

APR 29 2016

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

Before Panel No. 2

UNITED STATES,)	APPELLANT'S BRIEF AND
Appellee)	ASSIGNMENT OF ERRORS
)	
v.)	Case No. 201500381
)	
ALEXEY GEBERT,)	
Logistics Specialist Seaman (E-3))	
U.S. Navy)	
Appellant)	
)	

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?

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ALLOWING THE GOVERNMENT TO USE THE
ACCUSED'S STATEMENTS AND 404(B)
EVIDENCE?¹

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).

Statement of the Case

A Military Judge sitting alone convicted Appellant, contrary to his plea, of
one specification of wrongfully communicating a threat in violation of Article 134,
UCMJ, 10 U.S.C. § 934. The Military Judge found Appellant not guilty, following
an R.C.M. 917 motion, of one specification of wrongfully possessing handgun

¹ This Assignment of Error is raised pursuant to *United States v. Grostefon*, 12
M.J. 431 (C.M.A. 1982).

magazines in violation of Article 134, UCMJ. The Government withdrew and dismissed three other specifications: two specifications of alleged larceny in violation of Article 121, UCMJ, and one specification of allegedly violating a Hawaii statute regarding ammunition magazines in violation of Article 134, UCMJ. The Military Judge sentenced Appellant to seven months' confinement, reduction to the rank of E-1, 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's Comments.

In 2015, morale on the USS Port Royal ship was terrible. (R. 572.) Everyone hoped that the ship would "run aground" or get "decommissioned." (R. 599, 614.) And in this environment Appellant was discouraged along with his fellow sailors. Though he shared their frustrations, Appellant stood apart from his peers in his personality and interests. His peers repeat the refrain, "Gebert being Gebert," to explain his personality. (R. 576.)

While others communicated that they hoped harm would come to the ship, (R. 573), Appellant joked with more specificity about bombs and other similar harm to the ship. His friends and peers took his comments in stride as a joke. For example, QMSM **GT** thought Appellant was joking and venting his frustration;

he did not think that the comments were serious. (R. 270-71.) GSM3 MS never thought Appellant's comments about a bomb were serious and he joked with Appellant about these comments. (R. 295, 301, 307, 312.) When GSM3 MS previously confronted Appellant about other inappropriate comments, Appellant confirmed that he was indeed joking. (R. 303.) But he never confronted Appellant about the "explosive" comments because he did not think they were serious. (R. 305, 307.)

Another sailor reportedly said, "I'm proud of him," in response to one of Appellant's comments about building a bomb. (R. 296, 310.) DC3 JC testified that everyone thought he was joking. (R. 571.) She replied, "no," when asked whether she ever took anything that Appellant "said to be a serious threat." (R. 581.)

FC3 PL took the communications (as reported to him by others) "seriously" but also "with a grain of salt." (R. 221.) But FC3 PL was also the one listener who "[c]an take any of the smallest things serious." (R. 629.) And he did take some comments seriously; but it was not Appellant's words that he took seriously, but Seaman MS comments relaying prior communications from Appellant. (R. 343-44.) During trial, Seaman MS initially denied telling FC3 PL that Appellant was seriously building a bomb. (R. 313.)

Regardless, based on this conversation with Seaman MS [REDACTED] FCS PL [REDACTED] reported his concern about Appellant's pre-May 1 comments to the chain of command. (R. 239, 246.) Notably, it is this pre-May 1 report of a bomb from FC3 PL [REDACTED] that initiated the command's contact with NCIS, NCIS's investigation, and the search of the ship. (R. 247, 335-36.)

Recalling May 1, the date alleged in the charge sheet, FC3 PL [REDACTED] testified that Appellant told him about building a bomb. (R. 224-25.) But the Military Judge asked FC3 PL [REDACTED] about this May 1 communication, "did [Appellant] mention the word, 'bomb' or 'explosive'?" "I can't recall exactly," he replied. (R. 245-46, 250.) FC3 PL [REDACTED] could not even remember whether Appellant used "other terms similar to bomb." (R. 250.)

B. Article 32 Hearing Officer Report and Article 34 Advice.

After reviewing the evidence in this case, the Article 32 Hearing Officer marked "No" in the Preliminary Hearing Officer's report in response to "there is probable cause to believe an offense has been committed and that the accused committed that offense." (See IO Report at 2, dated June 22, 2015.) This finding of no probable cause was ambiguous and potentially misleading in light of her probable cause explanation for each specification—finding probable cause for some specifications and no probable cause for another. Rather than clarifying this ambiguity, the Staff Judge Advocate provided Article 34 Advice to the Convening

Authority that failed to mention the Hearing Officer's probable cause findings and recommendations. (Article 34 Advice, dated July 1, 2015.) Based on this flawed advice, the Convening Authority referred the charges and specifications to a general court-martial. (See Charge Sheet.) Due to this error, the Military Judge ordered that "new Article 34 advice [be] issued to the Convening Authority." (See Appellate Ex. XXII at 4.)

