

IN THE UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES,	)	ANSWER ON BEHALF OF
Appellee	)	APPELLEE
	)	
v.	)	Case No. 201500381
	)	
Alexey N. GEBERT,	)	Tried at Pearl Harbor, Hawaii on July
Logistics Specialist Seaman (E-3)	)	9, 22, and 28-31, and August 3, 2015,
U.S. Navy	)	by a general court-martial convened
Appellant	)	by Commander, Navy Region Hawaii.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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## **Errors Assigned**

### **I.**

**COMMUNICATING A THREAT REQUIRES A PURPOSEFUL AND INTENTIONAL MENS REA. THE MILITARY JUDGE ONLY REQUIRED A MENS REA OF RECKLESSNESS. DID THE MILITARY JUDGE ERR BY APPLYING A LESSER MENS REA TO THE COMMUNICATING A THREAT SPECIFICATION?**

### **II.**

**THE GOVERNMENT WAS REQUIRED TO PROVE A PURPOSEFUL AND INTENTIONAL MENS REA BEYOND A REASONABLE DOUBT. APPELLANT'S COMMUNICATION WAS OBJECTIVELY AND SUBJECTIVELY MADE IN JEST. WAS THE EVIDENCE FACTUALLY AND LEGALLY SUFFICIENT?**

### **III.**

**PRIOR TO REFERRING CHARGES TO A GENERAL COURT-MARTIAL THE ARTICLE 32 HEARING OFFICER MUST FIND PROBABLE CAUSE AND THE STAFF JUDGE ADVOCATE MUST PROVIDE ACCURATE ARTICLE 34 ADVICE TO THE CONVENING AUTHORITY. NEITHER REQUIREMENT WAS MET. WAS THIS CASE PROPERLY REFERRED?**

### **IV.**

**EVIDENCE IS NOT ADMISSIBLE IF IT IS IRRELEVANT, UNFAIRLY PREJUDICIAL, OR IMPROPER CHARACTER EVIDENCE. THE MILITARY JUDGE ADMITTED PROSECUTION EXHIBITS 4-5 AND 16-22, WHICH SERVED ONLY**

**TO IMPLY THAT APPELLANT WAS AN EXTREMEIST OR DANGEROUS. DID THE MILITARY JUDGE ERR BY ADMITTING THIS EVIDENCE?**

**V.**

**THE GOVERNMENT IS REQUIRED TO PROVIDE THE ACCUSED'S STATEMENTS TO THE DEFENSE PRIOR TO ARRAIGNMENT AND PROVIDE REASONABLE 404(B) NOTICE PRIOR TO TRIAL. BECAUSE NCIS WAITED UNTIL THE EVE OF TRIAL TO INVESTIGATE THIS CASE, THE GOVERNMENT DID NOT PROVIDE TIMELY NOTICE. DID THE MILITARY JUDGE ERR BY ALLOWING THE GOVERNMENT TO USE THE ACCUSED'S STATEMENTS AND 404(B) EVIDENCE?<sup>1</sup>**

### **Statement of Statutory Jurisdiction**

Appellant's approved sentence includes a bad-conduct discharge.

Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

### **Statement of the Case**

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of communicating a bomb threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). The Military Judge sentenced Appellant to confinement for seven months, reduction to pay grade E-1,

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<sup>1</sup> Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

### **Statement of Facts**

- A. Appellant conducted research on bombs, possessed materials pertinent to bomb-making, had experience making and detonating bombs, and told his shipmates that he was building a bomb and wanted to “blow up” the USS PORT ROYAL.

Appellant first built and detonated bombs as a teenager in 2007 and 2009, while living in London and Florida. (R. 354-55; Pros. Ex. 6 at 1-2; Appellate Ex. XXVIII at 1-2.) The bombs were ammonium nitrate explosives, which he constructed using fertilizer, ethanol, zip-lock bags, plastic boxes, and one meter-long strings soaked in alcohol or gasoline. (*Id.*) Both times, he and a friend detonated the bombs in fields near their schools. (*Id.*) The explosions created shock waves and small craters in the ground. (*Id.*)

By the time he joined the Navy in 2012, Appellant was intent on becoming an Explosive Ordinance Disposal (EOD) technician. (R. 354, 596, 620, 623; Pros. Ex. 6 at 1; Appellate Ex. XXVIII at 2.) But Appellant’s career goals were not realized, and in the spring of 2015, he found himself working onboard the USS PORT ROYAL in the Engineering Repair Division 09 (ER09) work center, “infamously known” onboard the ship as a dumping ground for lazy sailors. (R. 354, 569; Pros. Ex. 6 at 1.) Appellant’s job was to maintain and repair the ship’s ventilation systems and firefighting equipment. (R. 567; Pros. Ex. 6 at 1.)

Like others stationed on the USS PORT ROYAL, an aging cruiser that required constant maintenance and seldom deployed, Appellant's morale was low. (R. 292, 298, 499-500, 567-73, 598, 613, 622, 633, 638, 643-44; Appellate Ex. XLII at 5.) But unlike his shipmates who generally complained that they wished the ship would be decommissioned, sink, run aground, or otherwise stop working (R. 281, 500-04, 581, 599, 602, 614-17, 622-38, 643-46; Pros. Ex. 6 at 4; Appellate Ex. XLII at 5), Appellant communicated a specific plan to get himself off the ship for good: by using his bomb-making expertise to plant and detonate a bomb onboard. (R. 220, 229, 238, 260-67, 282-83, 567-71; Appellate Ex. XLII at 2-5.)

During the March to April 2015 timeframe, Appellant told shipmate Quartermaster Seaman (QMSN) GT that he hated the USS PORT ROYAL and wished it would "blow up." (R. 260, 264; Appellate Ex. XLII at 5.) He talked about using fertilizer to build and test bombs off shore in secret locations, and using copper to make armor-piercing bombs that would be strong enough to pierce the ship's hull. (R. 261-64; Appellate Ex. XXVIII at 2; Appellate Ex. XLII at 5.) One time Appellant invited QMSN GT to test the explosives. (R. 265.) Appellant discussed detonating a bomb in the ship's sonar dome or close to its hull or main engine room, and said he would inform QMSN GT before doing so. (R. 266-67.)

Appellant also discussed bombing the ship with Damage Controlman Third Class (DC3) JC. (R. 567-71; Appellate Ex. XLII at 5.) He told her that he did not

like working on the ship and wanted to blow it up, but he would tell her ahead of time so she could avoid being onboard. (R. 567-70; Appellate Ex. XLII at 5.) He discussed armor-piercing bombs and named two specific supervisors he hoped would be onboard when he detonated his bomb. (*Id.*) Appellant's comments and vocal interest in *The Anarchist's Cookbook* concerned DC3 JC due to their specificity and inappropriateness compared to the general dissatisfaction of other sailors. (R. 568, 570-71, 575, 582; Appellate Ex. XLII at 5.) Once, she counseled him that his comments were inappropriate. (R. 568; Appellate Ex. XLII at 12.)

In the weeks leading up to his apprehension on May 1, 2015, Appellant conducted internet research on ammonia nitrate bombs on public computers in Honolulu and on work computers in order to avoid detection by law enforcement. (R. 356-57; Pros. Ex. 6 at 2; Appellate Ex. XXVIII at 2; Appellate Ex. XLII at 4.) He printed instructional materials and took notes regarding the rate at which ammonia nitrate bombs explode and the heat and pressure they generate. (*Id.*) He also collected materials potentially useful in making a bomb, including washing machine motors with copper wiring, other spools of copper, fertilizer, ammunition cans and magazines, tools, and a cloth. (R. 104-05, 263-64, 279, 439-44, 512-15, 521-42, 578, 593; Pros. Exs. 12, 18-21; Appellate Ex. XXVIII at 3.)

Appellant kept these items in his room, along with several notebooks and a Wikipedia article on "Clandestine Cell Systems." (R. 363-65, 378-87; Pros. Exs.

4-5, 16; Appellate Ex. XXVIII at 3; Appellate Ex. XLII at 4-5.) The notebooks contained handwritten notes on, *inter alia*, clandestine cell systems, automatic weapons, bomb-making ingredients and instructions, hostage-taking and elimination of Navy SEALs and EOD personnel, and bomb-related diagrams. (R. 133-36, 363-65, 378-87, 428, 478; Pros. Exs. 4-5; Appellate Ex. XXVIII at 3; Appellate Ex. XLII at 4-5.)

On one occasion, Appellant stated out loud at work, “Maybe I should build a bomb.” (R. 293, 297; Appellate Ex. XLII at 2.) This was overheard by Gas Turbine System Technician Third Class (GSM3) MS, who also worked at ER09. (R. 291-93, 297; Appellate Ex. XLII at 2.) Later, Appellant commented that “maybe he would Anthrax the ship.” (R. 302.) GSM3 MS confronted him about this statement to make sure Appellant was joking. (*Id.*)

B. Appellant communicated a specific plan to bomb the USS PORT ROYAL to FC3 PL.

On April 27, 2015, Appellant took possession of a black Pelican case which, he later told several witnesses, contained a bomb or would be used to blow up the USS PORT ROYAL. (R. 228, 239, 243-44, 295-96, 309-10, 315.) He found the case in a box he was instructed to throw away and took it to his barracks room by car with the assistance of Logistics Specialist Third Class (LS3) K and GSM3 MS. (R. 295-96, 309-10, 358-59, 474-77, 491-92; Pros. Ex. 6 at 4.) GSM3 MS asked Appellant what he intended to use the Pelican case for; Appellant responded, “It’s

the case I'm going to build a bomb in.” (R. 296, 310; Appellate Ex. XLII at 2.)

