IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	**BRIEF ON BEHALF OF APPELLEE**
v.	)	USCA Dkt. No. 14-0029/AR
Sergeant (E-5) **RONALD J. DAVIS,** United States Army, Appellant	)	Crim. App. Dkt. No. 20100815

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Granted Issue:

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE AFFIRMATIVE DEFENSE OF DEFENSE OF PROPERTY WAS HARMLESS BEYOND A REASONABLE DOUBT.

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

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ].[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A military judge sitting as a general court-martial, convicted appellant, pursuant to his pleas, of two specifications of failure to go to his appointed place of duty, in violation of Article 86, UCMJ, 10 U.S.C. § 886 (2006).[3] Contrary to his plea, an officer panel convicted appellant of one specification of simple assault with an unloaded firearm in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2006).[4] The officer panel sentenced appellant to be reduced to the grade of E-4, confinement for ninety days, and to be discharged from the

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[1] 10 U.S.C. § 866.
[2] 10 U.S.C. § 867(a)(3).
[3] 10 U.S.C. § 886. JA 13-14.
[4] 10 U.S.C. § 928. JA 13, 15.

Army with a bad-conduct discharge.[5] The convening authority awarded thirty-four days confinement credit, and approved the findings and remainder of the adjudged sentence.[6] On July 15, 2013, the Army Court affirmed the findings and sentence by memorandum opinion.[7] On November 19, 2013, this Honorable Court granted appellant's petition for review of the above assignment of error.

Statement of Facts

A. Background

On February 20, 2010 the victim in this case, SPC S.S., went out to a sports bar in Harker Heights, Texas, with his girlfriend[8] (Miss A.R.), his squad leader (SGT Scott), SGT's Scott's wife (Mrs. Scott), appellant, and appellant's wife (Mrs. Davis).[9] Before going out that evening, Miss A.R. had previously asked Mrs. Davis if both she and SPC S.S. could stay the night at her home so they would not have to drive home after drinking, as the Davis home was in close proximity to the bars and clubs.[10] Mrs. Davis asked appellant if he objected to her inviting Miss A.R. and SPC S.S. into their home, to which appellant stated

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[5] JA 16.
[6] JA 17.
[7] JA 1-6.
[8] The victim goes by his middle name, thus he will be referred to as SPC "S.S." not SPC "G.S." At the time of trial Miss A.R. was no longer in a relationship with SPC S.S. JA 18-19.
[9] JA 115-17.
[10] JA 29, 116.

"[i]t's up to you."[11] Appellant admitted that he did not "have any part in that conversation ... that offer ... was between the two women."[12] As a result, Mrs. Davis "did the right thing" and informed Miss A.R. that both she and SPC S.S. could stay the night.[13] Mrs. Davis also hired a "roughly 14" year-old babysitter to take care of their four-month old child for the evening so that she and appellant could go out.[14] This babysitter brought her "little brother" along with her to the Davis house that evening.[15]

The evening's events began at a sports bar at approximately 2000 to 2030 hours.[16] Everyone except Mrs. Scott consumed alcohol in varying amounts.[17] Appellant and his wife ordered a pitcher of beer and consumed it throughout the evening.[18] SPC S.S. and Miss A.R. also ordered a pitcher of beer, but did not drink all of it.[19] Mrs. Davis and Miss A.R. also drank shots of alcohol.[20] Between 2100 and 2200, SPC S.S. and Miss A.R. left the group to go dance at a nearby club and later came back

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[11] JA 116, 174.
[12] JA 116.
[13] JA 174.
[14] JA 179.
[15] JA 159.
[16] JA 20, 116.
[17] JA 120.
[18] JA 116.
[19] JA 21.
[20] JA 21.

sometime between 2300 and 0000.[21] While SPC S.S. testified that they had nothing to drink during this time, appellant stated that the two appeared "a little drunk" and Mrs. Davis said they were "acting wildly, slurring, kind of staggering over people ...."[22] Neither party contests that SPC S.S. or Miss A.R. had any more drinks that evening after returning from the club.[23]

Appellant wanted to go play pool with his friends at another location because the pool tables at the sports bar were "just too packed."[24] Despite Miss. A.R.'s desire to also go play pool, SPC S.S. did not want to go because his ex-girlfriend worked there and he did not want there to be any "weirdness."[25] At around 0100 or 0130 appellant left the sports bar to drive to the pool hall while SPC S.S. drove both Mrs. Davis and Miss A.R. back to the Davis residence.[26] SPC S.S. testified that when he left the bar to drive home he was not drunk.[27]

While at the Davis residence, Miss A.R. and SPC S.S. began to argue with each other about SPC S.S.'s decision not to go play pool.[28] At no point did the argument ever turn into a

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[21] JA 22-23, 117-18.
[22] JA 119, 158.
[23] JA 23, 27.
[24] JA 120.
[25] JA 25.
[26] JA 121
[27] JA 25.
[28] JA 27.

physical altercation.[29] Mrs. Davis intervened to end the arguing and temporarily calmed the situation down, persuading SPC S.S. to come back inside the home with her and Miss A.R.[30] However, at some point SPC S.S. and Miss A.R. began arguing again.[31]

As a result of the ongoing verbal squabbling, Mrs. Davis tried to both call and text appellant about coming home from the pool hall, but appellant ignored both the call and text.[32] Eventually, the arguing between Miss A.R. and SPC S.S. continued outside the home in the driveway, escalating to the point of SPC S.S. slamming the door of Miss A.R.'s car after she told him to leave.[33] After slamming the car door, SPC S.S. walked down the road from the Davis residence "just to chill out" and smoke a cigarette while Mrs. Davis continued to comfort Miss A.R. at her car in the drive way.[34]

Neither Miss A.R. nor SPC S.S. broke any personal property inside or outside Mrs. Davis' home or otherwise damaged the home itself.[35] Both government and defense witnesses agree that