C. Collateral character evidence at trial.

In light of the fact that witnesses all believed Appellant's comments were in jest, the Government sought to introduce common sundry physical items of evidence allegedly related to bomb building and research Appellant conducted regarding groups and tactics under Mil. R. Evid. 404. As the Military Judge noted, this evidence consisted of various items that NCIS seized during the search of Appellant's barracks room:

[I]nvestigators found fertilizer; washing machine motors with copper wiring; other spools and pieces of wire including copper; pliers and other tools; grey cloth; metal plates; handwritten notes about the use of copper and other materials in bomb building, insurgent tactics, sleeper cells (including "Naval enlistee sleeper cells"), "attacks on U.S.," a list of items such as "metal plates" and "ammo casings" with corresponding locations such as "ship"; type-written printouts about explosives, ammonium nitrate bombs made from fertilizer, and the Navy Explosive Ordnance Disposal (EOD) Program; and Wikipedia entries on nitroglycerin and clandestine cell systems.

(Appellate Ex. XXVIII at 3.)

The Defense objected to this evidence—both in response to the *Motion in Limine* and throughout trial—and argued that the evidence was neither legally nor logically relevant to the charged offense. (Appellate Ex. X; *see, e.g.*, R. 551-64.) Over the Defense objections, the Military Judge admitted Prosecution Exhibits 4, 5, and 16-22, which dealt with this collateral conduct. (See Appellate Ex. XXVII; R. 563-64.)

D. The Military Judge requires only recklessness for the *mens rea*.

Finally, at the Defense's request, the Military Judge made Special Findings in this case. (Appellate Ex. XLII at 1; *see also* Appellate Ex. VII.) Pertinent here, the Military Judge made special findings regarding the required *mens rea* for communicating a threat. Without the benefit of *Rapert*, which had not yet been decided, the Military Judge followed Judge Alito's concurring opinion and was ultimately "persuaded by several reasons that under *Elonis* the *mens rea* standard applicable in this case is that of recklessness." (Appellate Ex. XLII at 9.)

Argument

I.

FOLLOWING *ELONIS* AND *RAPERT*, COMMUNICATING A THREAT UNDER ARTICLE 134 REQUIRES A PURPOSEFUL AND INTENTIONAL *MENS REA*. THE MILITARY JUDGE ONLY REQUIRED A RECKLESSNESS *MENS REA*. THIS WAS PREJUDICIAL ERROR.

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

The Court reviews an issue of statutory construction *de novo*. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008).

B. Communicating a threat requires a purposeful and intentional *mens rea*; recklessness is not enough.

Communicating a threat or hoax designed or intended to cause panic or public fear under Article 134, UCMJ, requires the Government to prove five elements beyond a reasonable doubt:

1. That the accused communicated certain language;
2. That the information communicated amounted to a threat;
3. That the harm threatened was to be done by means of an explosive ...;
4. That the communication was wrongful; and
5. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States pt IV. Para 109.b (2012 ed.)(MCM). To constitute proscribed rather than protected speech the language must be “wrongful” and stated with a criminal *mens rea*.

In recent relevant cases—the Supreme Court in *Elonis v. United States*, 135 S.Ct. 2001 (2015), and the Court of Appeals for the Armed Forces in *United States v. Rapert*, 75 M.J. 164, No. 15-0476 (C.A.A.F. 2016)—courts wrestled with the *mens rea* that is necessary to separate wrongful conduct from otherwise innocent conduct. Both courts agreed that a negligent mental state was not enough. *Elonis*, 135 S.Ct. at 2011-12; *Rapert*, slip op. at 10.

But the Supreme Court did not go farther to explicitly define the mental state that was required. The Supreme Court held that on the one hand negligence was not enough and on the other that there “is no dispute that the mental state requirement ... is satisfied if the defendant transmits a communication for the purpose of issuing a threat” *Elonis*, 135 S.Ct. at 2012. Judge Alito alone argued that “recklessness” should be the appropriate requirement since it is the “*mens rea* just above negligence.” But the majority refused to draw a line that separates innocent negligent conduct from criminal intentional conduct.

For its part the Court of Appeals for the Armed Forces held that Communicating a Threat under Article 134, UCMJ, inherently includes both “an objective prong and a subjective prong.” *Rapert*, slip op. at 7. Whether the language amounted to a threat should be evaluated objectively from the point of view of a reasonable person. *Id.* But leaving the analysis to only the objective reasonable person prong would leave room for criminalizing innocent negligent

communication, where the accused did not have a criminal *mens rea* but a third party viewed the communication as a threat. *Id.*

Thus, the subjective prong is essential to the crime. *Id.* slip op. at 9. The Court satisfied this requirement by tethering “wrongful” to the accused’s subjective intent: “The wrongfulness of [an] act obviously relates to the *mens rea* (not elsewhere specified amongst the elements) and lack of a defense, such as excuse or justification.” *Id.* The crime thereby “requires the Government to prove the accused’s *mens rea* rather than base a conviction on mere negligence.” *Id.* slip op. at 10 (emphasis added). As in *Elonis*, negligence is not enough.