FC3 PL saw Appellant carrying the Pelican case from LS3 K's car to his barracks room. (R. 249, 256-57.)

On April 29, 2015, Appellant was talking with GSM3 MS and FC3 PL at work when it was reported that contraband had been found in someone's barracks room. (R. 220, 294-95.) GSM3 MS asked Appellant if he had left bomb-making materials or anything incriminating in his room; Appellant replied, “No, they're far, far away.” (R. 220, 295; Appellate Ex. XLII at 2.) FC3 PL asked why Appellant would have something incriminating in his room, and GSM3 MS stated that Appellant was building a bomb. (*Id.*) The conversation was very serious and no one laughed. (R. 220-21.) Although FC3 PL “didn't want to jump to conclusions,” he took the reference to Appellant's bomb-making seriously. (R. 221.)

The next day FC3 PL asked GSM3 MS if he knew where Appellant intended to use his bomb. (R. 221, 313-14; Appellate Ex. XLII at 2.) GSM3 MS replied, “Yeah, he intends to use it on the ship.” (*Id.*) GSM3 MS also said Appellant was keeping his bomb in a black Pelican case, which connected with what FC3 PL had seen several days earlier. (R. 237, 243-45, 249, 256-57.) GSM3 MS relayed this information to FC3 PL because he was increasingly concerned about Appellant's comments and believed FC3 PL would report the information to the chain of command, which he did that evening. (R. 222, 315-16; Appellate Ex. XLII at 2-3.)

The next morning, May 1, 2015, FC3 PL asked Appellant about the Pelican case that apparently contained the bomb he was making. (R. 224-25, 243-46; Pros. Ex. 6 at 4; Appellate Ex. XLII at 3.) Appellant stated that his purpose for using the bomb was to cripple or damage the ship; that it was safely hidden; that he intended to place the bomb in the main reduction gear or sonar dome; that casualties were inevitable; and that he intended to evade responsibility for the explosion by detonating the bomb at a time when many contractors were present so that they would be blamed. (*Id.*) Appellant stopped talking whenever anyone walked by; his facial expressions were “very serious,” and he did not laugh or indicate he was joking in any way. (R. 225, 248; Appellate Ex. XLII at 3.) FC3 PL took his statements “very seriously.” (*Id.*)

Shortly thereafter, Appellant was apprehended. (R. 226.)

C. When questioned by NCIS, Appellant initially lied about the black Pelican case and the Wikipedia article on clandestine cell systems.

On May 1, 2015, Appellant was interviewed by Special Agent OS, Naval Criminal Investigative Service (NCIS). (R. 351; Pros. Ex. 6.) At first, Appellant denied any knowledge of the black Pelican case, and denied that he was building a bomb in it. (R. 491; Appellate Ex. XLII at 6.) Later, he admitted this was a lie and confirmed the other sailors’ account of how he had obtained the Pelican case and transported it to his barracks room in LS3 K’s car. (R. 491-92; Pros. Ex. 6 at 4; Appellate Ex. XLII at 6.)

Appellant also lied about the Wikipedia article on “clandestine cell systems” that was found in his barracks room. (R. 364; Appellate Ex. XLII at 6.) At first, he claimed he printed this article as part of a school homework assignment prior to entering the Navy in 2012. (*Id.*) But after Special Agent OS pointed out the date of April 5, 2015 on the document, Appellant admitted that he printed out the article while onboard the USS PORT ROYAL. (*Id.*)

Appellant admitted that he was actively taking steps to build and detonate a new ammonia nitrate bomb, and that the internet research he was surreptitiously conducting on public computers was related to this endeavor. (Pros. Ex. 6 at 3; Appellate Ex. XXVIII at 2.) He claimed he intended to detonate his bomb in a non-populated, state park area in Hawaii. (*Id.*)

D. The Military Judge ordered new Article 34 advice and the Staff Judge Advocate complied. The Preliminary Hearing Officer and the Staff Judge Advocate both found probable cause to support the Charge of communicating a bomb threat under Article 134.

In the Article 32 Report of June 22, 2015, the Preliminary Hearing Officer indicated in Block 18 of the form that there was not probable cause to believe Appellant committed the charged offense. (Article 32 Report at 2, June 22, 2015.) Several pages later, she clarified that she found probable cause to support most of the specifications, including the bomb threat specification, and recommended referral of all charges and specifications except Charge I (the alleged larceny of ammunition magazines) to a special court-martial. (Article 32 Report at 2, 6.)

In the initial Article 34 advice, the Staff Judge Advocate stated that the Preliminary Hearing Officer recommended the case be referred to a special court-martial, but he did not comment on the apparent ambiguity in her probable cause determinations, and he did not point out that she found no probable cause for Charge I. (Article 34 Advice, July 1, 2015; Appellate Ex. XXII at 2.) Instead, he advised the Convening Authority to refer “the case” (including all specifications) to a general court-martial, with minor modifications to the form of the charges. (*Id.*) The Convening Authority accepted this recommendation and the charges were re-preferred and referred on July 1, 2015. (Charge Sheet, July 1, 2015.)

On July 15, 2015, Appellant moved to dismiss Charge I due to improper referral, citing the Staff Judge Advocate’s omission of any discussion of the Preliminary Hearing Officer’s varied probable cause determinations. (Appellate Ex. VI at 10-13.) Appellant also argued that changes to Rule for Courts-Martial (R.C.M.) 405 imposed by Executive Order 13696, dated June 19, 2015, made the Preliminary Hearing Officer’s probable cause determination with respect to Charge I binding on the Convening Authority. (Appellate Ex. VI at 1-9.)

The Military Judge rejected Appellant’s argument regarding the binding nature of the Preliminary Hearing Officer’s probable cause determination, but agreed that the Article 34 advice was materially defective because it omitted any discussion of the Preliminary Hearing Officer’s determination that Charge I lacked

probable cause. (Appellate Ex. XXII at 2-4.) To remedy this material defect, the Military Judge ordered new Article 34 advice. (Appellate Ex. XXII at 4.)

On July 23, 2015, the Staff Judge Advocate issued new Article 34 advice, again recommending that the charges be referred to a general court-martial. (Appellate Ex. XXIII at 3.) But he also recommended that Charge I be withdrawn and dismissed, consistent with the Preliminary Hearing Officer's recommendation. (*Id.*) The Convening Authority acted in accordance with this advice. (R. 160.)

E. After referral, Trial Counsel provided statements from QMSN GT and DC3 JC to Appellant with notice of the prosecution's intent to introduce statements of the accused through their testimony.

On July 13, 2015, NCIS obtained a sworn statement from QMSN GT. (R. 166-67, 195; Appellate Ex. XXIX at 2, 18, 31.) The next day, Trial Counsel provided this statement to Appellant and notified him that QMSN GT would be a witness in the United States' case-in-chief. (*Id.*) Civilian Defense Counsel cross-examined QMSN GT concerning his NCIS statement at an Article 39(a) session on July 22, 2015. (R. 106-09.) On July 24, 2015, Trial Counsel notified Appellant of the prosecution's intent to introduce specific statements of Appellant through the testimony of QMSN GT. (Appellate Ex. XXIX at 19-20.)

On July 14, 2015, NCIS obtained a sworn statement from DC3 JC. (R. 167-68, 195; Appellate Ex. XXIX at 2, 20, 28.) Trial Counsel provided this statement to Appellant on July 21, 2015, and notified Appellant of the prosecution's intent to

introduce specific statements of Appellant through the testimony of DC3 JC on July 24, 2015. (*Id.*)

At an Article 39(a) session on July 28, 2015, Appellant moved to suppress the statements of QMSN GT and DC3 JC, arguing that Trial Counsel's disclosure was untimely. (R. 189; Appellate Ex. XXIV at 4.) The Military Judge found that Trial Counsel turned over QMSN GT's statement in a timely manner. (R. 195.) Although the Military Judge found that the disclosure of DC3 JC's statement was untimely, he concluded Trial Counsel's delay was inadvertent and was "not . . . an attempt to gain a tactical advantage over the defense." (R. 169, 195-96.) With respect to both statements, the Military Judge concluded that Trial Counsel complied with the disclosure requirements of Mil. R. Evid. 304(f)(2) and denied Appellant's Motion to Suppress. (R. 196.)

The Military Judge noted that ordinarily a continuance is the appropriate remedy when an accused is provided untimely notice of statements made by the accused that are intended to be introduced at trial through witness testimony. (R. 190, 196-97.) Civilian Defense Counsel objected that he had another court-martial scheduled for the following week and did not wish to delay Appellant's trial for two weeks. (R. 188-91.) The Military Judge ordered a one-day continuance to provide Appellant time to adequately prepare for cross-examination of DC3 JC and Civilian Defense Counsel did not renew his objection. (R. 196-201.)

