12 May 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 14-0222/AF
Airman First Class (E-3) ADRIAN TORRES, USAF *Appellant.*	)	Crim. App. No. 37623

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

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE REQUESTED INSTRUCTION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

Appellant pled not guilty to four specifications of simple assault consummated by a battery and one specification of aggravated assault. (J.A. at 1-2.) The victim in each incident was Appellant's wife, Airman First Class VJG. (J.A. at 31-66.) Appellant was found guilty of three of the four simple assault specifications for pulling his wife by the hair and arm, grabbing her breast, and hitting her on the torso. (J.A. at 1-

2). Appellant was found not guilty of the fourth specification. These acts occurred between March 2007 and January 2008. (Id.)

With regard to the aggravated assault specification, Appellant was charged with, and found guilty of, choking VJG's throat with his hands with a force likely to produce death or grievous bodily injury. (J.A. at 12.) Regarding this assault, VJG testified that she and Appellant went to bed at around 0200 hours on 13 May 2008, following a party at their on-base home. (J.A. at 31-34.) At the time the two went to bed, Appellant's physical condition seemed normal to his wife, although he had drank to the point of intoxication at the party, consuming at least "eight or ten shots." (J.A. at 23, 34, 55-56.)

A few hours after the couple had fallen asleep, their home telephone rang, waking VJG. (J.A. at 34-35.) The phone also awoke some sleeping party guests, who decided it was time for them to go home. (J.A. at 35.) VJG offered to give them a ride. (Id.) When she returned to her bedroom to tell Appellant that she was leaving, she saw him "on the floor . . . curled up in a ball . . . with just a t-shirt on and no pants." (Id.) VJG shook Appellant and told him she was leaving to drive some guests home, but he did not respond. (J.A. at 38-39.) When she returned to the house around 30 minutes later, Appellant had not moved. (J.A. at 43.) She shook him again and told him to wake up, but he did not respond. (Id.)

When VJG crouched down in front of Appellant and tried to lift him into a sitting position, he immediately "snapped awake," grabbed her, and threw her on the bed. (J.A. at 45.) He then put his body on top of VJG, wrapping his legs around her torso and grabbing her head by her hair. (J.A. at 47.) He punched her and then smashed her head into the bed's headboard repeatedly. (J.A. at 48.) Appellant then proceeded to strangle VJG with his hands, cutting off her air supply. (J.A. at 49-50.) During this violent assault, VJG could not "breathe or talk clearly, and [her] blood was splattering all over his face." (J.A. at 51.) Appellant then "looked at [VJG] in [her] eyes, and asked [her] if [she] liked it and if it felt good, and he [then] licked [her] blood off of his lips." (Id.)

VJG was able to grab a nearby phone and managed to hit Appellant on the side of the head with it. (J.A. at 52.) Appellant fell over. (J.A. at 53.) VJG fled into the living room where several guests were still present, including SrA KNB. (J.A. at 53, 70-71.) Appellant eventually came out of their bedroom and SrA KNB told him "[you] beat the shit out of her," before both VJG and SrA KNB left the home. (J.A. at 73.) SrA KNB could not recall if Appellant responded when she told him what he had done to his wife. (Id.) When military law enforcement arrived, Appellant was in bed, sleeping, and did not respond until the officers shook his feet. (J.A. at 30.)

Prior to this assault, Appellant suffered from periodic epileptic attacks. (J.A. at 183.) Major (Dr.) Brendan Lucey, Appellant's expert neurology witness, provided the members basic information about epilepsy and the "postictal" (post-epileptic seizure) period. (J.A. at 96-97, 100-06.) Dr. Lucey testified that, during a postictal period, an epileptic individual may fall asleep, or it is also possible for the individual to appear confused and do abnormal things, like taking off his or her clothes. (J.A. at 104.) Dr. Lucey further testified that postictal violence is "uncommon," and that "well-directed" violence (*i.e.*, focused on a specific individual) is "rare," only affecting less than one percent of epileptics. (J.A. at 112-13.) If postical violence occurs, Dr. Lucey testified that it would most frequently manifest itself in an "undirected" manner (*e.g.*, flailing one's arms). (J.A. at 106.)

As to whether a seizure occurred on 13 May 2008, Dr. Lucey only testified that it was "possible" that he had a seizure and that it was "possible" that Appellant acted out with postictal violence toward VJG. (J.A. at 110.) On cross-examination, however, Dr. Lucey testified it was "highly improbable" that Appellant was in a postical state when he attacked VJG since his actions after the assault--putting clothes on, talking, and calmly walking out of his bedroom--were inconsistent with a person experiencing a postical phase. (J.A. at 114-15.)