But while the Supreme Court in *Elonis* expressly refused to go further in identifying the required mental state, the Court of Appeals for the Armed Forces held that the *mens rea* must be “wrongful,” which “prevents the criminalization of otherwise innocent conduct and places the case at bar beyond the reach of *Elonis*.” *Rapert*, slip op. at 7. As the Court quoted, “a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose ... does not constitute [communicating a threat under Article 134].” *Id.* slip op. at 9 (quoting and citing MCM pt IV, para 110.c.). The Court further cited and quoted *United States v. Davis*, 6 C.M.A. 34, 37 (C.M.A. 1955): “[A] declarant’s true intention ... and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter.” *Id.*

Therefore, not only is negligence not enough, the *Rapert* decision goes beyond *Elonis* and requires that the accused communicate the threat with a wrongful *mens rea*. *Id.* An accused's subjective "true intention" could make objectively threatening communication innocent; that is, not merely defensible, but truly not criminal. *Id.* This is a heightened standard that goes beyond recklessness—which would be the next level of *mens rea*, as Judge Alito argued—and requires proof regarding the accused's intent.

The two-judge dissent in *Rapert* expressly makes this conclusion clear. Judge Stucky, joined by Judge Ryan, are in the dissent precisely because they would only "interpret a *mens rea* requirement beyond negligence to be present within the offense." *Id.* dissent slip op. at 10. The dissent claims that the majority's holding goes farther and creates "an incredibly high bar for prosecution" and it "is a substantial leap beyond the negligence standard" *Id.* dissent slip op. at 8. The dissent avers that the majority is "inappropriately legislating" "[t]o the extent it can be construed as instituting a *mens rea* standard beyond recklessness." *Id.* dissent slip op. at 11. And it "appears to place too high of a burden on prosecution by requiring an accused to possess a purposeful *mens rea* in order to be convicted of communicating a threat." *Id.*

In short, the majority in *Rapert* goes beyond *Elonis* in defining communicating a threat under Article 134. More than negligence is required, to be

sure. But the majority goes beyond recklessness and holds that the accused's intent must be "wrongful" and that the accused's true intention can make the communication innocent—a purposeful *mens rea* is required.² A purposeful and intentional *mens rea* is more than mere recklessness.³

C. The Military Judge committed prejudicial error by only requiring recklessness as the *mens rea*.

At the Defense's request, the Military Judge made Special Findings in this case. (Appellate Ex. XLII at 1; *see also* Appellate Ex. VII.) Pertinent here, the Military Judge made special findings regarding the required *mens rea* for communicating a threat. Without the benefit of *Rapert*, which had not yet been decided, the Military Judge followed Judge Alito's concurring opinion and was ultimately "persuaded by several reasons that under *Elonis* the *mens rea* standard applicable in this case is that of recklessness." (Appellate Ex. XLII at 9.)

² To be clear, the Government need not prove that the accused had the intent to carry out the purported threat; rather, the intent required is that the accused intended that the communication amount to a threat. *See* MCM Part IV, para 110(b)(1)(2012).

³ The proposed changes to MCM Part IV, para 110(c) further highlight that the accused's subjective intent is necessary: "For purposes of this paragraph, to establish that the communication was wrongful it is necessary that the accused transmitted the communication for the purpose of issuing a threat, with the knowledge that the communication would be viewed as a threat, or acted recklessly with regard to whether the communication would be viewed as a threat." *Manual for Courts-Martial, Proposed Amendments*, 80 Fed. Reg. 63209 (October 19, 2015).

As discussed above, however, recklessness is an insufficient scienter requirement in light of *Rapert*. Moreover, unlike the deference that the *Rapert* majority gave to the military judge's opinion in that case, it cannot be presumed that the Military Judge here interpreted "wrongful" to include a heightened intent requirement. Specifically addressing the scienter requirement, the Military Judge wrote:

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*. Nevertheless, because it is debatable whether these additional elements act as a complete surrogate for a *mens rea* requirement in separating wrongful from otherwise innocent conduct, the court determines out of an abundance of caution that the holding of *Elonis* applies to communicating a bomb threat under Article 134.

Appellate Ex. XLII at 9. The Military Judge therefore applied the recklessness *mens rea* standard. *Id.* This is a well-reasoned conclusion; in fact, it is the exact conclusion that Judge Stucky, joined by Judge Ryan, reached in the *Rapert* dissent.

But the majority disagreed, as noted above, and required a heightened mental intent. And it is this controlling opinion that now dictates the conclusion that the Military Judge erred by requiring only a *mens rea* of recklessness. This was legal error and, particularly in light of the weak facts supporting the specification as discussed below, it was prejudicial error. Appellant therefore respectfully requests that the Court set aside the findings and sentence in this case.

II.

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR COMMUNICATING A BOMB THREAT ON MAY 1.

