding no prejudice to the accused's substantial rights.)

Appellant has not demonstrated a material prejudice to a substantial right in this case. Reading the findings instructions as a whole, as the Supreme Court has required courts to do, the members were correctly instructed on the presumption of innocence, that Government alone had the burden of proof, that each and every element of every offense had to be proven beyond a reasonable doubt, that any doubt had to be resolved in favor of Appellant, and that it was the members' sole province to determine the issue of guilt. These proper instructions compensated for any possible error in the isolated statement, "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." In findings argument, trial counsel did not argue for a lower burden of proof or belabor the

military judge's reasonable doubt instruction.

Assuming that any error in the instruction constituted constitutional error -- and Appellant has not made a convincing argument that any of his constitutional rights were violated -- such error in this case would also have been harmless beyond a reasonable doubt. In light of the entirety of the findings instructions, the challenged instruction had no effect upon the guilty verdict. *See* United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) ("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.") (internal quotations omitted).

In sum, the military judge did not commit error in instructing 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." Even if the instruction was somehow error, Appellant suffered no material prejudice to a substantial right. As such, Appellant's claim for relief must be denied.

III.

APPELLANT'S CONVICTIONS ARE LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

The test for determining legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002) (citations omitted). "In resolving legal-sufficiency questions, this Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2002) (citations omitted). In assessing legal sufficiency, this Court is limited to the evidence presented at trial. United States v. Dykes, 38 M.J. 270 (C.M.A. 1993).

The test for determining factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987) ("beyond a reasonable doubt" is the correct standard to fulfill

congressional intent that the intermediate appellate courts conduct *de novo* review of factual sufficiency under Article 66(c), UCMJ); United States v. Sills, 56 M.J. 239, 240-41 (C.A.A.F. 2002). This Court's review of the factual sufficiency of evidence is limited to the entire record, which includes only evidence admitted at trial. Article 66(c), UCMJ; United States v. Bethea, 46 C.M.R. 223 (C.M.A. 1973).

Law and Analysis

As specified by the President and charged in Specification 1 of Charge I, aggravated assault under Article 128, UCMJ, requires the government to demonstrate four elements beyond a reasonable doubt:

> (1) That within the state of Maryland, between on or about 1 October 2010 and on or about 12 October 2010, Appellant did bodily harm to Ms. Y.M.;
>
> (2) That Appellant did so with a certain force and by stomping on her right hand with his foot;
>
> (3) That the bodily harm was done with unlawful force or violence; and
>
> (4) That the force was used in a manner likely to produce grievous bodily harm.

Manual for Courts-Martial, United States pt. IV, para. 54.b (2012 ed.) (MCM).

Similarly, in Specifications 3 and 5 of Charge I,[8] the Government had to demonstrate the following elements beyond a reasonable doubt:

> (1) That Appellant did bodily harm to Ms. Y.M.;
>
> (2) That Appellant did so by unlawfully striking Ms. Y.M. through the means alleged; and
>
> (3) That the bodily harm was done with unlawful force and violence.

MCM.

At trial, Appellant made the same arguments that he makes to this Court – that Ms. Y.M. fabricated all of these allegations only when she learned that Appellant was seeking custody of their daughter. (App. Br. at 25.) Appellant further argues that it must have been Ms. Y.M.'s previous partner who committed the abuse throughout her marriage to Appellant. (App. Br. at 25.) Again, this argument was made at trial, but also contradicts, and makes the idea that all of these allegations were made in order to gain custody of a child several years later in a divorce between Appellant and Ms. Y.M. impossible. For these theories to be plausible, Appellant asked the members and asks this Court to believe that Ms. Y.M. was somehow planning to frame Appellant for this abuse from the beginning of

[8] Appellant was found not guilty of Specifications 2, 4, and 6 of Charge I, which also alleged assaults consummated by a battery. Additionally, Appellant was found not guilty of the Specification of Charge II, which alleged that Appellant communicated a threat to kill.

their relationship, decided to have a child with him, and then only reported the allegations in a courtroom after he sought custody of the child. As pointed out by trial counsel, though, the most obvious way to ensure that Appellant did not get custody of their daughter would have been to allege that Appellant was hurting their daughter. (R. at 660-61.) Yet, Ms. Y.M. credibly testified that Appellant never hurt their daughter, even though there were photographs of bruises on the child. Ms. Y.M. explained that any bruises on the child inflicted by Appellant were an accident. (R. at 501.)

Despite Appellant's arguments that this was all one big fabrication, the government presented evidence that corroborated Ms. Y.M.'s testimony. For example, not only did the members hear Ms. Y.M.'s account of the first time Appellant assaulted her in October 2010, they had a portion of her medical records where Ms. Y.M. sought treatment the day after the assault and was referred to an orthopedic surgeon. (Pros. Ex. 1.) The members also had photographs of her injuries that supported the conviction under Specification 1. (Pros. Ex. 4.) Similarly, the members convicted Appellant of Specifications 3 and 5, which had photographic documentation of the injuries Appellant inflicted on Ms. Y.M. (Pros. Ex. 5, 7.) The government also called several witnesses to whom Ms. Y.M. reported the incidents of abuse, further corroborating her testimony.

The members were instructed on their duty to determine the believability of the witnesses. Having personally and carefully considered all this evidence, the court members still voted to convict Appellant of Specifications 1, 3, and 5 of Charge I. There is no reason for this Court to second-guess their discerning verdict, especially upon a cold record.

When every reasonable inference from evidence in the record is drawn in favor of the government, as this Court is required to draw, a reasonable trier of fact could have concluded that Appellant was guilty the charges and specifications of which he was convicted. Appellant's convictions are legally sufficient. Furthermore, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, this Court should also easily be convinced of Appellant's guilt. The findings are factually sufficient.

Ultimately, since the findings in this case were both factually and legally sufficient, Appellant's third assignment of error should be denied.

CONCLUSION

Because Appellant's allegations do not warrant relief, this Court should deny his claims and affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and Appellant's Civilian Defense Counsel on 23 January 2017 via electronic filing.

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