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[29] JA 27.
[30] JA 162.
[31] JA 98, 162.
[32] JA 122, 147. Contrary to appellant's testimony, Mrs. Davis testifies that she called appellant and "told him ... they were arguing ... and told him [that she] didn't know what to do." JA 169.
[33] JA 28, 51.
[34] JA 28.
[35] JA 43, 147, 175.

neither Miss A.R. nor SPC S.S. threatened or physically assaulted Mrs. Davis or anyone else.[36]

At some point, Mrs. Davis again texted appellant stating "[t]hese two, they're arguing and it's getting out of control ... I need you to come home now."[37] After seeing this message appellant "jumped in [his] truck, and headed to [his] house."[38] SGT Scott, who was at the pool hall with appellant, testified that this "immediately ticked off" appellant.[39] SPC S.S. testified that he saw appellant driving his truck at a high rate of speed squealing his tires coming around the corner where SPC S.S. was in the middle of the street.[40]

Appellant admitted he was "agitated" and drove past SPC S.S., straight to the house pulling beside Miss A.R.'s parked car and his wife's parked car in the driveway.[41] SPC S.S. testified he heard a crash or breaking noise so he hurried back in the direction of the house.[42] Miss A.R. testified that she heard - but did not see - appellant kick the back part of Mrs. Davis' car while he was heading towards the front door of the house.[43]

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[36] JA 43, 148, 175.
[37] JA 122.
[38] JA 122.
[39] JA 201.
[40] JA 29.
[41] JA 125.
[42] JA 30.
[43] JA 95.

B. The victim's version of events

According to SPC S.S., appellant went directly inside his house and then came back out to meet SPC S.S. standing where the sidewalk met appellant's porch.[44] Appellant then said, "I can't believe that you would do this at my house," to which SPC S.S. responded, "[w]hat do you mean?"[45] Appellant then replied, "I give you a place to stay for the night and then you pull this shit."[46] SPC S.S. then asked "[w]hat are you talking about" and then said "[y]ou need to relax ... [y]ou need to settle down."[47] Appellant retorted, "[d]on't tell me to settle in my own house."[48] SPC S.S. explained that he was trying to calm appellant down and was concerned given the crashing sound he had heard just moments before.[49]

Appellant became agitated to the point that he eventually swung his fist at SPC S.S.; however, appellant was drunk and missed SPC S.S.[50] SPC S.S. took a step back and said, "I'm not going to fight you."[51] Appellant, now on one knee, put his arm behind his back and retrieved the handgun he had previously

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[44] JA 31.
[45] JA 31.
[46] JA 31.
[47] JA 31.
[48] JA 31.
[49] JA 31. Appellant testified that Mrs. Davis later discovered that the taillight of her car had been damaged, but he denies knowing who damaged it or how it was damaged. JA 138.
[50] JA 31.
[51] JA 31.

placed in his back pocket.[52] Appellant charged the weapon by pulling the slide back, and pointed the handgun in the face of SPC S.S.[53] According to SPC S.S. and Miss A.R., appellant stated, "I'll shoot you, I'll shoot her, I'll shoot everyone, I don't give a fuck" or words to that effect.[54] SPC S.S. was frozen with fear and eventually Miss A.R. pulled him away.[55] SPC S.S., who suffers from PTSD, was extremely distraught and spent some time crying on the curb before Miss A.R. drove him away.[56]

Immediately after this encounter, SPC S.S. called his squad leader, SGT Scott and told him what happened.[57] As a result of call, on February 22, 2010 SPC S.S. provided a sworn statement about the incident to his company and later that morning went to the local police to provide a statement.[58]

C. Appellant's version of events

Appellant testified that his only concern was in regards to SPC S.S. and Miss A.R.; specifically, that "they were arguing, they were acting a fool [sic], getting loud and what not around [his] family, and [that he] didn't want them there no more [sic]."[59] Appellant further testified that after parking his

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[52] JA 32.
[53] JA 32.
[54] JA 33, 99.
[55] JA 137.
[56] JA 63.
[57] JA 64.
[58] JA 64-66.
[59] JA 136.

truck, he told his wife to "get the hell in the house" and told Miss A.R. that both she and SPC S.S. "are no longer welcome" and to "[g]et the fuck off [his] property."[60] Appellant also testified that he could hear SPC S.S. yelling out from the street "something along the lines of, '[w]hat the fuck's the matter with you ... [w]hat are you doing?'"[61] Appellant stated that he "stopped in [his] tracks, turned around and yelled over the cars towards [SPC S.S.] ... '[y]ou all need to get the hell out of here ... I don't want you here no more [sic].'"[62] Nothing in the record indicates that SPC S.S. heard this alleged demand by appellant.

Appellant next states that he yelled at his wife to "get the hell in the house" and then went inside the front door swinging it behind him as he entered.[63] However, the door did not shut all the way and remained partially opened.[64] Despite appellant's shouting at Mrs. Davis, she stood "right by [Miss A.R.'s] car" and refused to follow appellant in the house because she was "stubborn."[65] Appellant admits that he did not go to Mrs. Davis to see what the problem was, nor did he ask her what she wanted him to do about the situation or see if she wanted Miss A.R. or

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[60] JA 149.
[61] JA 128.
[62] JA 128.
[63] This is despite the fact that his wife would have still been behind him if she had complied with his demand. JA 129.
[64] JA 129, 178.
[65] JA 129, 150, 178.