A. The Court reviews legal and factual sufficiency *de novo*.

This Court reviews legal and factual sufficiency of the evidence *de novo*.

Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Turner*, 25 M.J. at 325.

The test for factual sufficiency requires this Court to be personally convinced, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Among other elements, the Government was burdened to prove that Appellant (1) objectively communicated certain language that amounted to a threat and (2) that Appellant had a subjectively wrongful or intentional *mens rea*. The Government failed the former under the factual sufficiency standard and the latter under both legal and factual sufficiency. The Government further failed to prove

that the alleged criminal communication was prejudicial to good order and discipline and service discrediting.

B. There is factually insufficient evidence to prove that Appellant communicated objectively threatening language to FC3 [REDACTED]

The Government charged Appellant with communicating “certain information to FC3 [REDACTED] on or about May 1, 2015. (Charge Sheet.) This alleged communication was that “I intend to place a bomb somewhere on 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.) Because there is no evidence that Appellant’s words to FC3 [REDACTED] were objectively threatening, the evidence is factually insufficient.

FC3 [REDACTED] testified that on May 1 Appellant told him about building a bomb. (R. 224-25.) Appellant did not, according to FC3 [REDACTED] indicate when he planned to plant the bomb. (R. 243.) And most of the comments and information that FC3 [REDACTED] relied on to determine whether he thought Appellant was serious came from other people: predominantly, Seaman [REDACTED] (R. 245.) Homing in on this point, the Military Judge asked FC3 [REDACTED] about the May 1 communication, “did [Appellant] mention the word, ‘bomb’ or ‘explosive’?” “I can’t recall exactly,” he replied. (R. 245-46, 250.) FC3 [REDACTED] could not even remember whether Appellant used “other terms similar to bomb.” (R. 250.)

That is, in trying to prove that on May 1 Appellant said, "I intend to place a bomb somewhere on 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," the Government was wholly unable to produce testimony that Appellant actually used the word "bomb" or "explosive." That deficiency cannot be overcome by the general claim of "or words to that effect" in a case where the communication is the alleged crime and where the Government cannot prove the most insidious alleged words in that communication.

Moreover, the communications that are directly attributable to Appellant—which were not made on May 1 and not made to FC3 PL [REDACTED]—were objectively treated as a joke. The only comments that were treated seriously were not made by Appellant; rather, they were Seaman MS [REDACTED] comments to FC3 PL [REDACTED] prior to May 1, which FC3 PL [REDACTED] took seriously and reported up the chain of command. (R. 343-44.) During trial, Seaman MS [REDACTED] initially denied telling FC3 PL [REDACTED] that Appellant was seriously building a bomb. (R. 313.) While he later wavered on this issue, this is a factual debate related to whether Seaman MS [REDACTED] ever told FC3 PL [REDACTED] about Appellant's pre-May 1 comments. It is not about whether Appellant's communication on May 1 was objectively threatening. (R. 313-14.) The evidence is insufficient to convict Appellant of the alleged conduct,

and Appellant cannot be tried and convicted of a threatening communication when no one who directly heard the communication objectively took it seriously.

QMSM **GT** thought Appellant was joking and venting his frustration; he did not think that the comments were serious. (R. 270-71.) GSM3 **MS** never thought Appellant's comments about a bomb were serious and he joked with Appellant about these comments. (R. 295, 301, 307, 312.) When GSM3 **MS** previously confronted Appellant about other inappropriate comments, Appellant confirmed that he was indeed joking. (R. 303.) But he never confronted Appellant about the "explosive" comments because he did not think they were serious. (R. 305, 307.)

Another sailor reportedly said, "I'm proud of him," in response to one of Appellant's comments about building a bomb—clearly indicative of the objective insincerity and jest in Appellant's sentiment. (R. 296, 310.) DC3 **JC** testified that everyone thought he was joking until he was arrested; thus his arrest, and not his words, were what turned this communication from a jest into a threat. (R. 571.) She replied, "no," when asked whether she ever took anything that Appellant "said to be a serious threat." (R. 581.)

The Government's star witness, FC3 **PL** took the communications (as reported to him by others) "seriously" but also "with a grain of salt." (R. 221.) Again, this is the one listener of second-hand comments who took the comments

seriously. (R. 221.) And he was the one listener who “[c]an take any of the smallest things serious.” (R. 629.)

In short, FC3 PL [REDACTED] took seriously Appellant’s second- and third-hand comments that were made prior to May 1. He reported his concern over these comments to the command. No one else who heard these comments first-hand took them seriously. There is insufficient evidence to find that Appellant’s communications were objectively threatening.

Moreover, he was not charged with these communications. He was charged with his May 1 communications to a witness who could not recall whether the word “bomb” or “explosive” was ever used in that conversation. The evidence is glaringly bare and insufficient to prove that Appellant communicated a bomb threat on May 1.

C. There is factually and legally insufficient evidence to prove that Appellant communicated wrongful or intentionally threatening language.

