

AUG 04 2016

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

Before Panel No. 2

UNITED STATES,)	APPELLANT'S REPLY BRIEF
Appellee)	
)	Case No. 201500381
v.)	
)	
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**

COMES NOW Appellant, through the undersigned counsel, and hereby
replies to the Government's Answer of 28 July 2016

The Government's ably written Answer cannot salvage this case. The
Military Judge applied the incorrect *mens rea* for the primary offense:
communicating a threat. Due to this mistake, Appellant was convicted of engaging
in communication that is not criminal. He is now a convict, who spent seven
months in confinement, and who is now awaiting his final discharge from the
Navy—though not all that he has lost can be regained, this Court has the authority
and duty to remedy this wrong and prevent further damage by setting aside the
findings and sentence.

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The Government first asserts Appellant is adopting Judge Stucky's dissenting opinion in *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016). (Gov. Ans. at 20). To the contrary, Appellant is asking this Court to following the binding *Rapert* majority opinion that requires both an objective and subjective *mens rea*; and this subjective *mens rea* requires much more than mere recklessness. Judge Stucky's dissent is never the less instructive in interpreting and applying the majority's opinion. It aids this Court by representing how two of the CAAF judges interpret the now-controlling *Rapert* opinion; they argue that it creates "an incredibly high bar for prosecution" and it "is a substantial leap beyond the negligence standard" *Id.* dissent slip op. at 8. Additionally they interpret the majority's opinion as placing "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.* Here the Military Judge did not hold the Government to this heightened burden.

The Government next argues that the Military Judge applied the "wrongfulness" element therefore negating prejudice to the Appellant. While the term "wrongful" has always applied to an Article 134, UCMJ, communicating a threat offense, it has never carried the meaning that *Rapert* assigns to it. Therefore, the Court cannot presume that the Military Judge here used the *Rapert* meaning of the term "wrongful" when deciding this case. Moreover, the Military Judge's

findings that the Government relies upon, improperly conflates the subjective and objective *mens rea* requirement that *Rapert* later distinguished as two separate and distinct parts. (Appellate Ex. XLII at 12.)

While it is clear that the Military Judge made some findings beyond a reasonable doubt, it is likewise evident that the Military Judge did not make each factual and legal finding beyond a reasonable doubt. This is the fundamental problem with the application of incorrect elements—the Government was not held to its burden and Appellant was convicted for engaging in innocent communication.

While arguing that the evidence is factually and legally sufficient, the Government employs the same tactic as the trial counsel and conflates various conversations, and reactions to these conversations, to generate a conclusion of “there is enough going on here, he must be guilty.” (Gov. Ans. at 24-35). But the Government’s burden is more precise. The Government specifically charged Appellant with communicating “certain information to FC3 [PL ██████████] on or about May 1, 2015. (Charge Sheet.) This alleged communication was “‘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.)

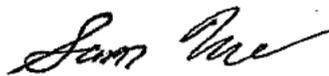
Aside from the insufficient *mens rea*, which is discussed previously, the Government's evidence is insufficient because it cannot point to any evidence that these words were spoken on May 1, 2015. As a wholly separate failing, the Government's evidence proves that the words Appellant did speak on May 1, 2015 were not reported to the chain of command and did not lead to an investigation. (R. 239, 246-47, 335-36.) Thus, these words 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 a subjective threat. The language that led to an investigation and command upheaval did not come from Appellant on May 1, 2015. 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.

WHEREFORE, for the reasons briefed previously and in this Reply, the Court should set aside the findings and sentence in this case.

Dated: August 4, 2016

Respectfully Submitted,

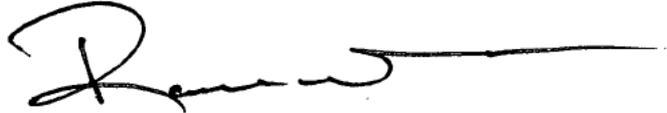


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I certify that a copy of the foregoing was delivered to the Government Appellate Division and electronically filed in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1), on August 4, 2016.



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