Maj (Dr.) Laura Baugh, the Government's expert neurology witness, testified that she believed Appellant had "epilepsy of a 'generalized' type." (J.A. at 136.) She went on to testify that postical violence is rare, but, if it does occur, it tends to happen in the "immediate postictal phase." (J.A. at 137.) Based upon the testimony she heard at trial and her training and experience, Dr. Baugh testified that a seizure, if it occurred on 13 May 2008, could only have occurred during the brief period that VJG was out of the bedroom to answer the telephone. (J.A. at 137.) Dr. Baugh reached this finding based upon her conclusion that, if Appellant had a seizure, he would have very likely roused VJG, who was sleeping in the same bed. (J.A. at 138.) But, if Appellant suffered a seizure while VJG was away from the bedroom to answer the telephone, that would mean the violence committed against VJG occurred 20 to 30 minutes after the seizure, a period of delay that is quite uncommon for the "rare" occurrence of postical violence. (J.A. at 138.)

Dr. Baugh ultimately testified, in her expert opinion, Appellant's actions were not part of a postictal response. (J.A. at 141-42.) Her opinion rested on three factors: 1) the rarity of postictal violence in general, 2) the lack of consistency in Appellant's responses, and 3) the atypical actions following the assault (no immediate violent response if Appellant had the seizure while VJG left to answer the phone, a

delay of 20 to 30 minutes until the "directed" violent response, Appellant getting dressed and having a conversation after the assault, and Appellant becoming somnolent again). (J.A. at 156.)

After the testimony of the expert witnesses, trial counsel stated that he believed the postical state evidence had possibly raised a mental responsibility defense. (J.A. at 144-45.) Trial defense counsel stated he had not prepared for a mental responsibility defense because a pretrial sanity board had concluded epilepsy was not a severe mental disease or defect. (J.A. at 119, 149-52, 190-92.) Trial defense counsel also stated that he was not raising a "partial mental responsibility" defense under R.C.M. 916(k)(2) because it was precluded under the law. (J.A. at 119.) Instead, trial defense counsel argued Appellant's "unconscious or semi-conscious" state following his seizure raised reasonable doubt as to his ability to conduct the *actus reus* (but not *mens rea*) of the offense. (J.A. at 149-52.)

Trial counsel disagreed, arguing that trial defense counsel was merely conflating *actus reus* and *mens rea*. (J.A. at 155.) Trial counsel also argued that partial lack of mental responsibility is not a defense to a general intent crime like the aggravated assault charge. (J.A. at 148.) The military judge nevertheless remained concerned about the mental responsibility issue because Dr. Lucey used the terms "knowing

and conscious" during her testimony. (J.A. at 161.) The military judge concluded that an instruction on the lack of mental responsibility would be necessary given the experts' testimony. (Id.)

At the request of trial defense counsel, the military judge continued the case and ordered a new sanity board to focus on the issue of whether the postictal period raised sanity concerns under R.C.M. 916(k)(1). (J.A. at 144-46.) A board-certified neurologist conducted the second sanity board, and he considered sworn testimony of fact and expert witnesses, as well as evaluated the medical records of Appellant. (J.A. 206-07.) The neurologist concluded: 1) Appellant was not suffering from a permanent or temporary severe mental disease or defect; 2) the only psychiatric disorders identified for Appellant were alcohol-induced mood disorder and partner relation problem; 3) Appellant was able to understand the nature of the court-martial and was able to constructively engage in his own defense; 4) a "postictal state can be characterized as a temporary mental disease or defect"; and 5) Appellant was not "experiencing a postictal state during the alleged assault." (Id.) When the court-martial resumed in late September 2009, the military judge declined to give the members the defense-requested special instruction on consciousness and voluntariness based on the findings of the sanity board. (J.A. at 177-78.)

SUMMARY OF THE ARGUMENT

There is no defense of unconsciousness or "automatism" in the military, nor should there be. The relevant evidence underlying such a claimed defense, however, is available to an accused and may be utilized by such an accused to cast doubt on the elements that must be proven beyond a reasonable doubt by the Government. In the case *sub judice*, Appellant was at no point hindered in his presentation of evidence. Moreover, the instructions provided to the members were correct, were applicable to the evidence presented, and were sufficient to provide the members with the appropriate framework from which they could make an informed judgment. If, however, the military judge erred by denying the defense its requested instruction, the evidence in this case was overwhelming and the possibility that Appellant was acting involuntarily was nonetheless disproven by the Government. Any error is, therefore, harmless.

ARGUMENT

A SEPARATE AND DISTINCT DEFENSE OF UNCONSCIOUSNESS OR "AUTOMATISM" DOES NOT EXIST IN THE MILITARY JUSTICE SYSTEM, NOR SHOULD IT EXIST; THUS, THE MILITARY JUDGE DID NOT ERR BY NOT GRANTING THE DEFENSE'S REQUESTED INSTRUCTION.