Morale on the ship was terrible. (R. 572.) Everyone hoped that the ship would “run aground” or get “decommissioned.” (R. 599, 614.) And in this environment Appellant was discouraged along with his fellow sailors. Though he shared their frustrations, Appellant stood apart from his peers in his personality and interests. His peers repeat the refrain, “Gebert being Gebert,” to explain his personality. (R. 576.)

While others communicated that they hoped harm would come to the ship, (R. 573), Appellant joked with his peers about bombs and other similar harm to the ship. No one took these jokes seriously and there is no indication that Appellant intended for these comments to be taken as a threat.

He continued this bonding exercise in his conversation with FC3 PL [REDACTED] on May 1. Even if FC3 PL [REDACTED] took this communication seriously that morning, there is no evidence that Appellant made this communication with a subjectively wrongful or intentional *mens rea*. To Appellant, this conversation was just like every similar conversation with his peers, as they joked and bonded over their common misery. He was fitting in, making his own jokes along the lines of his peers, but with his own twist: just Gebert being Gebert. The background and circumstances belie a purposeful or wrongful intent.

Moreover, the Government used irrelevant physical evidence to attempt to create a subjective intent out of whole cloth. As argued in Assignment of Error IV below, not only should the Military Judge have excluded much of the evidence—such as the tools and metal pieces found in Appellant's barracks—this evidence is not indicative of a subjective intent to make a threatening communication. Everyone in Appellant's section had tools; the NCIS Agent who investigated the case personally owned many of the same tools; and NCIS felt so little about the

cloth and Miracle Grow fertilizer that this evidence was never tested. (*See, e.g.*, R. 664-66.) These tools cannot be used to build intent where it does not exist.

The Court does not have to find that Appellant's comments were appropriate or made with good judgment. But to uphold the conviction the Court must find that Appellant's communication on May 1 was made with a subjectively criminal *mens rea*. Recklessness is not enough. There are simply insufficient facts in this Record to support such a conclusion.

D. The May 1 communication was neither prejudicial to good order and discipline nor service discrediting. It was an incidental communication that was not reported to the chain of command.

FCS PL [REDACTED] did not go and report Appellant's May 1 words to the chain of command; in fact, he had previously reported that Appellant had a bomb. (R. 239, 246.) And this report to the chain-of-command was based not on what Appellant had said to him but on what he had heard from others aboard the ship. (R. 246-47.) Notably, it is this pre-May 1 report of a bomb that initiated the command's contact with NCIS, NCIS's investigation, the search of the ship, and any attendant disruption to the command's mission. (R. 247, 335-36.)

It was therefore not Appellant's communication to FC3 PL [REDACTED] on May 1 that sparked this chain of events; rather, it was FC3 PL [REDACTED] pre-May 1 report that led to any potential for prejudice to good order and discipline or service discrediting conduct. (R. 247, 335-36.) The Government could have charged

Appellant with jokes and comments made prior to May 1, and the Government could have alleged that these communications ultimately met Article 134's terminal element. But the Government chose not to; instead, the Government chose to limit the allegation to this May 1 communication, which was not reported to the chain of command and which did not lead to any prejudice to good order and discipline or service discrediting consequences.

In sum, the evidence that the Government put on during its case-in-chief neither proves an objective nor subjective threat. And the language that led to an investigation and command upheaval did not come from Appellant on May 1. The evidence is factually and legally insufficient to sustain the conviction for communicating a threat and Appellant therefore respectfully requests that the Court set aside the conviction and sentence.

III.

THE CHARGES AND SPECIFICATIONS WERE IMPROPERLY REFERRED BECAUSE THE HEARING OFFICER'S ARTICLE 32 FINDINGS WERE AMBIGUOUS AND THE STAFF JUDGE ADVOCATE'S ARTICLE 34 ADVICE LETTER WAS INCORRECT. THE NEW ARTICLE 34 ADVICE WAS LATE AND INSUFFICIENT TO AMELIORATE THESE ERRORS.

- A. Prior to referral, the Article 32 Hearing Officer makes a specific determination and the Staff Judge Advocate must provide informed Article 34 Advice.

December of 2014 brought significant changes to Article 32 of the UCMJ.

Under the new Article 32, the presiding officer is a "hearing officer" rather than an "investigating officer." 10 U.S.C. § 832(b) (2014). This hearing officer does not simply conduct a "thorough and impartial investigation of all the matters set forth" in the proposed charges and specifications and then make a recommendation "as to the disposition which should be made of the case," as was done in the past. 10 U.S.C. § 832(b) (2012). Instead, the officer's responsibility is greater. The hearing officer is tasked, among other things, with "[d]etermining whether probable cause exists to believe an offense has been committed and [that] the accused committed the offense." 10 U.S.C. § 832(a)(2)(A) (2014)(emphasis added). This intentional change has significant consequences when the hearing officer makes a determination that the proposed charges and specification are not supported by probable cause.

