

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Michael IGNACIO
Cryptologic Technician-
Interpretive First Class (E-6)
United States Navy,

Appellant

APPELLANT'S REPLY BRIEF

Crim.App. No. 201000062

USCA Dkt. No. 12-0202/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES:

1. Contrary to the Government's assertion, the military judge never provided a dual-use instruction, or its functional equivalent.

The Government says that the military judge provided adequate instructions because his standard "consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt" instruction, is the functional equivalent of a dual-use instruction.¹ Not true.

The military judge merely covered how consent relates to the Government's burden. This falls well-short of *Neal's* particularized "content and sequential nature" requirements to convey dual-use.² The lower court recognized this, as it held that the military judge's instructions as a whole do not amount to a dual-use instruction. This is plain when we analyze the

¹ Appellee's Br. at 6, 9.

² *United States v. Neal*, 68 M.J. 289, 303 (C.A.A.F. 2010).

three pertinent portions of the military judge's instructions, which can be summarized as:

- (1) Consent has been raised and is relevant to the offense;
- (2) Consent defined; and
- (3) Government must prove lack of consent beyond a reasonable doubt.³

But what the military judge did not do is instruct the members that they *must* consider consent for two distinct purposes. Informing the members that consent evidence is relevant is not the same as instructing them they must consider it for two purposes.

2. Plain error is not the appropriate standard of review.

The Government conflates the facts in advocating for a plain error standard of review.⁴ The question of whether members received proper instructions is reviewed *de novo*.⁵ The absence of an objection does not change that. Here, Appellant requested a constitutionally-required instruction, which the military judge denied. Under that framework, although Appellant submits that *de novo* review is appropriate, this Court could review for an abuse of discretion, but not plain error.

Yet even if this Court reviewed for plain error, because the error is of constitutional dimension, the Government would

³ Joint Appendix (JA) at 30-31.

⁴ Appellee's Br. at 13.

⁵ *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

have to prove that it was harmless beyond a reasonable doubt.⁶
This it cannot do because the failure to provide a dual-use
instruction contributed to Appellant's conviction.

Conclusion

This Court should find that the military judge's failure to
provide a dual-use instruction deprived Appellant of his
constitutional right to due process. Accordingly, Appellant's
conviction for abusive sexual contact should be set aside.

/S/
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⁶ *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009)
(citing *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court,
Appellate Government Division and to Code 40 on April 10, 2012.

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