SPC S.S. to leave their property.[66]

Appellant testified that he "started to head toward [his] bedroom area," but that "he noticed that [his] pistol case [was] still in the kitchen table [sic] where it had been earlier from [him] cleaning up the pistol."[67] Apparently, "[e]arlier that evening before [appellant and his wife] got ready to leave, [appellant] took [the handgun] out to clean it", as he normally keeps it loaded in his safe in his bedroom or in his closet.[68] When asked by defense counsel where exactly the handgun was, appellant specifically mentioned it was on the "[k]itchen table or dining room table in the case, the hard plastic case."[69] Both the fourteen year-old babysitter and her little brother had been in the home all evening and had already been taken back to their home at this time.[70] Rather than return the pistol case to the safe, appellant removed the pistol from the case and stuck it in his back pocket.[71]

Appellant testified that he then turned to go to the bedroom when he noticed his wife was not in the house and the front door was still slightly open, so he headed back to the door to again

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[66] JA 178.
[67] JA 129.
[68] JA 129-30.
[69] Despite appellant stating the handgun was inside the plastic case, defense counsel asks the leading question "[w]hen you picked the weapon up off the table, was it loaded" inferring that the weapon was already outside of the plastic case. JA 130.
[70] JA 159.
[71] JA 130.

yell at his "stubborn" wife to get back in the house.[72] As appellant approached the door to open it, he testified that SPC S.S. was approaching the doorway.[73] Appellant testified that SPC S.S. entered the doorway area, and appellant said, "[g]et the fuck out," and "as soon as I said it, I pushed [SPC S.S] out of the doorway.[74] At no point did appellant allow SPC S.S. time to comply with his demand.[75]

Appellant claimed that SPC S.S. tried to come back at him, so he pushed SPC S.S. back again and told him to "get the hell out of here."[76] Appellant then testified that SPC S.S. "lunged toward [him] with a punch."[77] According to appellant, when SPC S.S. swung at him, he "ducted down [sic] ... [and] pushed him in the stomach with [his] left hand and ... drew [his] pistol with [his] right."[78] Appellant said he had the handgun held on SPC S.S. for, "maybe 20, 30 seconds ..." and eventually stated, "[y]ou really need to get out of here."[79]

With the gun still trained on SPC S.S., appellant noticed that SPC S.S. was starting to cry and shake, that he "could tell

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[72] JA 131, 178.
[73] JA 131, 270-73.
[74] JA 133-34, 272.
[75] JA 134.
[76] JA 134.
[77] JA 134.
[78] JA 134.
[79] JA 136.

the threat was over."[80] Appellant repeated his statement that SPC S.S. needed to leave.[81] SPC S.S. then looked down to see his sweater or hoodie thrown in the bushes, and he reached down to grab it then "took off down the driveway."[82] Appellant also testified that he called SPC S.S.'s supervisor, SGT Scott, to tell him "your boy, [SPC S.S.], acted a fool [sic] over here ... I had to pull my pistol on him;" however, this was denied by SGT Scott at trial.[83]

D. Instructions & Closing Argument

During instructions to the panel, the military judge provided the following in regards to the lesser-included offense of simple assault with an unloaded firearm:

> For self-defense to be a defense to the lesser included offense of simple assault with an unloaded firearm, the accused must have had a reasonable belief that bodily harm was about to be inflicted upon himself. And he must have actually believed that the force he used was necessary to prevent bodily harm. In other words, the defense of self-defense with respect to this lesser included offense has two parts:
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> First, the accused must have had a reasonable belief that physical harm was about to be inflicted on him. The test here is whether, under the same facts and circumstances in this case, any reasonably prudent person faced with the same situation would have believed that he would immediately be physically

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[80] JA 137.
[81] JA 137.
[82] JA 137, 272-73.
[83] JA 140. SGT Scott denied the fact that appellant called him after the incident, rather it was SPC S.S. who called him. It was only after SPC S.S.'s call that SGT Scott decided to head over to appellant's house to talk to him in person. JA 200-01.

> harmed. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant.
>
> Secondly, the accused must have actually believed that the amount of force he used was required to protect himself. To determine the accused actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused.[84]

The military judge then addressed the possibility of appellant intentionally provoking an attack:

> There exists evidence in this case that the accused may have been a person who intentionally provoked the incident. A person who intentionally provoked in their attack upon himself is not entitled to self-defense, if it was physically impossible--is not entitled to self-defense unless it was physically impossible for him to withdrawn in good faith. A person who has provoked an attack; therefore, has given up the right to self-defense if he willingly and knowingly does some act towards the other person, reasonably calculated and intended to lead to a fight. Unless such act is clearly calculated and intended by the accused to lead to a fight, the right to self-defense is not lost.
>
> The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that the accused intentionally provoked an attack upon himself, then you have found that the accused gave up the right to self-defense. However, if you have a reasonable doubt that the accused intentionally provoked upon--attack upon himself, then you must conclude that the accused retained the right to self-defense, and you must determine if the accused did in fact act in self-defense.[85]

The military judge did not issue an instruction on defense of property *sua sponte*.

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[84] JA 210-11.
[85] JA 212-13.

During government's closing argument, trial counsel described appellant's actions that evening:

> [Appellant] confronts [SPC S.S.]. He's yelling at him, "Get off my property. You're no longer welcome here. How could you do this? I give you a place to stay." [SPC S.S.] saying, "Hey, calm down. What's your deal? Why are you screaming? Why are you yelling?" [Appellant] doesn't want to hear that. This is his house. It's his castle. "No one tells me what he to do in my house." By this time, [appellant] is in a fit of rage. He wants to get rid of [SPC S.S.] now, anyway possible. He takes a swing, "Get off my property. Get out of here." In his intoxicated state, he misses, falls to the ground. His gut instinct tells him to pull the weapon out of his back, rack it, point it in--at his face. "I'll kill you. I'll kill her. I'll kill anybody. Get off my property."
>
> Does that sound like a man that was defending himself? Does that sound reasonable to you? Ask yourself this question when you go into that deliberation room. Would a reasonable person go inside directly after arriving at his house to go get a gun? Leaving his wife outside, in an unknown situation; pointing a weapon at someone who doesn't have a weapon pointing you. The only person here with a weapon, with a gun is [appellant].[86]

Government counsel further elaborated on this point later in his closing argument:

> I would submit to you, ladies and gentlemen, [appellant] used this weapon, offered this weapon to scare [SPC S.S.]. He used more force than was necessary in this case. If he wanted [SPC S.S.] off his property, he could've told him to get off, and if he wouldn't leave, he could've called the cops. He didn't do that. He took it upon himself. He took it upon himself to be violent and aggressive in his intoxicated state.[87]

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[86] JA 224.
[87] JA 228.