Following this probable cause determination, Article 34 of the UCMJ prohibits the referral of a specification to general court-martial unless the staff judge advocate advises the convening authority in writing that the specification is warranted by the evidence in the report of a preliminary hearing. And the staff judge advocate cannot do this when the hearing officer's report states that no probable cause exists. Likewise, the Fourth and Fifth Amendments to the Constitution prohibit subjecting anyone to the ordeal of trial—by general court-martial or otherwise—without probable cause.

So while in the past it was permissible for a convening authority to charge on to trial in spite of an investigating officer's *recommendation* against going forward, that is no longer the case. Trial by court-martial cannot continue in the face of a hearing officer's *determination* that no probable cause exists to support the proposed charges and specifications.

Errors in this process can be prejudicial to the accused. *See United States v. Murray*, 25 M.J. 445, 446-47 (C.M.A. 1988). And to the extent that the Article 34 advice is "incomplete, ill-considered, or misleading as to any material matter," the Staff Judge Advocate has failed to comply with the statutory obligation imposed by Article 34. *United States v. Riege*, 5 M.J. 938, 943 (N.C.M.R. 1978); *see also United States v. Greenwalt*, 6 C.M.A. 569 (C.M.A. 1955).

- B. The referral was improper because (1) the hearing officer's report was ambiguous and (2) the Staff Judge Advocate's Advice was improper.

On page 2 of the Preliminary Hearing Officer's report, the Hearing Officer marked "No" in response to "there is probable cause to believe an offense has been committed and that the accused committed that offense." (See IO Report at 2, dated June 22, 2015.) Under the previous Article 32 architecture this finding would have been a recommendation that the Staff Judge Advocate and Convening Authority would have considered prior to making a decision regarding referral. Under the current structure, however, the probable cause determination rests with the Hearing Officer; it is no longer simply a recommendation, it is a binding determination.

And while here the Hearing Officer's finding of no probable cause was ambiguous and potentially misleading in light of her probable cause explanation for each specification—finding probable cause for some specifications and no probable cause for another—the Staff Judge Advocate and the Convening Authority no longer have the authority to reconcile this ambiguity and find probable cause on their own accord. Rather than disregarding the Hearing Officer's finding of no probable cause, the Staff Judge Advocate or Convening Authority should have returned the report to the Hearing Officer for clarification.

Instead, the Staff Judge Advocate failed to inform the Convening Authority of the Hearing Officer's probable cause finding and recommended that the charges

and specifications be referred to a court martial. (Article 34 Advice, dated July 1, 2015.) Following this advice, the Convening Authority referred the charges and specifications to a general court-martial. (See Charge Sheet.) This was both procedurally and substantively erroneous.

First, as a result of the changes to Article 32, the Convening Authority did not have the power to refer the charges to a court martial without an explicit finding of probable cause by the Hearing Officer. Regardless of whether this finding was a scrivener's error or simply an ambiguity, without a clear finding of probable cause they had no legal authority to refer these charges to a court martial under the revisions to Article 32.

Second, the Convening Authority's Advice was defective. And though the Military Judge ultimately ordered that "new Article 34 advice [be] issued to the Convening Authority," the damage and prejudice was already baked in. (See Appellate Ex. XXII at 4.) The Convening Authority previously decided to refer the charges to a general court-martial based on procedurally and substantively defective advice. Based on this decision, the court martial was assembled, motions were litigated, and the case reached the eve of the trial.

In fact, even after the defective Article 34 Advice was identified by the Military Judge, Appellant entered pleas and the case continued toward the trial.

(R. 157.) The Article 34 Advice was treated as an administrative matter to be fixed and not as a right to be honored.

So when given the chance to issue new Article 34 Advice and make a renewed decision regarding referral, the outcome regarding the heart of the case was destined to be the same—though Charge I was withdrawn, the primary allegations remained the same. Moreover, Charge I should have never been referred, so it cannot now be credited to Appellant as a gift.

The originally defective Advice poisoned the well not only for which charges were referred, but for the forum. While the Hearing Officer recommended trial by special court-martial, the Convening Authority referred the charges and specifications to a general court-martial based on the original improper Article 34 advice. Inertia alone would ensure that this decision was then reaffirmed on the eve of trial.

In short, Appellant was subjected to a court martial despite the Hearing Officer's finding of no probable cause, despite the originally defective advice, and despite the built-in prejudice from these substantively and procedurally improper steps on the part of the Government. This was prejudicial error and the Court should set aside the findings and sentence as a result.

IV.

THE MILITARY JUDGE ERRED BY ADMITTING PROSECUTION EXHIBITS 4, 5, AND 16-22. THIS WAS IMPROPER CHARACTER EVIDENCE; IT WAS ALSO IRRELEVANT, PREJUDICIAL, AND CONFUSING.

- A. The Court reviews the Military Judge's decision to admit evidence for an abuse of discretion.

Since the Defense objected at trial, this Court reviews the Military Judge's decision whether to admit evidence for an abuse of discretion. *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999).