F. The Military Judge found the material and documentary evidence collected from Appellant's room was probative of his subjective intent at the time he communicated the bomb threat to FC3 PL.

Over Appellant's objection, the Military Judge admitted into evidence the various documentary and physical items seized from Appellant's room, including fertilizer, washing machine motors, copper wiring, pliers and other tools, gray cloth, metal plates, Appellant's notebooks, and printouts about clandestine cell units and other bomb-related information. (R. 562-64; Appellate Ex. XXVIII.) Citing *United States v. Gilluly*, 13 C.M.A. 458, 461 (C.M.A. 1963) and *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999), the Military Judge concluded that these items were probative of Appellant's intent at the time he communicated the alleged threat to FC3 PL. (*Id.*) Thus the Military Judge found that the evidence was admissible under Mil. R. Evid. 404(b) and the three-part test set forth in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989). (*Id.*)

The Military Judge expressly articulated the Mil. R. Evid. 403 balancing test on the Record and found "the probative value of [the] evidence outweighs the potential danger of unfair prejudice or confusing the issues." (R. 563-64; Appellate Ex. XXVIII at 6.) He stated that he would consider the evidence only for "the extent to which it bears on the intent of the accused in making the statements at issue on 1 May," and he would not consider the evidence for propensity purposes. (*Id.*)

G. The Military Judge issued Special Findings detailing the evidence supporting the elements of the offense, including “wrongfulness,” and his interpretation of *Elonis* regarding the *mens rea* standard applicable to communicating a threat under Article 134.

Upon request by Appellant, the Military Judge issued Special Findings detailing, *inter alia*: (1) the language communicated by Appellant on May 1, 2015, that, under the totality of the circumstances, amounted to a threat; (2) the Military Judge’s analysis as to why Appellant’s communication was “wrongful,” and why it was to the prejudice of good order and discipline and service-discrediting; (3) the Military Judge’s analysis of the applicable *mens rea* standard (recklessness) he applied to assess Appellant’s culpability; and (4) the evidence that satisfied this *mens rea* standard. (Appellate Ex. XLII at 2-11.)

The Military Judge based his finding concerning the applicable *mens rea* standard on *United States v. Elonis*, 135 S. Ct. 2001 (2015), which held that a federal statute prohibiting the communication of threats, 18 U.S.C. § 875(c), requires proof of a level of *mens rea* greater than negligence. (Appellate Ex. XLII at 9.) Without the benefit of the Court of Appeals for the Armed Forces’ later decision in *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016) (holding that the *mens rea* component missing in the statute at issue in *Elonis* is contained in the element of wrongfulness required to sustain a conviction for communicating a threat under Article 134), the Military Judge determined “out of an abundance of caution” to apply the holding of *Elonis* to the bomb threat specification under

Article 134. (Appellate Ex. XLII at 9-10.) Relying on the analysis from Justice Alito's concurring opinion, he determined the *mens rea* standard of recklessness to be applicable to the offense and applied that standard *in addition to* the element of wrongfulness. (*Id.*)

In his Special Findings, the Military Judge cited numerous circumstances and evidentiary items that supported both the wrongfulness element of the offense and the *mens rea* standard of recklessness: (1) Appellant's detailed statements to FC3 PL about his intention to cripple the ship with a bomb, the inevitability of casualties, and his plan to blame others; (2) Appellant's tone and demeanor when he made these statements; (3) Appellant's surreptitious research into bomb-making; (4) Appellant's prior experience detonating ammonia nitrate bombs; (5) Appellant's notebooks and the various bomb-related materials from his room; (6) Appellant's dislike for the USS PORT ROYAL and one of his supervisors; (7) Appellant's bomb-related statements to multiple sailors, including regarding detonating a bomb on the ship; (8) the videotape of Appellant bringing the Pelican case into the barracks; and (9) Appellant's lies to NCIS about the Pelican case and his article on clandestine cell systems. (Appellate Ex. XLII at 4-6, 11.) The Military Judge additionally found the *mens rea* standard of recklessness to be supported by the fact that at least two witnesses confronted Appellant about his inappropriate statements. (Appellate Ex. XLII at 11.)

H. The Military Judge also found that Appellant's threat was intentional.

Although the Military Judge interpreted *Elonis* to require application of the *mens rea* standard of recklessness, he also expressly found, “in light of the surrounding circumstances, [that] the evidence supports that [Appellant's] communication of a threat was *knowing and intentional*.” (Appellate Ex. XLII at 12, n.1) (emphasis added). This finding was also reflected when he found that Appellant's “tone, affect, and demeanor at the time he made the statements to FC3 [PL] are not suggestive of someone joking around at work and *unintentionally or inadvertently* being taken seriously.” (Appellate Ex. XLII at 4) (emphasis added).

### **Argument**

#### I.

*RAPERT* HELD THAT THE WRONGFULNESS ELEMENT OF THE OFFENSE OF COMMUNICATING A THREAT UNDER ARTICLE 134, UCMJ, PLACES THE OFFENSE OUTSIDE THE AMBIT OF *ELONIS*, THUS THERE WAS NO PREJUDICE TO APPELLANT FROM THE MILITARY JUDGE'S ERRONEOUS APPLICATION OF THE *MENS REA* STANDARD OF RECKLESSNESS *IN ADDITION TO* THE ELEMENT OF WRONGFULNESS. EVEN IF APPELLANT IS CORRECT THAT *RAPERT* CONSTRUED THE WRONGFULNESS ELEMENT TO REQUIRE AN INTENTIONAL OR PURPOSEFUL *MENS REA*, THERE STILL WAS NO PREJUDICE BECAUSE THE MILITARY JUDGE EXPRESSLY FOUND APPELLANT'S COMMUNICATION OF A THREAT TO BE “KNOWING AND INTENTIONAL.”

A. The standard of review is *de novo*.

Interpretation of statutes and regulations is a question of law this Court reviews *de novo*. *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005). As they pertain to a military judge’s explanation of the law he or she has applied, “[s]pecial findings are to a bench trial as instructions are to a trial before members.” *United States v. Postle*, 20 M.J. 632, 638 (N.M.C.M.R. 1985) (citing *United States v. Falin*, 43 C.M.R. 702 (A.C.M.R. 1971)). This Court reviews questions of law, such as the substance of instructions, *de novo*. *United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016).

B. Communicating a threat under Article 134 does not require additional proof of the accused’s *mens rea* beyond the wrongfulness element.

In *Elonis*, the Supreme Court examined a federal statute prohibiting the communication of threats, 18 U.S.C. § 875(c), and concluded that although the statute does not expressly include a scienter requirement, the law still requires a level of *mens rea* greater than simple negligence—that is, a *mens rea* standard sufficient “to separate wrongful conduct from otherwise innocent conduct.” *Elonis*, 135 S. Ct. at 2010. In a concurring opinion, Justice Alito criticized the majority’s opinion for not specifying which *mens rea* standard beyond simple negligence should be applied. *Id.* at 2014-16 (Alito, J., concurring in part and dissenting in part). He then provided a detailed analysis of why the *mens rea* standard of

recklessness should apply to 18 U.S.C. § 875(c) and to other statutes for which Congress has not explicitly prescribed the applicable *mens rea* standard. *Id.*

In *Rapert*, the Court of Appeals for the Armed Forces addressed whether the holding in *Elonis* applies to prosecutions for communicating a threat under Article 134. *Rapert*, 75 M.J. at 165. The facts in *Rapert* involved an appellant who, while watching the election coverage on television the night of President Obama's reelection in 2012 at his neighbor's residence, stated an intent to return home, don his grandfather's Ku Klux Klan (KKK) robe, and issue an order to kill the President at a KKK rally. *Id.* at 165-66. The appellant previously had indicated to his neighbor that his family had ties to the KKK. *Id.* at 166. Although the appellant later claimed he meant his statements as harmless jokes, and though no evidence of any actual family connection to the KKK was uncovered, the neighbor took his comments seriously and reported them to law enforcement. *Id.*

The *Rapert* court began its analysis by recognizing that the offense of communicating a threat under Article 134 involves both an objective and a subjective prong. *United States v. Whitley*, No. 201500060, 2016 CCA LEXIS 188, \*7 (N-M. Ct. Crim. App. Mar. 29, 2016) (citing *Rapert*, 75 M.J. at 168-69).

The first element of the offense is measured by an objective standard: would a reasonable person understand the statement as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future? The third element, on the other hand, is measured by a subjective standard: was the communication wrongful—that is, did the speaker

intend the statement ‘as something other than a joke or idle banter, or intend[] the statement[] to serve something other than an innocent or legitimate purpose’?<sup>2</sup>

*Id.* (quoting *Rapert*, 75 M.J. at 169). “Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required.” Manual for Courts-Martial (MCM), United States (2012 ed.), pt. IV, para. 109.c.(1). Instead, the subjective prong “relates to whether the speaker intended his or her words *to be understood as sincere*.” *Rapert*, 75 M.J. at 169, n.10 (emphasis in original).