In response, defense argued the following:

> The allegation is [appellant] assaulted [SPC S.S] with a deadly weapon. Of the instructions that you have heard and that you'll take back with you say, "A person acting in self-defense in order to discourage an assailant may threaten more force than he is legally allowed to actually use under the circumstances." [Appellant] could have gotten a lot more harm than he actually did [sic]. What [appellant] did was in response to what he reasonably believed to be a threat was pull out an unloaded weapon and aim it at a person who had attempted to come into his house twice, after being told "You need to leave."[88]

Defense then referenced the confrontation near the doorway:

> [Appellant] was just angry and kind of tired with the situation. But as he walks to the door, realizing that his wife hasn't come inside, and at that point, he sees [SPC S.S.]. All of the things that he just talked about, in combination with the fact that [SPC S.S.] is standing in his doorway, causes the situation to come to a head. For a second time, [appellant] ... said, "Get the F out of my house." Okay? And in response, [SPC S.S.] did not. [Appellant] exercising his right to defend his home, pushed [SPC S.S.] out of the house, said, "Get out of here." [SPC S.S.] wasn't very happy about that, tried to come back in. "What's your problem, man? What's your problem?" [Appellant] [s]hoves him out of the house again; get out of here.
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> At this point, [SPC S.S] is not happy. How do we know that he's not happy? We know he's not happy because we know ... he said things, around that time. "I don't like when people put boundaries on me. It can make me blow up real fast." Boundaries like, get off my property, get out of my house, I need you to go. Of course he wasn't happy; so what does he do? He takes a swing at [appellant]. In response, [appellant] ... took the stand, [and said], "I pulled my unloaded pistol in order to threaten him, in order to get [SPC S.S.] to leave."[89]

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[88] JA 229.
[89] JA 232-33.

Trial defense counsel later summed up their argument and version of events:

> In the real world, [appellant's] world, what actually happened was: [SPC S.S.] was angry because boundaries were drawn. Because [appellant] was kicking him out of his house for acting like a jerk. Specialist [S.S.] didn't like that, so he took a swing. And in response [appellant] exercised his right to self-defense.[90]

During rebuttal, government countered by arguing the following to the panel:

> I would submit to you, ladies and gentlemen, that [appellant] acted far beyond what is required for self-defense. He did not act reasonably. A prudent person would not have pulled a weapon in that situation. A prudent person would not have thought [SPC S.S.] was a threat in that situation. Claiming self-defense fails in this case, ladies and gentlemen, if you'll honestly look at the evidence. The credible evidence, self-defense isn't there. Look at the credible evidence, [appellant] is the aggressor. [Appellant] was the angry one.[91]

Summary of Argument

The military judge's error for failing to instruct on the defense of property *sua sponte* is harmless beyond a reasonable doubt, as the panel rejected appellant's theory of self-defense and would have similarly rejected an even narrower, weaker defense of property theory. Even considering the defense of property, given the victim's status as an invited guest, appellant did not provide the victim a reasonable amount of time to leave the premises when he immediately shoved the victim near

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[90] JA 241.
[91] JA 242-43.

the doorway area. The evidence is overwhelming that appellant was the aggressor in this case and his actions were not reasonable in ejecting the victim from the property and the lack of a defense of property instruction is harmless.

Standard of Review

The adequacy of a military judge's instructions as to affirmative defenses is reviewed de novo.[92] Such instructional errors are tested for prejudice under the harmless beyond a reasonable doubt standard; that is "'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'"[93]

Law

Generally speaking, a military judge has substantial discretionary power to decide whether to issue a panel instruction.[94] Nevertheless, when an affirmative defense is raised by the evidence, an instruction is required.[95] "[W]aiver does not apply to required instructions such as ... affirmative defenses."[96] "A military judge is required to instruct members on any affirmative defense that is 'in issue,' and a matter is

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[92] *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006).
[93] *Id.* (quoting *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)).
[94] *See United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)).
[95] *See id.*
[96] *United States v. Stanley*, 71 M.J. 60, 63 (C.A.A.F. 2012) (internal quotations omitted).

considered 'in issue' when 'some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose.'"[97] "[T]he military judge must answer the legal question of whether there is some evidence upon which members could reasonably rely to find that each element of the defense has been established ... [t]his test is similar to that for legal sufficiency."[98]

Under military law, a "person is justified in using reasonable force to protect [his] real or personal property from trespass or theft, when the person reasonably believes that [his] property is in immediate danger of an unlawful interference, and that the use of such force is necessary to avoid the danger."[99] The Military Judge's Benchbook outlines the two parts of the defense of property:

> First, the accused must have had a reasonable belief that [his] ... [real or personal] property was in immediate danger of [trespass or theft]. The test here is whether, under the same facts and circumstances as in this case, any reasonably prudent person, faced with the same situation, would have believed that [his] ... property was in immediate danger of unlawful interference.
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> Secondly, the accused must have actually believed that the amount of force [he] ... used was required to

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[97] *Stanley*, 71 M.J. at 61 (quoting *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)).
[98] *United States v. Schumacher*, 70 M.J. 387, 389-90 (C.A.A.F. 2011).
[99] Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 5-7, n. 1. (1 Jan. 2010). JA 268-69.