- B. Evidence that is not relevant or that is unduly prejudicial is not admissible.

The Rules of Evidence provide that "relevant evidence is admissible" and evidence "which is not relevant is not admissible." Mil. R. Evid. 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Yet even relevant evidence is subject to certain exclusions. Mil. R. Evid. 402 ("except as otherwise provided"). One such exclusion prescribes: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues" Mil. R. Evid. 403.

Mil. R. Evid. 404(b) provides an additional limitation by prohibiting certain character evidence:

Evidence of uncharged misconduct is impermissible for the purpose of showing a predisposition toward crime or criminal character. However, uncharged misconduct can be admitted for “other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010) ((footnotes omitted)(citing Mil. R. Evid. 404(b))).

Appellate courts review the admissibility of uncharged misconduct under Mil R. Evid. 404(b) using the three-part *Reynolds* test:

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

Staton, 69 M.J. at 230 (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)). The evidence must fulfill all three prongs to be admissible. *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010).

C. The Military Judge erred by admitting Prosecution Exhibits 4, 5, and 16-22, which was extraneous and prejudicial character evidence.

Appellant was charged with communicating a threat under Article 134. (Charge Sheet.) He was not charged with attempting to make a bomb or

attempting to bomb the ship. Nor was he charged with providing material support for terrorism, treason, or any other illicit activity related to militias or foreign groups. The Government had to prove whether he communicated a bomb threat beyond a reasonable doubt; nothing more and nothing less.

Nonetheless, the Government sought to introduce various items of evidence related to bomb building and research Appellant conducted regarding groups and tactics under Mil. R. Evid. 404 by arguing that Appellant's relationship with non-traditional interests made his guilt more probable. This evidence was so central to the Government's case that the Government sought a pre-trial ruling on its admissibility. (Appellate Ex. V.) As the Military Judge noted, this evidence consisted of various items that NCIS seized during the search of Appellant's barracks room:

[I]nvestigators found fertilizer; washing machine motors with copper wiring; other spools and pieces of wire including copper; pliers and other tools; grey cloth; metal plates; handwritten notes about the use of copper and other materials in bomb building, insurgent tactics, sleeper cells (including "Naval enlistee sleeper cells"), "attacks on U.S.," a list of items such as "metal plates" and "ammo casings" with corresponding locations such as "ship"; type-written printouts about explosives, ammonium nitrate bombs made from fertilizer, and the Navy Explosive Ordnance Disposal (EOD) Program; and Wikipedia entries on nitroglycerin and clandestine cell systems.

(Appellate Ex. XXVIII at 3.)

The Defense objected to this evidence—both in response to the *Motion in Limine* and throughout trial—and argued that the evidence was neither legally nor

logically relevant to the charged offense. (Appellate Ex. X; *see, e.g.*, R. 551-64.) The Defense further pointed out that this evidence would likely lead to prejudice and confusion. (Appellate Ex. X at 4.) As the Defense argued, this evidence would transform a straight-forward communicating a threat case into a trial-within-a-trial regarding unsubstantiated implications that Appellant was a would-be terrorist.

Despite these objections, the Military Judge admitted Prosecution Exhibits 4, 5, and 16-22, which dealt with this collateral conduct. (See Appellate Ex. XXVII; R. 563-64.) The Military Judge's ruling was error, however, because this evidence was neither legally nor logically relevant to whether Appellant communicated a bomb threat. There was no fact of consequence that was made more or less probable by the existence of this evidence. Moreover, it was improper character evidence.

This evidence could only conceivably inform the element of whether "the information communicated amounted to a threat" and whether the communication was "wrongful." And as discussed in prior Assignments of Error I and II, the Government had to prove both "an objective prong and a subjective prong" related to whether the communication amounted to a threat. The listener of Appellant's communication would not know of this material in his barracks room, so it could not inform the objective prong.

And there is no logical connection between whether Appellant's words subjectively amounted to a threat and the fact he possessed a gray cloth, spools of copper, or notes on sleeper cells. Additionally, despite the Government's repeated implications, the Government never proved that these items were being used to construct a bomb. These were ordinary tools and items used aboard the ship by Appellant's fellow sailors; likewise, these were tools that even the Government's NCIS witnesses personally possessed. (*See, e.g.*, R. 664-66.) The Government never proved why Appellant's possession of these items was nefarious while it was not so for the other witnesses.

It was irrelevant whether Appellant possessed this material in his barracks room. His communication either amounted to an illicit threat or it did not. This evidence was not relevant under Mil. R. Evid. 402, it fails the *Reynolds* test, and it should have been excluded under Mil. R. Evid. 403.

D. This error was prejudicial because it was highly inflammatory.

Though this was a Military Judge-alone trial, the likelihood that this evidence prejudiced Appellant is high. In fact, the possibility that it will continue to prejudice Appellant even on appeal is likewise high. This material and research is unorthodox and seemingly suspicious, which is precisely the problem; human nature makes this suspicion difficult to disregard.