The *Rapert* court rejected the appellant’s argument that the elements of the offense of communicating a threat under Article 134 allowed him to be convicted based on a negligence standard in contravention of *Elonis*. *Id.* at 165. Noting that “the infirmities found in 18 U.S.C. § 875(c) are not replicated in Article 134, UCMJ,” the court held that the “wrongfulness” element of the latter (the “subjective prong”)—specifically the requirement to prove that an accused’s statement was wrongful because it was not made in jest or as idle banter, or for an innocent or legitimate purpose—“prevents the criminalization of otherwise ‘innocent conduct,’ and thus requires the Government to prove the accused’s mens rea rather than base a conviction on mere negligence.” *Id.* at 168-69. As a result,

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<sup>2</sup> *Rapert* addressed communicating a threat under MCM, Part IV, paragraph 110, whereas Appellant was charged with communicating a bomb threat under paragraph 109. The first element of paragraph 110 is listed as two separate elements in paragraph 109, while the third element of paragraph 110 (wrongfulness) is listed as the fourth element of paragraph 109. Compare MCM, pt. IV, para. 110.b.(1) and (3), with MCM, pt. IV, para. 109.b.(1)(a)-(b) and (d).

the “wrongfulness” element places prosecutions for the offense of communicating a threat “beyond the reach of *Elonis*.” *Id.* at 168.

Adopting Judge Stucky’s dissenting opinion in *Rapert*, Appellant here argues that the majority implicitly imposed an intentional *mens rea* requirement on the offense of communicating a threat under Article 134 *in addition to* the element of wrongfulness.<sup>3</sup> (Appellant’s Br. at 11.) But the majority opinion does not go so far. Instead, the *Rapert* court held that when a court-martial determines that an accused’s communication is “wrongful,” no further inquiry into the accused’s subjective intent is required. *Rapert*, 75 M.J. at 169. Further, no decision issued by this Court or its sister courts has adopted Appellant’s reading of the holding of *Rapert*. *See, e.g., Whitley*, 2016 CCA LEXIS 188, at \*6-9 (holding an appellant’s statement that he would “be in [his] garage with [his] AR-15, waiting [for child protective services to] come try to take [his] kids away” was wrongful because the surrounding context did not reveal the statement to have been made in jest).

C. The Military Judge’s application of the *mens rea* standard of recklessness *in addition to* the element of wrongfulness, though erroneous in light of *Rapert*, could not have prejudiced Appellant because it exacted a higher standard of proof than the law required.

Where an erroneous jury instruction inures to the benefit of an accused by placing a higher burden of proof on the prosecution than is required by law, then

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<sup>3</sup> Similar to Justice Alito’s concurring opinion in *Elonis*, Judge Stucky’s dissenting opinion suggests that communicating a threat under Article 134 should be read to require proof that the accused acted *recklessly*. *Rapert*, 75 M.J. at 179.

the error cannot be prejudicial to the accused. *Killian v. United States*, 368 U.S. 231, 257-58 (1961); *United States v. Deutsch*, 451 F.2d 98, 113 (2nd Cir. 1971) (“The trial court’s error in charging the jury that intent to influence was a necessary element of the offense did not prejudice [the appellant], for the erroneous charge merely ‘exacted a higher standard of proof than the law required.’”) (citing *Killian*, 368 U.S. at 258); *United States v. Houston*, 406 F.3d 1121, 1125 (9th Cir. 2005) (finding the district court erred by instructing the jury that a statute prohibiting distribution of a controlled substance resulting in death required proof of “proximate cause,” but holding such error harmless because it “inured to the benefit of the defendant because it placed a higher burden of proof on the Government than is required by law”) (citing *Killian*, 368 U.S. at 257-58).

Here, the Military Judge’s Special Findings—analogueous to jury instructions, *see Postle*, 20 M.J. at 638—show that he applied a *mens rea* standard of recklessness *in addition* to the element of wrongfulness in the offense of communicating a threat under Article 134. (Appellate Ex. XLII at 4-11.) But he did not *replace* the wrongfulness element with a recklessness standard. (*Id.*) In fact, the Military Judge expressly suggested the argument that the *Rapert* court would later adopt as its holding: “Arguably, the element of wrongfulness and the terminal element under the Article 134 offense, neither of which exist under 18 U.S.C. § 875(c), address the scienter concerns posed in *Elonis*.” (Appellate Ex.

XLII at 9.) Nevertheless, without the benefit of *Rapert*, he applied the recklessness standard *in addition to* wrongfulness “out of an abundance of caution.” (*Id.*)

This additional requirement, though erroneous in light of the *Rapert* court’s later decision, inured to the benefit of Appellant by placing a higher burden of proof on the United States (in the form of an additional scienter element) than the holding in *Rapert* requires. *See supra* at 21. As such, the Military Judge’s application of *Elonis* to the facts of the case, though erroneous, did not prejudice Appellant. *See Killian*, 368 U.S. at 257-58.

D. Even if Appellant is correct that *Rapert* construed wrongfulness to require an intentional *mens rea*, there still was no prejudice because the Military Judge expressly found his communication of a threat to be “knowing and intentional.”

The factual premise of Appellant’s argument—that the Military Judge only found that Appellant *recklessly* communicated a threat, but not *intentionally*—is incorrect. (Appellant’s Br. at 12-13.) In his Special Findings, after detailing why “the weight of the evidence supports beyond a reasonable doubt that the accused was not operating under some mistaken belief that he would be perceived as joking but was inadvertently taken seriously,” the Military Judge found the evidence supported “an awareness of wrongdoing on the part of the accused in communicating the threat that more than satisfies the recklessness standard.” (*Id.*) More specifically, the Military Judge found that, “in light of the surrounding

circumstances, the evidence supports that the accused's communication of a threat was *knowing and intentional*." (Appellate Ex. XLII at 12, n.1) (emphasis added).

Thus, assuming *arguendo* that Appellant's interpretation of the *Rapert* court's holding is correct, he still can demonstrate no prejudice, because the Military Judge's finding of recklessness was superfluous to his finding that Appellant communicated a threat with an intentional *mens rea*. Analogously, where a military judge issues a superfluous findings instruction unnecessary to a finding of guilt to all elements of an offense, courts have generally regarded such superfluous instructional errors as harmless. *See United States v. Cowan*, 42 M.J. 475, 478 (C.A.A.F. 1995) ("To the extent that the erroneous instruction contributed to a 'superfluous' finding, it was harmless beyond a reasonable doubt.").<sup>4</sup>

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<sup>4</sup> The United States does not concede that "harmless beyond a reasonable doubt" is necessarily the prejudice test here, particularly given that this was a judge-alone case. However, given the nature of the facts in this case and the holding in *Rapert*, any error here was harmless regardless of the prejudice test applied.

## II.

THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN THE CONVICTION. BASED ON THE WORDS THEMSELVES AND THE SURROUNDING CONTEXT, APPELLANT'S COMMUNICATION—LIKE RAPERT'S AND WHITLEY'S—MEETS BOTH THE OBJECTIVE AND SUBJECTIVE PRONGS OF THE THREAT OFFENSE, AS WELL AS THE TERMINAL ELEMENT.

A. The standard of review is *de novo*.

This Court has an independent obligation to review each case *de novo* for legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

B. The test for legal sufficiency requires drawing every reasonable inference in favor of the prosecution; the test for factual sufficiency requires “recognizing that the trial court saw and heard the witnesses.”

The test for 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. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (internal citations and quotations omitted). In resolving questions of legal sufficiency, the 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. 2001).

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 members of [this Court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. In making this determination, the Court must "recogniz[e] that the trial court saw and heard the witnesses," Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), giving "great weight to the determination of the finder of fact at trial." *United States v. Johnson*, 6 M.J. 681, 682 (N.M.C.M.R. 1978). This Court may be convinced beyond a reasonable doubt of an appellant's guilt even where there are conflicts in the evidence, and may accord a witness's credibility greater weight on some topics than on others. *United States v. Lepresti*, 52 M.J. 644, 648 (N-M. Ct. Crim. App. 1999).

C. The evidence is factually sufficient to support the objective prong of the offense because a reasonable person in FC3 PL's position would perceive Appellant's statements as a threat.

Appellant was charged, in pertinent part, with wrongfully communicating certain information to FC3 PL on or about May 1, 2015, to wit:

'I intend to place a bomb somewhere on [the] USS PORT ROYAL where it would do the most damage to cripple or sink the ship, probably the main reduction gear,' or words to that effect, which language constituted a threat to ham a person or property by means of an explosive, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(Charge Sheet, Jul. 1, 2015.)

In order to prove this offense, the United States was required to show: (1) that Appellant communicated certain language; (2) that the information

communicated amounted to a threat (the *objective* prong of the offense); (3) that the harm threatened was to be done by means of an explosive; (4) that the communication was wrongful (the *subjective* prong of the offense); and (5) that, under the circumstances, the conduct was prejudicial to good order and discipline or service-discrediting. Article 134, UCMJ; MCM, pt. IV, para. 109.b.(1).

1. Based on Appellant’s demeanor, tone, affect, and the surrounding context, Appellant’s words communicated an intent to damage or destroy the USS PORT ROYAL and to kill bystanders by means of an explosive bomb.