> protect [his] ... property. To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's [age, intelligence, emotional control etc.] are all important factors in determining the accused's actual belief about the amount of force required to protect [his] ... property. No requirement exists for the accused to have requested that [the alleged victim] stop interfering with [his] ... property before resorting to force to protect [his] ... property.[100]

While military case law is somewhat sparse on the subject, several military cases are helpful to the analysis of this case. In *United States v. Gordon*, the Army Board of Review found the following instruction a proper summary of the defense of property in the military:

> To justify a resort to force in defense of property, the danger should be such as to induce one exercising reasonable and honest judgment to interfere to prevent taking of his property. The mere suspicion or fear of encroachment is not justification for the use of force. The necessity, however, need not be real. It need only be reasonably apparent to the one using the force and the resistance offered be in good faith.[101]

More recently, this court has noted in *United States v. Marbury* that it is "well established that a service member has a legal right to eject a trespasser from his or her military bedroom ... and a legal right to protect [his] personal property."[102] Yet,

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[100] Benchbook para. 5-7, n. 1. JA 268-69.
[101] *United States v. Gordon*, 33 C.M.R. 489, 500 (A.B.R. 1963) *reversed on other grounds*, 34 C.M.R. 94 (C.M.A. 1963).
[102] *United States v. Marbury*, 56 M.J. 12, 15 (C.A.A.F. 2001) (citing *United States v. Richey*, 20 M.J. 251, 253 n.2 (C.M.A.

at the same time, this court cautioned that "these legal rights are not unlimited, and they must be exercised *reasonably*."[103] "Reasonableness in this context means that reasonable force must be used, i.e., force that is reasonably necessary to eject the trespasser or otherwise protect the property."[104]

Similarly, the Military Judge's Benchbook acknowledges that a "person, who is lawfully in possession or in charge of property, and who requests another to leave whom he/she has a right to request to leave, may lawfully use as much force as is *reasonably* necessary to remove the person, after allowing a *reasonable* time for the person to leave."[105] "The person who refused to leave after being asked to do so, becomes a trespasser and the trespasser may not resist if only *reasonable* force is employed in ejecting him ...."[106]

The decisions of some Federal Circuit Courts shed further light on what exactly constitutes "reasonable" conduct. In one case *Przybyla,* three Internal Revenue Service [hereinafter IRS] agents attempted to seize Przybyla's real property to satisfy a tax deficiency.[107] Przybyla drew a gun, clicked off the safety,

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1985; *United States v. Regalado*, 33 C.M.R. 12, 14 (C.M.A. 1963)).

[103] *Id.* (emphasis added).

[104] *Id.*

[105] Benchbook para. 5-7, n. 3 (emphasis added). JA 268-69.

[106] *Id.* (citing *Regalado*, 33 C.M.R. at 12) (emphasis added).

[107] *See generally United States v. Przybyla*, 737 F.2d 828, 829 (9th Cir. 1984) (holding that appellant's use of a firearm as "a

and waved the gun in the general direction of the agents while escorting them off his property.[108] He was convicted of assaulting an IRS agent and impeding the administration of the tax laws.[109] The Ninth Circuit Court of Appeals held that even if the appellant were justified in requesting that the agents leave his property, his use of a weapon in this manner was unlawful.[110] That court also noted that Przybyla made "no attempt to discuss his reason for requesting that the agents leave his property."[111] In another case from the Fifth Circuit, *United States v. Gant*, that court noted that "the threat of loss of property without more never justifies the use of deadly force ...."[112] Moreover, that court tied self-defense and defense of property together in circumstances where use of deadly force is present via a firearm.[113] Additionally, at least one legal treatise has also reflected this same connection.[114]

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show of force" to persuade IRS agents to leave his private property was unlawful) (citations omitted).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *United States v. Gant*, 691 F.2d 1159, 1163 n.7 (5th Cir. 1982).

[113] "Since the threat of loss of property without more never justifies the use of deadly force ... we assume that the district court would not have allowed either defense [self-defense or defense of property] without an accompanying finding that [appellant] was in danger of death or serious bodily harm." *Gant*, 691 F.2d at 1163 n.7.

[114] "When the property which an owner is seeking to protect is located in a dwelling house, a greater measure of force may be

Argument

Despite the Army Court's finding that at least some evidence was raised by appellant as to the defense of property, the military judge's apparent error for failing to instruct on that defense *sua sponte* is still harmless beyond a reasonable doubt, as the panel rejected appellant's primary theory of self-defense and would have similarly rejected an even narrower and weaker defense of property theory.[115]

A. Self-defense versus Defense of Property

To begin, despite the fact that appellant raised at least some evidence that he was defending his property by pointing a handgun at SPC S.S.'s face, such a defense of property theory is substantially weaker than appellant's argument for self-defense. In that regard, the best evidence offered by appellant as to defense of property is the following testimony:

> [I]f we get into a fist fight, this dude hits me and knocks me out, *what's going to happen to* my family, *my house,* his girlfriend because - I mean, they've already been fighting and - you know, this was what my wife was telling me, that she was so worried that she

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permissible. Thus, if the dwelling house is entered or attempted to be entered by force and under such circumstances as to give rise to a *reasonable belief that the owner's life is endangered* or that the intruder intends to commit a felony, the owner may use deadly force, if reasonably necessary, to prevent or terminate such entry." WHARTON'S CRIMINAL LAW, Defense of Property § 191 (15th ed.) (emphasis added).

[115] JA 4. *See generally* 40 C.J.S Homicide § 163 n.13 ("The right of an accused to defend his or her person is far boarder than the right to defend his or her property") (citation omitted).

had to call me and tell me to come home because of what they were saying to each other.[116]

Essentially, appellant's apparent concern was that he may have been knocked unconscious defending himself from SPC S.S. and that the victim could then, among other things, cause some type of unspecified harm to his real or personal property.[117] There are several significant problems with such a defense theory which ultimately renders the omission of a defense of property instruction harmless beyond a reasonable doubt.

