IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201100062
Michael IGNACIO, Cryptologic Technician (Interpretive) First Class (E-6) U.S. Navy Appellant	)	USCA Dkt. No. 12-0202/NA

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

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Issue Presented

IN AN ARTICLE 120(h), UCMJ, CASE, THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS TO CONSIDER ALL OF THE EVIDENCE, INCLUDING THE EVIDENCE OF CONSENT, WHEN DETERMINING WHETHER THE GOVERNMENT PROVED GUILT BEYOND A REASONABLE DOUBT. IN LIGHT OF *UNITED STATES v. PRATHER*, AND *UNITED STATES v. CHEESEMAN*, DOES THE *APPLICATION* OF THE AFFIRMATIVE DEFENSE PROVIDED BY ARTICLE 120 WITHOUT THE AFOREMENTIONED INSTRUCTION VIOLATE APPELLANT'S RIGHT TO DUE PROCESS?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006). Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006), provides the Court with jurisdiction over this case.

Statement of the Case

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120(h), UCMJ, and one specification of wrongful sexual contact in violation of Article 120(m), UCMJ, 10 U.S.C. § 120 (2006). After findings were announced, the Military Judge dismissed the wrongful sexual contact specification as "multiplicious" with the abusive sexual contact specification. (Joint Appendix (J.A.) 40.) The members sentenced Appellant to a bad-conduct discharge, three years of confinement, reduction to pay grade E-1, and forfeiture of all

pay and allowances. (J.A. 41.) The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. (J.A. 10-12.) On November 8, 2011, the lower court affirmed the findings and sentence. *United States v. Ignacio*, No. 201100062 (N-M. Ct. Crim. App. Nov. 8, 2011). Appellant then filed a petition for grant of review with this Court, which this Court granted on November 15, 2011.

Statement of Facts

A. Appellant sexually assaulted an incapacitated shipmate.

In September of 2009, Appellant was part of a detachment temporarily assigned to the United States Coast Guard Cutter HAMILTON. (J.A. 2.) The HAMILTON docked in Puerto Vallarta, Mexico for a port call. (R. 14.) Seaman (SN) JA left the ship for liberty in Puerto Vallarta at approximately 1400. (J.A. 14.) Later that afternoon, SN JA encountered Appellant who invited SN JA to share a hotel room with him and Food Serviceman First Class (FS1) HA. (J.A. 16-17.)

Throughout the rest of the afternoon and into the evening the men drank a significant quantity of alcohol. (J.A. 2, 15-17.) At the end of the night, Appellant convinced SN JA to come back to the hotel room with him despite SN JA's concerns about being back on the ship in time for duty. (J.A. 16-17.) Appellant convinced SN JA that he would ensure that SN JA made

it back to the ship on time. (J.A. 16-17.) Although SN JA had been drinking alcohol all afternoon and evening, he was able to walk back to the hotel under his own power, stopping at a store with Appellant for a sandwich and water. (J.A. 18.)

When Appellant and SN JA returned to the hotel room, FS1 HA was already asleep on one of the two beds. (J.A. 19.) SN JA intended to sleep on the floor, but Appellant convinced him that there was room for the two of them to share the remaining bed. (J.A. 20.) SN JA lay down on the bed and went to sleep while Appellant went to take a shower. (J.A. 20.) When SN JA awoke, Appellant was performing oral sex on him. (J.A. 21.) At some point, SN JA ejaculated. (J.A. 45.) SN JA pushed Appellant off of him, yelled at him, pulled up his shorts, grabbed his shirt and shoes, and left the room. (J.A. 21.) FS1 HA remained asleep throughout the assault and SN JA's departure. (J.A. 21.)

B. Appellant's requested instructions and the Military Judge's instructions to the members.

Following the evidence on the merits, the Military Judge discussed the instructions he would provide to the Members. (J.A. 24.) Appellant requested a dual use instruction on the evidence of consent. (J.A. 24-25, 48-50.) The Military Judge granted this motion, but did not provide the exact wording Appellant requested. (J.A. 25.) He specifically found that the issue of consent had been raised by the evidence and that he

would not only give the instruction on the affirmative defense of consent, but that he would also instruct the Members to use any evidence of consent when determining whether the Government had met its burden on the element of substantial incapacity. (J.A. 25.)