The type of “threat” with which Appellant was charged is defined as “an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future . . . [by means of an] explosive bomb.” MCM, pt. IV, para. 109.b.(1)(b)-(c) and c.(1)-(2); *see United States v. Sturmer*, 1 C.M.A. 17, 18 (1951) (“A threat is an avowed present determination or intent to injure presently or in the future”) (internal citations, quotations, and emphasis omitted). As noted *supra*, whether a communication qualifies as a threat under this definition is evaluated under an objective standard—that is, “from the point of view of a reasonable [person].” *Rapert*, 75 M.J. at 168 (quoting *United States v. Phillips*, 42 M.J. 127, 129 (C.A.A.F. 1995)). In making this determination, this Court considers “not just the statement itself, but the surrounding context.” *Whitley*, 2016 CCA LEXIS 188, at \*7-8 (citing *United States v. Brown*, 65 M.J. 227, 231 (C.A.A.F. 2007)).

The *Rapert* court found the appellant’s communication to his neighbor met this “objective prong” of the offense when he expressed a present intent to kill President Barack Obama after his 2012 reelection. After the election results were announced, the appellant communicated words to the effect of:

When I go back to Missouri for training soon, I am going to pull my [KKK] robe out and give one order to be carried out to kill that n[\*\*\*\*]r. I am not going to serve under that n[\*\*\*\*]r and I will ask for this one order to be carried out by me.

*Rapert*, 75 M.J. at 166. Despite a lack of evidence showing that Rapert actually intended—or was even capable of—carrying out this threat, the *Rapert* court found that these words met the objective prong of the offense, because “a reasonable person would understand” those words to signify a present determination or intent to kill the President. *Id.* at 168-70. Importantly, the court noted that Rapert previously told his neighbor that his family had ties to the KKK. *Id.* at 166. This likely impacted the neighbor’s perception of the appellant’s sincerity.

In finding the objective prong of the offense had been met in *Whitley*, this Court emphasized the appellant’s serious tone and demeanor at the time he communicated an intent to injure someone from law enforcement or child protective services using his AR-15 rifle. *Whitley*, 2016 LEXIS CCA 188, at \*8-9. “[R]egardless of whether the appellant actually intended to carry through with” his stated intent, the Court reasoned, “the entire context of the conversation leads us to

conclude that . . . a reasonable person would have believed that the appellant's statement was a threat." *Id.*

Here, Appellant was charged with communicating a present intent "'to place a bomb somewhere on [the] USS PORT ROYAL where it would do the most damage to cripple or sink the ship, probably the main reduction gear,' or words to that effect." (Charge Sheet, Jul. 1, 2015.) Like the individuals who heard the threats in *Rapert* and *Whitley*, FC3 PL testified that he "took [Appellant's statements] very seriously." (R. 225.) He described Appellant as "very serious in everything he said" and took note that he would stop the conversation whenever anyone walked by, so as to keep his words private. (R. 225, 228-30.)

As in *Rapert* and *Whitley*, a reasonable person would understand Appellant's words, given their surrounding context and Appellant's apparent seriousness at the time he communicated those words, to signify a sincere threat to damage or destroy the USS PORT ROYAL by means of an explosive. And like the neighbor in *Rapert*, FC3 PL's perception of Appellant's sincerity was informed by (1) his recent interactions with Appellant, (2) his knowledge that Appellant appeared to be making a bomb in his black Pelican case, and (3) overhearing Appellant and GSM3 MS discussing the bomb several days earlier. (R. 220-21, 249, 256-57, 294-95; Appellate Ex. XLII at 2.) Thus, a reasonable person *in FC3 PL's position*

would have even more reason to regard Appellant's words as a sincere threat and not a joke or idle banter.

2. When Appellant and FC3 PL referred to "the Pelican case," they both understood they were talking about a bomb.

Appellant argues that the evidence is factually insufficient because he did not specifically say the word "bomb" in his conversation with FC3 PL on May 1, 2015, but instead they both referred to "the Pelican case." (R. 244-46; Appellant's Br. at 15-16.) But the Military Judge examined FC3 PL regarding this issue and clarified that "the context of the conversation [was] suggestive of there being some kind of bomb devise in the [P]elican case," and that both FC3 PL and Appellant understood they were actually talking about *the bomb inside the Pelican case* when using the term "Pelican case." (R. 244-46; Appellate Ex. XLII at 3.)

Further, within the full context of a detailed conversation concerning explosions, casualties, specific locations to plant "the Pelican case," and placing blame on civilian contractors, it would be clear to any reasonable person in FC3 PL's position that Appellant was communicating a threat to do harm by means of an *explosive*, not by means of an *empty Pelican case*. (R. 253-54.)

3. Appellant is incorrect that "no one" took his comments about bombing the ship seriously.

Appellant argues that "no one who directly heard the [May 1, 2015] communication objectively took it seriously," and that therefore this Court should

find that the communication objectively did not amount to a threat. (Appellant's Br. at 17.) But Appellant's premise is faulty. The *only* person who directly heard the statements in question—FC3 PL—testified that he “took them very seriously.” (R. 225.) Thus the Military Judge made Special Findings that FC3 PL “took the accused's statements seriously.” (Appellate Ex. XLII at 3.)

Appellant points to other statements about bombing the ship he made to other shipmates prior to May 1 in order to argue that, because other individuals did not take these other statements seriously, FC3 PL reasonably should not have taken Appellant's May 1 communication seriously. (Appellant's Br. at 16-18.) But FC3 PL generally was not a part of these prior conversations, thus they are irrelevant to the question of whether a reasonable person *in FC3 PL's position* on May 1, 2015, would find Appellant's expression of a present intent to bomb the USS PORT ROYAL to be a sincere threat.

Further, FC3 PL was not the only witness to express concerns about Appellant's previous comments. DC3 JC specifically counseled Appellant that his bomb-related comments were inappropriate. (R. 568; Appellate Ex. XLII at 12.) GSM3 MS confronted him about his threat to “Anthrax the ship.” (R. 302.) And GSM3 MS told FC3 PL about Appellant's Pelican case because he was worried that Appellant *might actually carry out his threat to bomb the ship* and believed

FC3 PL would report the information to the chain of command. (R. 222, 315-16; Appellate Ex. XLII at 2-3.)

D. Considering Appellant's statements and the surrounding context, the evidence is legally and factually sufficient to support the subjective prong of the offense: that the threat was wrongful because it was not made in idle jest or for an innocent or legitimate purpose.

As discussed *supra*, the “wrongfulness element” (the subjective prong) of the offense is met if the communication “was not made in jest or as idle banter, or for an innocent or legitimate purpose.” *Rapert*, 75 M.J. at 169. As with the objective prong, this Court considers “not just the statement itself, but the surrounding context.” *Whitley*, 2016 CCA LEXIS 188, at \*7-8 (citations omitted).

Here, as in *Rapert* and *Whitley*, Appellant’s “tone, affect, and demeanor at the time he made the statements to [FC3 PL] are not suggestive of someone joking around at work and unintentionally or inadvertently being taken seriously.”

(Appellate Ex. XLII at 4.) Not only was Appellant describing a specific and detailed plan to explode a bomb onboard a U.S. Navy warship, thereby disabling the ship and taking casualties, he stopped talking to FC3 PL about his intent whenever someone would walk by, suggesting a desire to keep their communications secret. (R. 225, 248; Appellate Ex. XLII at 3.) If Appellant, as he argues now, had intended his statements to be taken by FC3 PL only as a joke or as idle banter, he would not have done this. (Appellant’s Br. at 19.)

Further, Appellant had already been confronted about his inappropriate statements by DC3 JC and GSM3 MS in the past, so he was on notice that people around him were taking his comments about damaging the ship seriously and did not approve of those comments. (R. 302, 568; Appellate Ex. XLII at 12.) As the Military Judge found, this “supports an awareness of wrongdoing on the part of [Appellant] in communicating the threat [to FC3 PL] that more than satisfies the recklessness standard,” and also supports that the communication of the threat “was knowing and intentional.” (Appellate Ex. XLII at 12.)

Finally, as discussed in greater detail *infra* in Assignment of Error IV, Appellant was also in possession of numerous physical and documentary items potentially relevant to bomb-making, including fertilizer, washing machine motors, copper wiring, various tools, gray cloth, metal plates, his notebooks containing bomb-related information, and printouts about clandestine cell units and other bomb-related information. (R. 562-64; Appellate Ex. XXVIII.) This and other evidence—including his admissions to NCIS—supported that he was actively taking steps to build and detonate a bomb, and provided additional support for the wrongfulness element of Appellant’s communication. *See infra* at 44-52.

E. As in *Gilluly, Rapert, and Whitley*, Appellant’s threats were prejudicial to good order and discipline and service-discrediting.

“Conduct prejudicial to good order and discipline” is conduct which causes a reasonably direct and obvious injury to good order and discipline, while service

discrediting conduct is which “has a tendency to bring the service into disrepute or which tends to lower it in public esteem.” MCM, pt. IV, para. 60.c.(2) and (3); *see United States v. Daniels*, No. 200200423, 2003 CCA LEXIS 11, \*6-7 (N-M. Ct. Crim. App. Jan. 30, 2003). A “low evidentiary threshold” is required to satisfy the so-called “terminal element(s)” of an Article 134 offense. *United States v. Goings*, 72 M.J. 202, 206 n.5 (C.A.A.F. 2013) (citing *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011) (“evidence that the public was actually aware of the conduct is not necessarily required” to support clause 2 of Article 134’s terminal element); *see United States v. Irvin*, 60 M.J. 23, 26 (C.A.A.F. 2004) (finding a sufficient factual basis to support clause 1 and clause 2 of Article 134’s terminal element despite no evidence that any other servicemembers were aware of, or saw, the child pornography)); *United States v. Holiday*, 4 C.M.A. 454 (C.M.A. 1954) (holding that “the communication of a threat to *any person in the military establishment* [constitutes] direct and palpable prejudice to good order and discipline of the armed forces”) (emphasis added).