First, there is no evidence in the record that SPC S.S. ever threatened or intended to damage, steal, or otherwise interfere with appellant's use of his real or personal property.[118] Additionally, SPC S.S.'s action of simply walking towards the front door cannot be interpreted to constitute reasonable fear that he was threatening to forcibly enter appellant's residence, especially considering that (even according to appellant) at most SPC S.S. came up to the doorway area and then stopped.[119] Moreover, all witnesses agree that at

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[116] JA 142-43. (emphasis added).
[117] JA 142-43.
[118] In fact, the only damage done to appellant's property during this incident appears to have been caused by appellant himself when he kicked the taillight of his wife's vehicle upon returning home in an agitated manner. JA 30, 95, 138, 175-76.
[119] *See generally Duran v. City of Maywood*, 221 F.3d 1127, 1131 (9th Cir. 2000) (noting that "the act of walking up a person's driveway cannot reasonably be interpreted as forcibly entering a residence") (citation omitted).

no time did SPC S.S. try to forcibly enter appellant's home.[120] Rather, the record indicates that the only reason SPC S.S. approached appellant's home is because that was where appellant was; that is, SPC S.S. had no intent to enter the home but rather he sought to find out from appellant what was wrong.[121] Appellant's fanciful concerns about what SPC S.S. may have done to appellant's house are patently absurd and do not even come close to passing the first objective "reasonable belief" element of the defense of property that requires appellant to prove that his "property was in immediate danger of trespass [or] theft."[122]

Second, appellant's unreasonable concern for his property is premised on the condition that would necessarily trigger the affirmative defense of self-defense (i.e. that only if appellant were "knock[ed] out" in a "fist fight" then SPC S.S. would be free to cause harm to his property).[123] Given the factual circumstances of this case and the positioning of appellant between the victim and his home, self-defense was necessarily the stronger of the two tied-together affirmative defenses.[124] The fact that self-defense played such a pivotal role in appellant's theory of defense (and the defense of property

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[120] JA 45, 97, 131-33, 170.
[121] JA 30, 96.
[122] Benchbook para. 5-7, n. 1. JA 268-69.
[123] JA 142-43.
[124] *See generally Gant*, 691 F.2d at 1163 n.7; WHARTON'S CRIMINAL LAW, *Defense of Property* § 191 (15th ed.).

playing little if any role) was most likely the reason the military judge either overlooked or actively chose not to issue the defense of property instruction *sua sponte*.

Third, appellant's theory does not hold water even under the second subjective prong of the defense of property affirmative defense. Appellant "must have actually believed that the amount of force [he] ... used was required to protect [his] ... property."[125] On the contrary, appellant gave an unbelievable explanation so far as how he became armed prior to the confrontation. To this end, appellant testified that upon entering the home he "started to head toward [his] bedroom area" to go to sleep, but that "he noticed that [his] pistol case [was] still in the kitchen table [sic] where it had been earlier from [him] cleaning up the pistol."[126] According to appellant, "[e]arlier that evening before [he and his wife] got ready to leave, [he] took [the handgun] out to clean it."[127] Given that the fourteen year-old babysitter and her little brother had been watching appellant's child while he was out at the sports bar, this would necessarily mean that he left the handgun inside a case on the kitchen table while these minors were present.[128]

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[125] Benchbook para. 5-7. JA 268-69.
[126] JA 129.
[127] JA 129-30.
[128] JA 159. When asked by defense counsel where exactly the handgun was, appellant specifically states that it was on the

Rather than returning the handgun case with the handgun inside to the bedroom safe, appellant inexplicably removed the handgun from its case and stuck it in his back pocket to transport it to the bedroom.[129]

It is then a great coincidence that appellant changed his mind and decided to head toward the partially-open front door to retrieve his "stubborn" wife when he unexpectedly saw the victim approaching the doorway area.[130] Given this implausible chain of events, the panel was not persuaded by appellant's story of why he was armed. Likewise, even if a defense of property instruction was given, the panel would have found that appellant's subjective intent from the outset was to intimidate and scare SPC S.S. with the weapon, not that he "actually believed" the handgun "was required to protect [his] property."[131] More importantly and by all accounts, SPC S.S. had stopped at some point outside appellant's front door.[132] Consequently, appellant could have simply shut the door and

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"[k]itchen table or dining room table *in the case* ...." JA 130 (emphasis added).

[129] Conversely, in the unlikely event that appellant misspoke and the handgun was outside the case, this meant that appellant left a firearm on the kitchen table all night with minors present. JA 130, 159.

[130] JA 131.

[131] Appellant's version of events would have been more believable if he honestly testified that he armed himself "just in case" any possible confrontation with SPC S.S. would turn violent. Benchbook para. 5-7 n.1. JA 268-69.

[132] JA 45, 97, 131-33, 170.

called the police if SPC S.S. was actually threatening him or his property.[133] Even according to appellant's self-serving version of events, appellant chose to confront SPC S.S. at the "doorway area" by saying "[g]et the fuck out" and pushing him immediately thereafter.[134] Thus, appellant did not allow SPC S.S. any time to physically comply with his verbal demand.[135]

Additionally, there is no evidence that SPC S.S. actually heard appellant's alleged prior demand to leave shouted "over the cars toward [SPC S.S.]" while SPC S.S. was still out in the street.[136] Even assuming SPC S.S. heard appellant, both SPC S.S. and Miss A.R. were invitees of Mrs. Davis (not appellant), thus there would have been a legitimate question in SPC S.S.'s mind of whether Mrs. Davis was going to revoke her invitation as she had refused to follow her husband inside the house.[137] Both of these facts show that it was entirely unreasonable for appellant to aggressively confront SPC S.S. by immediately pushing him and