Appellant requested, *inter alia*, a novel instruction on how the Members should use the evidence of consent:

> [Y]ou may consider evidence of consent at two different levels for Specification 1. Neal at 31. First, you may consider whether evidence of SN [JA]'s consent raises a reasonable doubt as to whether the prosecution has met its burden of proving the element of substantial incapacitation. Id. Second, you may also consider whether the defense has introduced sufficient evidence of SN [JA]'s consent to successfully establish the affirmative defense of "Consent." Id.

(J.A. 49.)

The Military Judge provided the parties with copies of the instructions he intended to provide the Members. (J.A. 24, 54-61.) However, he declined to give the exact instruction Appellant requested, noting that the Appellant's requested instruction "omits critical information regarding the definition of consent, specifically that one substantially incapable of physically declining participation may not consent as well as omitting that the burden shifts back to the government should the defense successfully raise the affirmative defense on consent." (J.A. 25.) The Military Judge then interpreted the

statute; he explained that because of the difficulty in crafting an instruction on the affirmative defense of consent that would not confuse the Members or create an illogical, unconstitutional burden shift, he would instead provide the instruction found in the Military Judge's Benchbook to resolve any "confusion or ambiguities in favor of the accused." (J.A. 26-28.) Referencing *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010), the Military Judge explained that the he would

> instruct the members that evidence of consent goes to the second element of the offense as well as that consent is a defense which the government must disprove beyond a reasonable doubt. The intent of this approach is to balance the intent of Congress, the dictate of superior court rulings and the plain wording of the statute in a manner that ensures any ambiguity is resolved in favor of the accused.

(J.A. 28.) The Military Judge specifically asked whether either party had any objection to the instructions he intended to provide to the Members. (J.A. 24.) Neither party objected.

The Military Judge then instructed the Members regarding consent as follows:

> The evidence has raised the issue of whether [SN JA] consented to the sexual act concerning the offense of abusive sexual contact, as alleged in Specification 1 of the Charge. Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt.
>
> Additionally, consent is a defense to the charged offense. "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means that there

> is no consent. A person cannot consent to sexual activity if that person is substantially incapable of physically declining participation in the sexual conduct at issue.
>
> The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense of abusive sexual contact, as alleged in Specification 1 of the Charge, you must be convinced beyond a reasonable doubt that at the time of the sexual contact alleged, [SN JA] did not consent.

(J.A. 30-31.)

Argument

> THERE WAS NO INSTRUCTIONAL ERROR BECAUSE CONSENT WAS AN ELEMENT THE GOVERNMENT HAD TO PROVE. IF THE "DUAL USE" INSTRUCTION WAS REQUIRED, THE MILITARY JUDGE PROPERLY INSTRUCTED THE MEMBERS THAT EVIDENCE OF CONSENT WAS RELEVANT TO WHETHER THE GOVERNMENT HAD PROVED ALL THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT. FINALLY, EVEN IF THIS COURT DETERMINES THE MILITARY JUDGE ERRED IN HIS INSTRUCTIONS TO THE MEMBERS, APPELLANT IS NOT ENTITLED TO RELIEF AS HE WAS NOT PREJUDICED BY SUCH ERROR.

A. Standard of review.

Whether a panel is properly instructed is a question of law reviewed *de novo*. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). However, military judges have substantial discretionary power in deciding on the instructions to give. *United States v. Stanley*, No. 11-0143/AR, slip op. at *6 (C.A.A.F. Mar. 22, 2012).

B. There was no instructional error because lack of consent was the Government's burden to prove, and not an affirmative defense. Nonetheless, the Military Judge provided a proper "dual use" instruction.

1. The Military Judge had a legally sufficient reason for why he deviated from the statutory scheme by instructing the Members that lack of consent was an element the Government must prove.

This Court has found it to be harmless error to deviate from the illogical and constitutionally untenable statutory burden shift created by Article 120, UCMJ, and instead instruct members in accordance with the Military Judge's Benchbook. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011); *see* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 509 (Jan. 1, 2010).