In *Gilluly*, the appellant phoned in a threat to blow up the officers and noncommissioned officers clubs at Fort Hood, Texas, with a bomb. *Gilluly*, 13 C.M.A. at 460. The Court of Military Appeals affirmed the appellant’s conviction for communicating a threat that was to the prejudice of good order and discipline even though the appellant had no actual intention, nor the means, to carry out the

threatened destruction. *Id.* at 461. In a concurring opinion, Judge Ferguson found the threat to blow up the officers messes with bombs to be “clearly prejudicial to good order and discipline,” and noted that “[t]he tendency of such a ‘jest’ to create panic and to upset the operations of a military installation is self-evident.” *Id.* at 463 (Ferguson, J., concurring).

In both *Rapert* and *Whitley*, although the appellants communicated threats in off-base private residences, this Court and its superior court found the evidence in each case sufficient to establish both prongs of the terminal element of Article 134. *Rapert*, 75 M.J. at 165; *Whitley*, 2016 LEXIS CCA 188, at \*8-9. Further, this Court in *Whitley* found the evidence sufficient to establish the terminal element even though the appellant’s threat to seriously injure law enforcement or child protective services personnel was not reported to law enforcement until *after* the appellant had already been arrested. *Whitley*, 2016 CCA LEXIS 188, at \*9.

Here, Appellant—while on duty onboard the USS PORT ROYAL—communicated a specific threat to another servicemember, stating his intent to detonate a bomb onboard the ship in order to disable it, resulting in the loss of life to innocent sailors and civilians. (R. 224-25.) This statement “caused great concern to [Appellant’s] shipmate, [FC3 PL], who would have immediately reported it to his chain of command but for the fact that he had already reported similar concerns about the accused hours earlier and was told they were being

addressed.” (Appellate Ex. XLII at 6.) As in *Rapert* and *Whitley*, this direct impact on the servicemember listener, combined with the highly inflammatory nature of the communication itself, is more than sufficient to meet the “low evidentiary threshold” required to satisfy both clauses of the terminal element under Article 134. *Goings*, 72 M.J. at 206 n.5 (citations omitted).

Appellant argues this Court should find the terminal element missing in this case solely because the threatening communication did not lead *directly* to Appellant’s apprehension. (Appellant’s Br. at 21.) But no case law supports this argument, and *Whitley* stands for the opposite proposition. As the Military Judge found, “a Naval warship [need not] be evacuated twice in order to demonstrate the direct and obvious injury to good order and discipline caused by one of its sailors telling another sailor onboard his detailed intent to place a bomb on the ship.” (Appellate Ex. XLII at 7.)

### III.

THE PRELIMINARY HEARING OFFICER'S PROBABLE CAUSE DETERMINATIONS ARE NOT BINDING ON THE CONVENING AUTHORITY. REGARDLESS, ANY DEFECT IN THE ARTICLE 32 REPORT OR THE ARTICLE 34 ADVICE RELATED ONLY TO THE LARCENY CHARGE THAT WAS WITHDRAWN AND DISMISSED AFTER THE REVISED ARTICLE 34 ADVICE.

A. The standard of review is *de novo*.

Whether a charge or specification has been properly referred to a court-martial is a jurisdictional question that this Court reviews *de novo*. *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012).

B. A preliminary hearing officer's probable cause determinations and forum recommendation are not binding on a convening authority.

Unless waived, a preliminary hearing is required before a charge or specification may be referred to a general court-martial. Article 32(a)(1), UCMJ, 10 U.S.C. § 832(a)(1) (2014). One purpose of the preliminary hearing is to determine “whether there is probable cause to believe an offense has been committed” by the accused. Article 32(a)(2)(A), UCMJ. In addition to conducting the preliminary hearing in accordance with the procedures set forth in R.C.M. 405, the preliminary hearing officer must prepare a report that specifically addresses, *inter alia*, whether probable cause exists for each charge and specification. Article 32(c), UCMJ; R.C.M. 405(j)(2)(G).

Although the preliminary hearing officer is required to address probable cause in the Article 32 report, the preliminary hearing officer's probable cause determinations and forum recommendation are not binding on the convening authority. *See MacDonald v. Hodson*, 19 C.M.A. 582, 583 (C.M.A. 1970); R.C.M. 405(a), Discussion ("Determinations and recommendations of the preliminary hearing officer are advisory."); *see generally* Report of the Military Justice Review Group, Part I: UCMJ Recommendations 315-23 (2012) [hereinafter MJRG Report].

Instead, the staff judge advocate's Article 34 advice performs the probable cause "screening function" that is one of the functions of civilian grand jury proceedings and preliminary hearings. *See* MJRG Report at 318-23, 341-45. Under Article 34, a convening authority cannot refer a specification to a general court-martial "unless he has been advised in writing by the staff judge advocate that . . . the specification is warranted by the evidence indicated in" the preliminary hearing officer's report. Article 34(a), UCMJ, 10 U.S.C. § 834(a) (2015); *see* R.C.M. 406(b), Discussion ("The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause"); *United States v. Murray*, 25 M.J. 445, 448 (C.M.A. 1988) (describing the 1983 amendments to Article 34 that made the staff judge advocate's probable cause determination binding on the convening authority).

Contrary to Appellant's contention, nothing in the recent amendments to Article 32 indicates that Congress acted or intended to make preliminary hearing

officer probable cause determinations or forum recommendations binding on convening authorities. *See generally* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013); 159 Cong. Rec. H7949 (daily ed. Dec. 12, 2013) (Joint Explanatory Statement on H.R. 3304). Instead, the Article 32 hearing in its current form remains a *procedural* prerequisite to referral of charges to a general court-martial, not a charge-dispositive screening mechanism akin to the staff judge advocate's Article 34 advice.

Appellant argues that the amended statute's use of the phrase "determining whether probable cause exists" in describing one of the preliminary hearing's four purposes makes the preliminary hearing officer's probable cause determinations dispositive. (Appellant's Br. at 22-23.) But had Congress intended such a result, it surely would have used the more specific language contained in Article 34, quoted *supra*, that makes the staff judge advocate's probable cause determinations binding on the convening authority. Article 34(a), UCMJ; *see Murray*, 25 M.J. at 448.

Further, Appellant's exact argument was recently addressed and rejected by the Coast Guard Court of Criminal Appeals in *United States v. Meador*, 75 M.J. 682 (C.G.C.C.A. 2016). After reviewing the recently amended text of Article 32, UCMJ, and the available legislative history accompanying the statute's amendments, the *Meador* court concluded that:

there is nothing in the recently amended language of Article 32 to suggest that the [preliminary hearing officer's] opinion that probable

cause does not exist as to a specification precludes the [staff judge advocate] from making a different determination or the [convening authority] from referring the specification for trial, after the requirements of Articles 32 and 34 have been met.

*Meador*, 75 M.J. at 683-84. Significantly, the Court of Appeals for the Armed Forces denied review. 2016 CAAF LEXIS 486 (C.A.A.F. June 14, 2016).

C. Regardless, the Preliminary Hearing Officer and the Staff Judge Advocate found there was probable cause to support the bomb threat specification. Thus Appellant suffered no material prejudice.

Assuming arguendo that the Preliminary Hearing Officer's determination that Charge I lacked probable cause was binding on the Convening Authority, Appellant can demonstrate no material prejudice to a substantial right because the error was with the larceny charge, which was withdrawn and dismissed by the Convening Authority after the Staff Judge Advocate issued his revised Article 34 advice. (Appellate Ex. XXIII; Charge Sheet, July 1, 2015; R. 160.) Appellant argues that "the damage and prejudice was already baked in" following the Staff Judge Advocate's first defective advice, but he cites no case to support this argument that a charge can be "improperly referred" based on defective Article 34 advice (later corrected) for a separate charge that ultimately was *not* referred for trial. (Appellant's Br. at 25.) Nor is the undersigned aware of any such case.

In accordance with the Military Judge's order, the Staff Judge Advocate thoroughly and correctly described the Preliminary Hearing Officer's probable cause findings and forum recommendation, including the apparent ambiguity

between Block 18 on the second page of the report and the Preliminary Hearing Officer's detailed probable cause findings for the Article 134 specifications several pages later. (Appellate Ex. XXIII at 1-2.) The Staff Judge Advocate concluded that "[t]he allegation of each offense in [the revised charge sheet] is warranted by evidence indicated in [the Article 32 Report]" and provided his forum recommendation. (Appellate Ex. XXIII at 3.) This is all that is required for a proper referral to a general court-martial under Article 34 and R.C.M. 406 and 601(d). *See Murray*, 25 M.J. at 448. Thus the sole charge now before this Court—the bomb threat specification under Article 134—was properly referred.