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[133] Additionally, it is apparent from Defense Exhibit C that the front door opens to the inside of the house as there are no visible hinges on the outside of the door. Thus, even if SPC S.S. was "in [appellant's] doorframe," as appellant alleges this would not prevent being able to shut the door. JA 132, 272.
[134] Appellant testified that "as soon as I said ["get the fuck out"], I pushed [SPC S.S] out of the doorway." JA 134.
[135] JA 128, 134.
[136] JA 128, 134. Appellant even tries to argue that the fact that "SPC S.S. re-approached [appellant's] home after [appellant] drove by him [in his truck] in the street ... clearly shows that SPC S.S. had the opportunity to leave ..." but does not explain how the act of driving by in a truck constitutes a demand to leave the property. Appellant's Brief at 13.
[137] JA 29, 116-17, 174, 178.

then later drawing his weapon and pointing it at the victim's face.[138]

B. United States v. Marbury

In many respects this case is similar to *United States v. Marbury*. In that case, this court noted that "the lower court, based on evidence in [that] case, characterized [that] appellant as an '*aggressor;*'" while in the present case, the lower court stated there was "overwhelming evidence that appellant was the initial aggressor in the physical confrontation" and that "[a]ppellant's initiation of a physical confrontation with SPC S.S. was not a reasonable necessary, or justifiable use of force under the circumstances, nor was the threat of deadly force appellant employed immediately thereafter by brandishing a firearm."[139] Just like in this case, the Army court in *Marbury* similarly characterized that appellant's aggressive conduct as follows:

> Appellant ... knew that [the victim] was intoxicated and combative. Appellant's decision to challenge [the victim] with a large knife in an attempt to scare him out of her room after she had withdrawn to safety was a clear failure to exercise that degree of due care

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[138] JA 29, 116-17, 134-35, 174, 178.

[139] JA 5. *Marbury*, 56 M.J. at 15 (emphasis in original) (citing *United States v. Marbury*, 50 M.J. 526, 530 (Army Ct. Crim. App. 1999)). Such a holding that finds brandishing of a firearm as an unlawful threat of force in defense of property is in line with Federal Circuit Courts of Appeal. *See e.g. Przybyla*, 737 F.2d at 829; *Gant*, 691 F.2d at 1163 n.7.

> that a reasonably prudent person would exercise under the circumstances.[140]

If one omits the word "combative," and replaces the terms "large knife" with "handgun" and "her room" with "his home" the two cases are scarcely distinguishable.[141]

Furthermore, *Marbury* also noted that "[w]ith respect to the reasonableness question, some additional comment [was] warranted on the particular military context of [that] incident."[142] Here too this court should consider that appellant was a non-commissioned officer in SPC S.S.'s company.[143] As such, appellant should have acted with greater deference and prudence before resorting to physical violence and threats of physical violence. Unlike *Marbury*, appellant in this case did not even attempt to enlist the assistance of fellow soldiers such as SGT Scott (SPC S.S.'s squad leader) to help convince SPC S.S. away from his property.[144] Like *Marbury*, appellant did not enlist the assistance of military or civilian police to reasonably resolve the situation.[145]

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[140] *Id.*
[141] *See id.*
[142] *Id.*
[143] JA 115.
[144] *See Marbury*, 56 M.J. at 13, 16. JA 64, 111, 115, 139. It would have been entirely possible for appellant to have simply have shut the door if either himself or his property was truly under imminent threat. JA 272.
[145] *See Marbury*, 56 M.J. at 16.

Lastly, the Army court's holding in *Marbury*, just like the holding of Army court in this case "is in general accord with civilian law."[146] Given that 1) the victim in *Marbury* was much more intoxicated, combative, and openly hostile than SPC S.S. ever was; 2) the victim in *Marbury* was already inside her living quarters where as SPC S.S. was an invited guest admittedly outside of the home, and 3) that the appellant in *Marbury* at least first tried to enlist the help of others to evict the trespasser, where as the appellant in this case immediately resorted to physical force and threatened infliction of grievous bodily harm or death, this court should find that appellant did not act reasonably in repeatedly pushing then pointing a firearm at the victim.[147] This use of force by appellant in this case was more aggressive and excessive than the force used by the appellant in *Marbury*.

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[146] *See generally Marbury*, 56 M.J. at 15 (finding that brandishing a knife for the purpose of ejecting her assailant was excessive or unreasonable force, hence unlawful conduct" and that such a holding "is in general accord with civilian law.") (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.9(a) (1986) ("One whose lawful possession of property is threatened by the unlawful conduct of another, *and who has no time to resort to the law for its protection,* may take reasonable steps, including the use of force, to 'prevent or terminate' such interference with property.")(emphasis in original). Given that SPC S.S. did not pose an imminent threat to appellant's property and appellant could have simply shut the victim outside, appellant had ample time to call the police.

[147] JA 5, 45, 97, 131-35, 170. *Marbury,* 56 M.J. at 16,

C. Defense of Property versus Provocateur/Duty to Retreat

Appellant claims in his brief that "because the members were not instructed as to [his] right to defend his property, they did not have guideposts for an informed deliberation [and] [a]s such, a theory of defense was eviscerated."[148] Appellant then cites two cases that discuss self-defense in the home or an area comparable thereto, stating that the military judge's error "allowed the [panel] members to believe that [appellant] had a duty to retreat."[149] Finally, appellant freely admits that while the military judge properly gave an instruction on "provocateur-mutual combatant," because there was no defense of property instruction, the panel was "never given the option to find that [appellant] was merely a person ejecting a trespasser who refused to leave."[150]

Appellant's above argument is flawed in that it becomes nonsensical if the argument is followed to its logical conclusion. Assuming for the sake of argument that the reason the panel members found appellant guilty was because they