In *Medina*, which is similar to this case, the military judge instructed the members on aggravated sexual assault in accordance with the Military Judges' Benchbook, and did not employ the statutory provision regarding the defense's burden of proof on the affirmative defense of consent. *Medina*, 69 M.J. at 465. However, that judge did not interpret the statute on the record, and otherwise failed to provide "a legally sufficient explanation" for why he departed from the statutory scheme, which this Court found to be error. 69 M.J. at 465. Notwithstanding, the instruction "was clear and correctly conveyed to the members the Government's burden" and thus the error was "harmless beyond a reasonable doubt." *Id.* at 465-66.

In the present case, the Military Judge provided instructions to the members nearly identical to those provided in *Medina*. (*See id.* at 465; J.A. 30-31.) However, the Military Judge here did not commit error because he interpreted the statute on the Record and then provided a legally sufficient explanation for why he deviated from the statutory instruction. (J.A. 26-28.) He explained that the language of the statute could not be constitutionally or logically applied by the members. (J.A. 26-27.) And that in instructing the members the court sought to "synthesize binding precedent and congressional intent and [the court's] mandate to provide the members with the correct statement of the law in these facts by utilizing the benchbook instruction in the hopes of resolving any confusion or ambiguities in favor of the accused." (J.A. 27.) The Military Judge then applied what was then this Court's most recent ruling on this issue——*United States v. Neal*, 68 M.J. 289——to the facts of this case. (J.A. 28.) Thus, the Military Judge did not commit error by instructing the members as he did. *See Medina*, 69 M.J. at 465.

The Military Judge instructed that lack of consent was an element to be proved by the Government, thus consent was no longer an affirmative defense to be proved by the accused. In *Martin v. Ohio*, the Supreme Court held that when the Government places a burden on the accused to prove an affirmative defense,

the evidence put forward to prove that defense must also be used by the factfinder in determining whether the Government has met its burden on all of the elements of the offense. *Martin v. Ohio*, 480 U.S. 228, 234 (1987). Because Appellant had no burden, the "dual use" instruction was not required. *Id.*; *See Medina*, 69 M.J. at 465; *see also United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011)(finding that the "dual use" instruction was required where the military judge attempted to instruct in accordance with statutory instruction). Accordingly, Appellant's assignment of error is moot.

Even if this Court determines that the Military Judge did err by providing the Benchbook instruction, Appellant was not prejudiced by the error because the Military Judge provided an instruction that was clear and correctly conveyed to the members the Government's burden. *See Medina*, 69 M.J. at 465. Furthermore, as explained below, the Military Judge also provided a legally sufficient "dual use" instruction.

2. <u>There is no instructional error because the Members were instructed that evidence of consent was relevant to whether the Government had proved SN JA's incapacity beyond a reasonable doubt</u>.

The Military Judge instructed the members that: "[e]vidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt." (J.A. 30.) This is a sufficient "dual use" instruction, if one was

necessary. *See Martin*, 480 U.S. at 234; *see also Estelle v. McGuire*, 502 U.S. 62, 73 (U.S. 1991)(explaining that the proper inquiry is not whether the instruction "could have" been applied by the jury in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it).

Here, as the court below noted, the Members were instructed that lack of consent was an element that the Government had to prove beyond a reasonable doubt and *not* an affirmative defense; thus, there was no risk of compartmentalization of evidence by the Members because Appellant had no burden at all. (J.A. 30-31); *United States v. Ignacio*, No. 201100062, slip op. at 5 (N-M. Ct. Crim. App. Nov. 8, 2011). Accordingly, there was no risk that evidence presented by Appellant to show consent would be disregarded by the members because Appellant failed to carry his burden to prove an affirmative defense. *Id.*; *see Martin*, 480 U.S. at 234.

Unlike the erroneous instruction used in *Prather*, the Military Judge here did not state that the evidence of consent *may* be used, *if* relevant, in considering whether the Government proved each element beyond a reasonable doubt. *Prather*, 69 M.J. at 343-45. Rather, the Military Judge stated that the evidence *was* relevant to the Government's burden, thus satisfying the requirements of *Martin v. Ohio*. (J.A. 30.) The Government was required to prove their entire case beyond a reasonable doubt,

and the Members were so instructed. *See Victor v. Nebraska*, 511 U.S. 1, 33 (1994)(explaining that when assessing instructional error the question is whether the error would have caused a reasonable juror to misinterpret the prosecution's burden of proof or allow them to believe they could convict the defendant upon a degree of proof less than beyond a reasonable doubt).