#### IV.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING EVIDENCE RELEVANT TO APPELLANT'S INTENT TO ACTUALLY CARRY OUT A BOMB THREAT, BECAUSE THIS EVIDENCE *ALSO* TENDED TO ESTABLISH THE "WRONGFULNESS" OF THE THREAT: THAT APPELLANT WAS NOT MERELY JOKING OR MAKING IDLE BANTER.

- A. The standard of review abuse of discretion; the admissibility of Mil. R. Evid. 404(b) evidence is determined under the three-part *Reynolds* test.

A military judge's decision to admit evidence is reviewed for abuse of discretion. *United States v. McCollum*, 58 M.J. 323 (C.A.A.F. 2003). A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military

judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). "The abuse of discretion standard requires not that the judge was wrong, but rather was clearly wrong." *United States v. Neiman*, No. 201500119, slip op. at 4 (N-M. Ct. Crim. App. July 26, 2016) (quoting *United States v. Byrd*, 60 M.J. 4, 12 (C.A.A.F. 2004) (Crawford, C.J., concurring in the result)).

This Court reviews a military judge's decision to admit evidence offered under Mil. R. Evid. 404(b) using the three-part test set forth in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989):

(1) Does the evidence reasonably support a finding by the court members that the appellant committed the prior crimes, wrongs or acts?; (2) What fact of consequence is made more or less probable by the existence of the evidence?; and (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice?

*United States v. Parker*, 71 M.J. 594, 610 (N-M. Ct. Crim. App. 2012) (citing *Reynolds*, 29 M.J. at 109). With respect to the third prong of the test, "[w]hen a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citations and quotations omitted).

Furthermore, in a judge-alone trial, this Court observes a strong presumption that the military judge limited his consideration of the evidence to its proper

purpose. *United States v. Ray*, 26 M.J. 468, 471 (C.A.A.F. 1988) (citing *United States v. Kinman*, 25 M.J. 99, 101 (C.M.A. 1987)); *United States v. Seghetti*, No. 201200244, 2013 CCA LEXIS 271, \*7-8 (N-M. Ct. Crim. App. Mar. 28, 2013) (“[T]he risk that members will treat evidence of uncharged acts as character evidence and use it to infer that an accused has acted in character, and thus convict is simply not present [in a bench trial].”) (citations and quotations omitted)).

B. The Military Judge did not abuse his discretion when he found that: (1) the evidence reasonably supports that Appellant intended to build a bomb; (2) the bomb-related evidence seized from Appellant’s room is probative of Appellant’s intent to threaten; and (3) the probative value of this evidence outweighs its prejudicial effect.

“Military judges are presumed to know the law and to follow it correctly absent clear evidence to the contrary.” *Rapert*, 75 M.J. at 170 (quoting *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007)). Here, the Military Judge supported his decision to admit the evidence offered under Mil. R. Evid. 404(b) not only by correctly articulating the three-part *Reynolds* test, but by putting his analysis for each of the three *Reynolds* prongs on the Record, and by citing applicable case law in support of his conclusions. (Appellate Ex. XXVIII at 4-6.)

1. The evidence reasonably supports that Appellant intended to build and detonate a bomb.

As the Military Judge correctly noted, the threshold for the first prong of admissibility under the *Reynolds* test is very low. (Appellate Ex. XXVIII at 4 (citing *United States v. Acton*, 38 M.J. 330, 333 (C.A.A.F. 1993)). The prosecution

merely needs to show that a “jury *could* reasonably find the conditional fact . . . by a preponderance of the evidence.” *Acton*, 38 M.J. at 333 (quoting *Huddleston v. United States*, 485 U.S. 681, 690 (1988)) (emphasis added).

Here, this test is easily met. Appellant had been building and detonating bombs since he was fourteen years old, and he remained avidly interested in bomb-making since that time. (R. 354-55; Pros Ex. 6 at 1; Appellate Ex. XXVIII at 1-2.) He talked to multiple witnesses about making, testing, and hiding bombs, the materials needed to make armor-piercing bombs, and his desire to explode a bomb on the USS PORT ROYAL. (R. 220, 229, 238, 260-67, 282-83, 567-71; Appellate Ex. XXVIII at 2-3; Appellate Ex. XLII at 2-5.) He conducted research on bomb-making using public and work computers to avoid detection by law enforcement, and he told investigators that he was actively planning to build and detonate an ammonia nitrate bomb. (R. 356-57; Pros. Ex. 6 at 2-3; Appellate Ex. XXVIII at 2; Appellate Ex. XLII at 4.) He lied to investigators about his black Pelican case and the articles he printed on “clandestine cell systems.” (R. 364, 491-92; Appellate Ex. XXVIII at 1-3.) His notebooks contained notes on bomb-making and bomb-related diagrams; and the physical items seized from his room were materials he openly admitted were relevant to his interest in bomb-making. (R. 133-36, 261-64, 363-65, 378-87, 428, 478, 567-69; Appellate Ex. XXVIII at 3.)

Based on these circumstances and more, a jury could reasonably find that Appellant intended to build and detonate a bomb onboard the USS PORT ROYAL—the subject of his threat—and that the material and documentary items seized from his room were relevant to that intent. Thus the Military Judge did not abuse his discretion with respect to the first prong of the *Reynolds* test.

2. Per *Gilluly* and cases addressing analogous federal statutes, evidence that an accused intended to carry out a threat is probative of the accused’s subjective intent to threaten.

Noting that Appellant’s trial defense strategy was to argue that he intended his statements to FC3 PL as a joke, the Military Judge concluded under the second prong of *Reynolds* that “the facts of consequence made more or less probable by the evidence center around the intent of the accused in communicating the alleged threat”—that is, the wrongfulness element of the offense. (Appellate Ex. XXVIII at 5.) The Military Judge cited two cases in support of this conclusion: *Gilluly* and *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999). (Appellate Ex. XXVIII at 4-5.) These and other Circuit Court decisions address the connection between the *intent-to-carry-out-a-threat* and the *intent-to-threaten* and provide ample support for the Military Judge’s conclusion and demonstrate that it was not influenced by an erroneous view of the law.

In *Gilluly*, the Court of Military Appeals found that a declarant’s actual intention to effectuate (or not to effectuate) a threatened injury bears on his or her

innocence or guilt as to the threat offense itself. *Gilluly*, 13 C.M.A. at 461. Thus a person who truly intends to carry out a bomb threat and who is in possession of bomb-making materials is *less likely* to be joking or making idle banter when they communicate an intent to blow up a warship than a person who has no actual intent of blowing up a ship, and who is not in possession of such bomb-making materials.

In *Viefhaus*, a white supremacist was convicted of using a telephone to transmit a bomb threat in violation of 18 U.S.C. § 844(e). In a recorded message, he encouraged “all white warriors . . . to pick up a sword against the government . . . [or else] bombs will be activated in 15 pre-selected major U.S. cities . . . one week from today.” *Viefhaus*, 168 F.3d at 394. Law enforcement agents seized various items from the appellant’s home, including “literature espousing hate and violence, Nazi propaganda, a cache of weapons, books on making bombs, [and] chemicals and other materials that could easily be converted into high-powered pipe bombs.” *Id.* at 395. Over the appellant’s objection, the district court permitted introduction of these items under Fed. R. Evid. 404(b) “for the purpose of showing [the appellant’s] motive, intent, and state of mind.” *Id.* at 395, 397.

On appeal, the appellant argued that he lacked the intent to commit a true threat and claimed the district court erred in admitting the racially inflammatory items seized from his home. *Id.* at 397. The Tenth Circuit disagreed:

When the defendant offers lack of intent as a defense, even though the government does not have to prove subjective intent as an element of

the offense, the circumstances surrounding the making of the calls becomes relevant. The evidence offered clearly was probative of defendant's state of mind and tends to counter his allegation of benign purpose.

*Id.* at 397-98 (quoting *United States v. Cox*, 957 F.2d 264, 267 (6th Cir. 1992) (per curiam) (sustaining conviction under 18 U.S.C. § 875(c)); accord *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998) (same); *United States v. Fulmer*, 108 F.3d 1486, 1501-02 (1st Cir. 1997) (sustaining conviction under 18 U.S.C. § 115(a)(1)(B)). Noting that “[t]he only way a jury could properly assess the sincerity of [the appellant’s] beliefs, as well as the likely effect [his] message would have on an objective listener, was to examine the circumstances in which the comments were made,” the court ruled that the probative value of the evidence outweighed its prejudicial effect and held that the district court’s admission of the evidence under Fed. R. Evid. 404(b) was proper. *Id.* at 398.

Similarly, in *United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007), the Ninth Circuit held that weapons seized from an appellant’s house were admissible to prove the appellant’s specific intent to communicate a threat under 18 U.S.C. § 875(c), the statute at issue in *Elonis*. *Sutcliffe*, 505 F.3d at 950-52, 958-59. The appellant posted threats to commit violent acts against two former coworkers and a process server on a website he created after he was fired. *Id.* At trial, he argued that he did not actually intend to threaten violence. *Id.* at 959. The Ninth Circuit upheld the district court’s admission of the seized weapons, noting that this

evidence supported that the appellant had the requisite specific intent to threaten.