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[148] Appellant's Brief at 11.
[149] Appellant's Brief at 11. *See generally United States v. Yabut*, 43 C.M.R. 223, 235 (C.M.A. 1971) (holding that member instructions in that case did "not equate the failure to retreat to proof of guilt [and] they [did] not impose upon the accused a duty to retreat"); *United States v. Adams*, 18 C.M.R. 187, 195 (C.M.A. 1955) (held that member instructions "plainly left the court with the erroneous impression that the accused's tent was not his home").
[150] Appellant's Br. at 11-12. Benchbook para. 5-2-6 n.5; JA 264-65.

believed appellant had unlawfully provoked SPC S.S. by pushing him, they would have necessarily found that appellant's actions were "clearly calculated and intended by the accused to lead to a fight."[151] Part of the military judge's instructions at trial pointed out that: "[u]nless such [a provocative] act is clearly calculated and intended by the accused to lead to a fight, the right to self-defense is not lost."[152] Assuming the panel was following the military judge's instructions, appellant's argument would mean that, in this scenario, the panel members would have had to find that appellant both *lawfully* pushed SPC S.S. in an effort to remove him from appellant's property while at the same time *unlawfully* intending that these acts would lead to a fight. However, appellant cannot have it both ways- the lawful, reasonable force required for a valid defense of property cannot also be specifically intended to unlawfully cause a fight.

Alternatively, if the panel members did not find that appellant specifically intended to cause a fight by pushing the victim, then "the right to self-defense is not lost" and the panel would go back to applying the instructions on self-defense. The only problem for appellant is that the verdict in

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[151] JA 134, 212-13. Benchbook para. 5-2-6 n.5.
[152] JA 212-13.

this case necessarily suggests that the panel members specifically rejected this theory of self-defense.

Likewise, appellant's argument that the omission of a defense of property instruction "allowed the members to believe that [appellant] had a duty to retreat" seems to infer that a provocateur can use the castle doctrine as a shield to unlawfully provoke physical confrontations on their own property to then respond with additional force without the requirement of retreat.[153] Such a proposal would set a dangerous precedent and should be disregarded by this court.

Additionally, despite appellant's exaggerations that his already weak defense of property theory was "*eviscerated*" by the lack of an instruction, he nevertheless took full advantage of the opportunity to present such a defense to the panel members.[154] Beyond the testimony provided by appellant and his wife, trial defense counsel stated during closing argument that "[w]hat [appellant] did was in response to what he reasonably believed to be a threat was pull out an unloaded weapon and aim

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[153] Appellants Brief at 11. *See e.g.* L.S.E., Annotation, *Homicide or Assault in Defense of Habitation or Property*, 34 A.L.R. 1488 (1925) ("One assaulted in his house need not flee there from, but his house is his castle only for purposes of defense; it cannot be turned into an arsenal for purposes of offensive effort against lives of others.") (citation omitted).

[154] Appellant's Brief at 11. The Ninth Circuit in *United States v. Morsette* similarly found that the appellant in that case was "free to argue - and in fact did argue - that he had a right to defend his home and a right to defend himself in his home." *See United States v. Morsette*, 622 F.3d 1200, 1202 (9th Cir. 2010).

it at a person who had attempted to come into his house twice, after being told 'you need to leave.'"[155] Trial defense counsel also argued that appellant was merely "exercising his right to defend his home, [when he] pushed [SPC S.S.] out of the house ...."[156] He then listed the different "boundaries" that appellant put on SPC S.S. such as "get off my property, get out of my house, I need you to go" that allegedly made SPC S.S. so angry that he tried to punch appellant.[157] Trial defense counsel then summed up appellant's argument tying together both the theory of self-defense and defense of property together arguing that:

> [SPC S.S.] was angry because boundaries were drawn. Because [appellant] was kicking him out of his house for acting like a jerk. Specialist [S.S.] didn't like that, so he took a swing. And in response [appellant] exercised his right to self-defense.[158]

The issue here was not that the lack of a defense of property instruction eviscerated one of appellant's defenses, it was that the evidence against appellant was overwhelming and, as a result, the panel members rejected appellant's version of events both in regards to his stronger theory of self-defense and his significantly weaker theory defense of property. Given the

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[155] JA 229.
[156] JA 233.
[157] JA 241.
[158] JA 241.

particular facts of this case, a defense of property instruction would have provided no benefit to appellant.

Conclusion

In sum, appellant's decision to level a handgun at his wife's invited guest, who only wanted an explanation for appellant's aberrant behavior, was an excessive and unreasonable use of force. Given that the panel found appellant guilty beyond a reasonable doubt of the lesser-included offense of simple assault with an unloaded firearm, it is patently clear that the panel rejected appellant's self-serving version of events where SPC S.S. allegedly came up to his doorframe and tried to punch him. In rejecting appellant's theory of self-defense, the panel members necessarily found SPC S.S.'s version of events to be more credible. Specifically, they found that the appellant was the "first aggressor" and that he "intentionally provoked the incident" by first pushing SPC S.S. and then by trying to punch him outside on the front porch area. Given the facts of this case, an instruction on defense of property would not have benefitted appellant. The trial defense counsel knew this or they would have requested such an instruction. As such, the evidence is overwhelming that appellant was the aggressor in this case and his actions of leveling a handgun on his fellow soldier were an entirely unreasonable and excessive means of ejecting him from the

property. The lack of a defense of property instruction was harmless beyond a reasonable doubt.

WHEREFORE, the Government respectfully requests that this honorable court affirm the findings and sentence.

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February 6, 2014

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I certify that the foregoing BRIEF ON BEHALF OF APPELLEE, *United States v. Davis*, Crim. App. Dkt. No. 20100815, Dkt. No. 14-0029/AR was filed electronically with the Court on the 6th day of February, 2014 and contemporaneously served electronically on military appellate defense counsel, Captain Brian D. Andes.

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