Under the instructions provided, no reasonable juror could have been confused as to the Government's burden of proof. *See McGuire*, 502 U.S. at 73. Or, assuming the members followed the instructions, convicted Appellant upon a degree of proof less than beyond a reasonable doubt. *Victor*, 511 U.S. at 33. Accordingly, the instructions were constitutionally sound.

This case is readily distinguished from *United States v. Cheeseman*, No. 200900567, 2010 CCA LEXIS 384, *12-13 (N-M. Ct. Crim. App. Nov. 9, 2010), *rev'd*, No. 11-0256, 2011 CAAF LEXIS 552 (C.A.A.F. May 5, 2011). In *Cheeseman*, appellant bore the burden of proving the affirmative defense, but contrary to the teachings of *Martin v. Ohio* the military judge failed to instruct the members that evidence of the affirmative defenses is relevant to the other elements of the crime. *Id.* at *13. Here, on the other hand, the members were instructed that lack of consent had to be proved by the Government beyond a reasonable doubt; *and*, in accordance with *Martin v. Ohio*, that any evidence of consent was relevant to the other elements of

the offense. (J.A. 30-31); *see Martin*, 480 U.S. at 234. There is no useful analogy to be drawn between *Cheeseman* and the case at bar.

Appellant cites only *Humanik v. Beyer*, 871 F.2d 432 (3d Cir. 1989), for the proposition that the Military Judge's instructions to the members, in the present case, were insufficient. (Appellant's Br. at 8-9.) *Humanik* is inapt to this case, however, because it addresses the constitutionality of an idiosyncratic, state-specific affirmative defense that cannot be instructed on in such a way as to ensure that the jury does not misinterpret their task and the parties' respective burdens. In the case at bar, unlike in *Humanik*, Appellant had no burden of proof; hence the Members could not have been confused as to how to apply the evidence that Appellant put forward. *Cf. id.* at 440-41 ("When such a standard instruction is coupled with one *placing a burden on the defendant* to prove his defense by a preponderance of the evidence, the predictable result is more than mere confusion.")(emphasis added.) *Humanik* is not analogous because this Court has already determined that Article 120, UCMJ, can be instructed on constitutionally, as it was in the case at bar. *See Medina*, 69 M.J. at 465-66.

Even if this Court determines the "dual use" instruction was required it should still determine there was no error: the Members were properly and constitutionally instructed that

evidence of consent was relevant to all the elements of the crime. (*See* J.A. 30.)

However, if this Court determines that there was error, and that the "dual use" instruction provided was insufficient, this Court should test for plain error because Appellant did not object to the instruction provided by the Military Judge. *See United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011).

C. Even if there was error, it was not plain error because the law is in flux, so the error was not plain or obvious, and Appellant suffered no material prejudice to a substantial right.

1. The proper test is plain error review, not harmless beyond a reasonable doubt.

"Failure to object to an instruction given or omitted [forfeits] the objection absent plain error." *Pope*, 69 M.J. at 333 (citing Rule for Courts-Martial (R.C.M.) 920(f), Manual for Courts-Martial, United States (2008 ed.)); *see also United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)(explaining the difference between waiver and forfeiture, and that if an appellant forfeits a right by failing to raise it at trial this Court tests for plain error).

Appellant did not object to the Military Judge's instructions (*see* J.A. 24-25) and has thus forfeited error absent plain error. R.C.M. 920(f); *Pope*, 69 M.J. at 333 (concluding instructional error, absent objection, is tested for plain error); *see Johnson v. United States*, 520 U.S. 461, 464

(1997) (applying plain error review to instructional error); *see also United States v. Olano*, 507 U.S. 725, 731-32 (1993) (discussing appellate review in Article III Courts under Fed. Rule Crim. P. 52(b)); *Harcrow*, 66 M.J. at 156 (discussing appellate review in Article I courts under R.C.M. 920(f) and Mil. R. Evid. 103(d)).

Under the plain error framework, an appellate court will only grant relief for potential error not raised at trial if there is (1) error; (2) that is plain or obvious; and, (3) that materially prejudices the appellant's substantial rights.[1] *Johnson*, 520 U.S. at 464; Art. 59(a), UCMJ. The appellant bears the burden of persuasion for all three prongs.[2] *Olano*, 507 U.S.