*Id.*; accord *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001).

Per *Gilluly* and these cases addressing analogous federal statutes,<sup>6</sup> the Military Judge correctly concluded that:

[Appellant’s] knowledge of and intent to build bombs, research and interest in working with explosives, motives for attacking the PORT ROYAL (whether personal or ideological), preparations in this regard, and overall state of mind are all facts of consequence in determining what his intent was in communicating the alleged statement.

(Appellate Ex. XXVIII at 5.) Because “[t]he evidence at issue bears directly on these facts of consequence,” the Military Judge did not abuse his discretion under the second prong of the *Reynolds* test. (Appellate Ex. XXVIII at 6.)

3. Not only did the Military Judge conduct a Mil. R. Evid. 403 balancing test on the Record, he expressly stated he would not consider the evidence for propensity purposes. Thus he did not “clearly abuse his discretion” under the third prong of *Reynolds*.

Applying the third *Reynolds* prong, the Military Judge recognized “the dangers of allowing the case to devolve into the question of whether [Appellant] is some sort of aspiring domestic terrorist with a propensity for criminal activity, as opposed to the appropriate inquiry into” his intent in communicating the statements

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<sup>6</sup> By contrast, in those Circuits where 18 U.S.C. § 875(c) was interpreted pre-*Elonis* to require only general intent, evidence offered to prove motive or intent was sometimes held to be inadmissible. See, e.g., *United States v. Himelwright*, 42 F.3d 777, 783 (3d Cir. 1994) (evidence that defendant possessed two firearms at the time of communicating a threat to “blow everybody away” not admissible since it went toward specific intent, which the Government did not have to prove).

to FC3 PL, but also that Appellant’s “intent in communicating the alleged statement . . . goes to the heart of the charged offense.” (R. 563-64; Appellate Ex. XXVIII at 6.) Balancing these two interests on the Record, the Military Judge concluded that “the probative value of [the] evidence outweighs the potential danger of unfair prejudice or confusing the issues.” (Appellate Ex. XXVIII at 6.)

Further mitigating any danger of unfair prejudice, the Military Judge expressly stated that he would consider the evidence only for “the extent to which it bears on the intent of the accused in making the statements at issue on 1 May,” and that he would not consider the evidence for propensity purposes. (*Id.*)

Given the Military Judge’s analysis and articulation of the probative value of the evidence and the danger of unfair prejudice, his ruling cannot be said to evince a *clear* abuse of discretion, *Manns*, 54 M.J. at 166. As noted *supra*, this Court observes a strong presumption in a judge-alone trial that the military judge will limit his consideration of the evidence to its proper purpose. *Ray*, 26 M.J. at 471 (internal citations omitted). The Military Judge’s careful analysis under the third prong of *Reynolds* gives this Court no reason to abandon that presumption here.

C. Appellant fails to demonstrate how the Military Judge’s ruling was outside the range of choices reasonably arising from the applicable facts and law, or how his Mil. R. Evid. 403 ruling was “a clear abuse of discretion.”

Appellant argues that the various items seized from his room should have been excluded because they were “neither legally nor logically relevant to the

charged offense” and they constituted “improper character evidence.” (Appellant’s Br. at 29-30.) But Appellant fails to cite a single case demonstrating that the Military Judge adopted an erroneous interpretation of the law, and he fails to distinguish or even address the two cases cited by the Military Judge in support of his ruling (additional support for which appears *supra*). (Appellant’s Br. at 27-33.)

Moreover, in arguing that admission of the evidence was highly prejudicial (Appellant’s Br. at 31-33), Appellant ignores the strong presumption in a judge-alone trial that the military judge will limit his consideration of the evidence to its proper purpose. *Ray*, 26 M.J. at 471 (internal citations omitted). Instead, Appellant merely speculates, without any support in the Record or in case law, that “while the Military Judge may be expected to more carefully use this evidence for its admitted purpose only, it would still be impossible to mentally set aside or compartmentalize.” (Appellant’s Br. at 33.) But this speculation runs directly counter to *Ray* and to the “clear abuse of discretion” standard of review this Court employs in all cases where the military judge conducts a proper balancing test under Mil. R. Evid. 403 on the record.

As Appellant’s speculative argument is unsupported and runs counter to the law, while the Military Judge’s findings and conclusions are well-within range of choices reasonably arising from the applicable facts and the cases addressing the admissibility of 404(b) evidence in analogous contexts, this Court should find that

the Military Judge did not abuse his discretion in admitting the items seized from Appellant's room and offered under Mil. R. Evid. 404(b).

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE ORDERED A ONE-DAY CONTINUANCE TO PROVIDE APPELLANT SUFFICIENT TIME TO REVIEW DC3 JC'S SWORN STATEMENT, INTERVIEW HER, AND PREPARE FOR CROSS-EXAMINATION OF HER AT TRIAL.<sup>7</sup>

A. The standard of review is abuse of discretion.

A military judge's decision to admit evidence over objection is reviewed for abuse of discretion. *United States v. McCollum*, 58 M.J. 323 (C.A.A.F. 2003).

B. A continuance normally is the appropriate remedy when the prosecution provides untimely notice of the accused's pretrial statements that are intended to be introduced at trial.

"If the prosecution seeks to offer a statement made by the accused or derivative evidence that was not disclosed before arraignment, the prosecution must provide timely notice to the military judge and defense counsel." Mil. R. Evid. 304(f)(2). If the defense objects, "the military judge may make such orders as are required in the interests of justice." *Id.* However, "[t]he military judge should not impose a sanction harsher than necessary to accomplish the goals of

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<sup>7</sup> This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Rule 304(d)(1).”<sup>8</sup> *United States v. Blackshire*, No. 852309, 1986 CMR LEXIS 2781, \*17 (N.M.C.M.R. Feb. 20, 1986) (citing *United States v. Sarcinelli*, 667 F.2d 5, 6-7 (5th Cir. 1982)).

Where the prosecution fails to comply with Mil. R. Evid. 304(f)(2), granting a continuance ordinarily is an appropriate remedy to meet the “interests of justice.” *United States v. Trimper*, 28 M.J. 460, 468-69 (C.A.A.F. 1989); *United States v. Hawkins*, No. 200001089, 2005 CCA LEXIS 170, \*4-6 (N-M. Ct. Crim. App. May 31, 2005). Excluding such statements is ordinarily inappropriate where the prosecution has not acted in bad faith, and where “the failure to disclose was inadvertent.” *Blackshire*, 1986 CMR LEXIS 2781, at \*16-17; see *United States v. Reynolds*, 15 M.J. 1021, 1023 (A.F.C.M.R. 1983) (“If . . . the failure to make a timely disclosure is inadvertent and unintentional, a continuance to discover the circumstances surrounding the statement is appropriate.”).

C. Any delay in disclosing the statements was inadvertent.

The Military Judge concluded that Trial Counsel’s one-day delay in disclosing QMSN GT’s statement was not untimely and was in compliance with Mil. R. Evid. 304(f)(2). (R. 195-96.) Although Appellant disagrees, he has not

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<sup>8</sup> R.C.M. 304(d)(1) in the pre-2013 version of the Rule has been moved to subsection (d) (Disclosure of Statements by the Accused and Derivative Evidence) of the current version of the Rule.

pointed to any case holding a one-day delay to be untimely and requiring exclusion of the evidence at trial. (Appellant's Br. at 34-35.)

Although the Military Judge found that Trial Counsel's seven-day delay in disclosing DC3 JC's statement was untimely, he found that the delay was inadvertent and that "the government did not delay turning over the statement to the defense in an attempt to gain a tactical advantage." (R. 195-96.) This finding was supported in the Record and was not clearly erroneous. (R. 169.)

The Military Judge concluded that Trial Counsel's disclosure of DC3 JC's statement, though untimely, complied with Mil. R. Evid. 304(f)(2). (R. 196.)

D. The Military Judge did not abuse his discretion, as his ruling did not reflect an erroneous view of the law.

Based on his findings and conclusions, and taking into account Appellant's desire not to delay the trial an entire week due to his Civilian Defense Counsel's upcoming scheduling conflicts, the Military Judge granted a one-day continuance to allow Appellant's defense team to interview DC3 JC and prepare for her cross-examination at trial. (R. 196.) In doing so, the Military Judge recognized that "the case law supports pretty clearly that a continuance is ordinarily the remedy that is provided in a situation like this . . . , it's normally not excluding the testimony; it's normally providing a continuance so that the other side can prepare." (R. 190.)

This was a correct view of the law. *See supra* at 50.

Because the Military Judge's ruling was within "the range of choices reasonably arising from the applicable facts and the law," it was not an abuse of discretion. *Miller*, 66 M.J. at 307. Appellant argues that "[e]xclusion of this evidence was the only appropriate remedy," but he cites no case or other authority in support of this drastic proposition. (Appellant's Br. at 35.) Thus this Court should reject Appellant's argument and dismiss this Assignment of Error.

### **Conclusion**

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.



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### **Certificate of Filing and Service**

I certify that the original and required number of copies of the foregoing were delivered to the Court, Appellate Defense Counsel, and electronically filed in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on July 28, 2016.



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