It is not that the Military Judge intentionally punished Appellant for these items found in his room or for the research that he had done; rather, it is impossible to clearly view the relative weakness of the Government's evidence when that limited evidence is buttressed by this inflammatory and irrelevant character evidence. Reasonable doubt would have been met with the rejoinder that Appellant was up to something suspicious.

Because this evidence was not relevant to prove whether Appellant was actually building a bomb or whether he was actively engaged in alternative groups, it could only be useful to the Government for its implications, as they argued in closing:

He has, in his barracks room, Your Honor, fertilizer, fertilizer with not the highest ammonium-nitrate concentration, but it's fertilizer. It's in his room. He has a significant amount of copper, Your Honor, heavy copper. He's got a lot of wires; he's got the cloth, Your Honor, that—look, defense is absolutely right that this cloth could've been nothing. But it also could've been used to build a bomb in the way he built two bombs in the past. And the copper that was found in his room he talked to people about and he told people what he would do with the copper.

(R. 697.) Meaning, Appellant is a bad man, he is out of the mainstream, he was intent on attacking America, he may be a terrorist, and thankfully he was caught in time—that is what the Government was implicitly arguing.

And while these implications and any further inferences that may be drawn are not true, the tinge persists. In any part of American society, and particularly in the military, this type of collateral information would surely weigh on the scales of

justice, improperly putting a thumb on the scale for the Government and lessening the burden of proof.

And 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. The Government ensured that the Military Judge did not set it aside by bringing up this collateral character evidence in the opening statement, throughout the testimony of several witnesses, and during closing arguments. (*See, e.g.*, R. 212, 326, 374, 439, 514, 694-97.) Any error was therefore not harmless.

Additionally, the fear that Members would not be able to look beyond this evidence may have forced Appellant's decision regarding the forum. Appellant requested Members composed of officers, only to later change this request to Military Judge-alone. (R. 155, 163.) The Military Judge's decision to admit this evidence infected the trial in countless ways.

This is simply not evidence that can be overlooked and its erroneous admission into evidence necessarily prejudiced Appellant. And in light of the otherwise weak case, this error cannot be overcome by the strength of the remaining evidence. In short, the Military Judge erred by admitting this evidence and this error prejudiced Appellant. The Court should set aside Appellant's conviction and sentence as a result.

V.

THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S STATEMENTS AND USING EVIDENCE OBTAINED AFTER ARRAIGNMENT.⁴

- A. The Court reviews the Military Judge's decision to admit evidence for an abuse of discretion.

Since the Defense objected at trial, this Court reviews the Military Judge's decision whether to admit evidence for an abuse of discretion. *Schlamer*, 52 M.J. at 84.

- B. The Government must provide timely notice of statements and evidence to the Defense.

The Government is required to disclose all "statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces" to the Defense prior to arraignment. Mil. R. Evid. 304(d)(1). The Government is also required to provide reasonable advance notice of Mil. R. Evid. 404(b) evidence prior to trial. Failure to comply with these requirements and other discovery-related requirements can lead to a prohibition on the Government admitting these statements into evidence. R.C.M. 701(g)(3).

⁴ This Assignment of Error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

C. The Government failed to provide timely notice of statements and evidence to the Defense; the Military Judge erred by not excluding this evidence.

NCIS delayed the bulk of the investigation until after the arraignment and mere weeks prior to trial. This effectively overcame the Government's burden to provide timely notice. Due to a lack of timely notice, the Defense objected to the Government's use of statements and evidence that required timely notice.

(Appellate Ex. XXIV.) Nonetheless, the Military Judge relieved the Government of its burden by allowing this evidence—including testimony and statements from DC3 **JC** and Seaman **GT**—to be used at trial. (R. 195-97.)

A short continuance was an insufficient remedy, particularly since it forced Appellant to choose between an insufficiently short continuance or a much longer continuance (due to the Civilian Defense Counsel's schedule) that would leave Appellant confined. (R. 190-91.) Appellant should not have been forced into this dilemma due to NCIS's neglect and delay. Exclusion of this evidence was the only appropriate remedy and the Military Judge's ruling was prejudicial error.

Conclusion

WHEREFORE, because Appellant was prejudiced by the Military Judge incorrectly lowering the Government's burden of proof, the insufficient evidence, the fatally flawed referral process, and the erroneously admitted evidence, Appellant respectfully requests that this Court grant relief by setting aside the findings and sentence in this case.

/s/

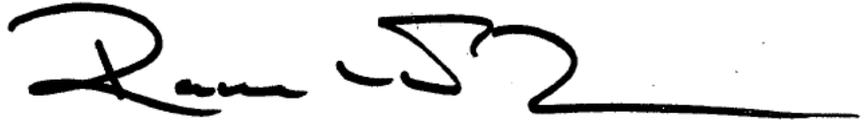
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Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court and the Appellate Government Division on April 25, 2016. I also certify that a copy of the foregoing was electronically filed in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1), on April 25, 2016.



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