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[1] The third plain-error prong under *Olano* is that the error "affects substantial rights." *Olano*, 507 U.S. at 732. Military jurisprudence requires a heightened standard relative to the Federal Rules of Criminal Procedure: "A finding or sentence may not be held incorrect on the ground or an error of law unless the error *materially prejudices the substantial rights of the accused*." Article 59(a), UCMJ (emphasis added). This accounts for the slightly different standard under prong three. *Cf. Powell*, 49 M.J. at 465.

[2] Federal courts apply a fourth prong: if all three previously-stated requisites are satisfied, the court may exercise its discretion to remedy the error "only if the error seriously affects the fairness, integrity or public reputation of public proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009); *see Johnson*, 520 U.S. at 464. The Government submits that the Court should include plain error's fourth prong in this framework. *See, e.g., United States v. Cotton*, 535 U.S. 625, 631 (2002); *Puckett*, 556 U.S. at 135. Without the fourth prong, as is the current state of military law, there is an inadequate difference between a preserved error and a forfeited error.

at 734-35; *United States v. Ballan*, No. 11-0413, 2012 CAAF LEXIS 238, at *15 n. 5 (C.A.A.F. Mar. 1, 2012)(citing *United States v. Girouard*, 70 M.J. 5, (C.A.A.F. 2011); *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011); *but see United States v. Powell*, 49 M.J. 460, 464-65 (1998) (whereas *Olano* states that the defendant bears the burden for all three prongs, and *Powell* cites to that portion of *Olano*, *Powell* states that the burden shifts to the Government for the third prong).

Although instructional error has constitutional dimensions, plain error, as described above, is the appropriate standard of review for this case. R.C.M. 920(f); *see Johnson*, 520 U.S. at 464. In *Johnson*, the Supreme Court held that plain error review, as described in *Olano*, is required in instances where the judge improperly instructs the jury but the accused fails to object. *Johnson*, 520 U.S. at 469; *cf. Nader v. United States*, 527 U.S. 1, 9 (1999)(applying harmless-error review to instructional error *to which appellant objected*). This is so because Fed. R. Crim. P. 30(d) dictates that forfeited instructional errors are subject to plain error review.[3] *Johnson*, 520 U.S. at 466. *Johnson* explained that a "Rule which by its terms governs direct

[3] Fed. R. Crim. P. 30(d) states in pertinent part: "OBJECTION TO INSTRUCTIONS. ... Failure to object [to a jury instruction] in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)." Fed. R. Crim. P. 52(b) establishes when plain error review must be applied; it states: "PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

appeals from judgments of conviction in the federal system, [. . .] therefore governs this case." *Id.* at 466.

The Supreme Court, therefore, requires testing forfeited instructional error for plain error when the rules so dictate, as is the case here. R.C.M 920(f); *see Johnson*, 520 U.S. at 468; *Pope*, 69 M.J. at 333. The Rules for Courts-Martial are the rules that govern the military justice system just as the Federal Rules of Criminal Procedure govern the federal system. Accordingly, as required by R.C.M 920(f), this Court must apply plain error review to the forfeited instructional error. *Id.*; *see Ballan*, 2012 CAAF LEXIS 238, at *15 n. 5; *Girouard*, 70 M.J. 5; *McMurrin*, 70 M.J. 15 (all explaining the plain error review standard).

The only exception to this rule would be if the instructional error amounted to "structural error," mandating automatic reversal. *See Arizona V. Fulminante*, 499 U.S. 279, 309 (1991). But the Court has found structural error in only a very limited class of cases. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel);

Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge). Any error here, *arguendo*, does not come anywhere near amounting to a structural error.

As recently as *Medina*, however, this Court——while holding that plain error review was the appropriate standard of review for forfeited instructional errors——nonetheless stated that instructional error "must be tested for prejudice under the standard of beyond a reasonable doubt." 69 M.J. at 465 (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)); *see United States v. DiPaolo*, 67 M.J. 98, 102 (C.A.A.F. 2008); *United States v. Kaiser*, 58 M.J. 146, 149-150 (C.A.A.F. 2003). However, the harmless beyond a reasonable doubt standard is inappropriate in light of the dictates of R.C.M. 920(f) because it is inapposite to plain error review.

Should this Court determine there was instructional error and the "dual use" instruction provided was insufficient, considering Appellant did not object to that error, this Court should apply plain error review. *Pope*, 69 M.J. at 333. This requires Appellant to bear the burden of satisfying all the prongs of that test and, in particular, show "material prejudice to a substantial right." *See Ballan*, 2012 CAAF LEXIS 238, at *21-22; *see Olano*, 507 U.S. at 736.

If this Court determines there was error, that error was not plain or obvious.

2. Error cannot be "plain" or "obvious" if the law was unsettled at the time of trial. Here, the law regarding how to properly instruct members on the affirmative defense of consent in an Article 120, UCMJ, case was clearly in flux at the time of trial.

Plain or obvious error "is error that is so clear-cut, so obvious, a competent [. . .] judge should be able to avoid it without the benefit of an objection." *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). When the law is unsettled at the time of trial and the accused does not object, any error cannot be said to be "plain." *Id.; see also United States v. David*, 83 F.3d 638 (4th Cir. 1996), *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994), *cert. denied*, 513 U.S. 1196 (1995), *United States v. Dupaquier*, 74 F.3d 615, 619 (5th Cir. 1996), *United States v. Washington*, 12 F.3d 1128 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 828 (1994) (all holding that if the law was unsettled at the time of trial but only later clarified while on appeal, then while error, it is nonetheless not plain).

Here, the law was unsettled at the time of trial and is so currently. *See, e.g., Medina*, 69 M.J. at 466 (Baker, J., concurring)("It is not clear what is left on the table and how military judges are supposed to now proceed in light the Court's positions in Prather and Medina. The only course left open, it appears, is for military judges to continue giving 'erroneous' instructions that nonetheless remove the prejudice embedded in

Article 120, UCMJ, beyond a reasonable doubt.") Since the law is unsettled, and was not clearly against Appellant at the time of trial, any error cannot be plain or obvious.

3. Assuming error, there was no prejudice: the Military Judge increased the burden on the Government, while relieving Appellant of his burden to prove the affirmative defense of consent.

By instructing the members in accordance with the Military Judges' Benchbook, the Military Judge relieved Appellant of his burden to prove the affirmative defense of consent by a preponderance of the evidence in favor of requiring the Government to prove lack of consent beyond a reasonable doubt. (J.A. at 26-28, 55); Military Judges' Benchbook at 509. In this regard, this case is nearly identical to *Medina*, where this Court found that the Benchbook instruction did not prejudice the accused, but rather found error to be harmless beyond a reasonable doubt. *Id.* at 466; *see United States v Redd*, No. 201000682, 2011 CCA LEXIS 413 (N-M. Ct. Crim. App. Dec. 29, 2011)(finding no prejudice where the military judge instructed the members in an Article 120, UCMJ, case in accordance with the Military Judges' Benchbook), *appeal denied*, No. 11-8035, 2011 CAAF LEXIS 641.

Furthermore, Appellant has failed to carry his burden of persuasion and show how he has suffered material prejudice to a substantial right because of the Military Judge's instruction.

See *Ballan*, 2012 CAAF LEXIS 238, at *15, 21-22. He has offered nothing that indicates he has, in fact, been prejudiced, but merely hypothesized how it is possible that he may have been prejudiced. (Appellant's Br. at 9.) As the burden is Appellant's to bear, this is an insufficient showing to warrant relief. *See McGuire*, 502 U.S. 73; *United States v. Quinones*, 511 F.3d 289, 313-14 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 252 (2008)("To secure reversal based on a flawed jury instruction, a defendant must demonstrate both error and ensuing prejudice."); *cf. DiPaola*, 67 M.J. 98, 102 (reversible error where the military judge failed to instruct members on the affirmative defense of mistake of fact as to consent where evidence in support of that affirmative defense was overwhelming).

Even if this Court determines that plain error test articulated in *Ballan*, supra, is inapt for this case, the instructional error was nonetheless harmless beyond a reasonable doubt. *See Medina*, 65 M.J. 465 (finding the error in a nearly identical case to be harmless beyond a reasonable doubt.)

This court should conclude that any error, *arguendo*, did not result in a due process violation because, as in *Medina*, Appellant has not been prejudiced.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

/s/

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court on April 6, 2012. I also certify that this brief was electronically served on Appellate Defense Counsel, Capt Michael Berry, USMC, on April 6, 2012.

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