Standard of Review

The question of whether the members were properly instructed is a question of law reviewed *de novo*. United States

v. Payne, 73 M.J. 19, 22 (C.A.A.F. 2014)(citing United States v. Maynulet, 68 M.J. 374, 376 (C.A.A.F. 2010)); *see also* United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008). Nevertheless, this Court has also concluded that a military judge has "substantial discretionary power" to determine whether to issue an instruction.[1] Maynulet, 68 M.J. at 376 (quoting United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000)). A military judge's denial of a requested instruction is reviewed for an abuse of discretion.[2] United States v. Carruthers, 64 M.J. 340, 345-46 (C.A.A.F. 2007) (citing United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993), *cert. denied*, 512 U.S. 1244 (1994)).

[1] Why a military judge is seemingly granted more discretion (at times) when trial defense counsel requests an instruction, versus when trial defense counsel does not request one, is not entirely clear. *Compare, e.g.*, United States v. Carruthers, 64 M.J. 340 (C.A.A.F. 2007)(denial of requested leniency instruction not error--abuse of discretion review), *with* United States v. McDonald, 57 M.J. 18 (C.A.A.F. 2002)("even though not requested, [the] military judge has a *sua sponte* duty to give [a mistake of fact] instruction[] when reasonably raised by the evidence"--*de novo* review); *but see* Maynulet, 68 M.J. at 376 (military judge did not err under a *de novo* review after denial of a requested instruction for mistake of law defense--no analysis conducted under United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993)). The disparity in deference to the judge may be explained by the difference between a required instruction under R.C.M. 920(e) and "other explanations, descriptions, or directions [that] may be necessary and which are properly requested." *See, e.g.*, United States v. Stanley, 71 M.J. 60, 62 (C.A.A.F. 2012)(noting that waiver does not apply when a "required instruction" is at issue--*de novo* review); United States v. Gutierrez, 64 M.J. 374, 376 (C.A.A.F. 2007)(a military judge has a *sua sponte* duty to give certain instructions even though the instructions are not requested by the parties--*de novo* review). Alternatively, the disparity may be explained by the difference between the substance and form of an instruction: "In regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." United States v. Behenna, 71 M.J. 228, 232 (C.A.A.F. 2012) (citing United States v. Woford, 62 M.J. 418, 419 (C.A.A.F. 2006)).

[2] Although Appellant does not expressly concede that the standard of review is an abuse of discretion, his brief cites United States v. Gibson, 58 M.J. 1 (C.A.A.F. 2002), and analyzes the alleged error under the three-prong abuse of discretion test from Damatta-Olivera, 37 M.J. at 474. (App. Br. at 15-19.)

In evaluating whether a military judge's failure to give a requested instruction constitutes error, this Court applies a three-prong test to determine whether the requested instruction: (1) was "correct"; (2) "not substantially covered in the main [instruction]"; and (3) covers "such a vital point in the case that the failure to give it deprived [the appellant] of a defense or seriously impaired its effective presentation." Carruthers, 64 M.J. at 346; *see also* United States v. Gibson, 58 M.J. 1 (C.A.A.F. 2002).

Law and Analysis

There is no separate defense of unconsciousness or "automatism" in the military, nor should there be. Appellant, however, was at liberty to cast doubt on the elements that the Government was required to prove. Appellant was, thus, never prevented from arguing the lawfulness of his conduct--the members merely chose not to believe the defense's theory. Further, the military judge took great steps to ensure Appellant's rights were protected by continuing the trial and ordering a second sanity board. And at the conclusion of that sanity board, he was correct to deny Appellant's requested instruction. If, however, the military judge somehow abused his discretion by denying Appellant's proposed instruction at trial, any error here is harmless beyond a reasonable doubt.

1. The military judge was not required to give the defense's proposed instruction.

"Criminal liability is normally based upon the concurrence of two factors, an evil-meaning mind and an evil-doing hand." United States v. Bailey, 444 U.S. 394, 402 (1980)(internal brackets and quotations omitted). Accordingly, a crime consists of two components: the *actus reus* (the required act or omission) and the *mens rea* (a particular mental state). United States v. Thomas, 65 M.J. 132, 133 (C.A.A.F. 2007); United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010).

In this case, Appellant made a tactical decision to try and avoid any inference that Appellant was not mentally responsible, expressly waiving any claim that he contested the *mens rea* of the offense.[3] (J.A. at 155.) Rather, Appellant sought to attack the voluntariness of the act itself, a tactic that trial defense counsel argued undermined the *actus reus* of the offense. In so doing, Appellant attempted to create, without legal authority, a modified partial mental responsibility instruction for general intent crimes. He sought to put forth this theory through testimony which, in reality, raised the specter of a lack of mental capacity. This is ultimately why the military judge ordered a second sanity board and provided the mental responsibility instruction. (J.A. at 144, 177-80, 198-99.)

[3] SDC: "The consciousness doesn't go to *mens rea*. It goes to the *actus reus*."

Appellant's *actus reus* attack and proposed instruction originated from a footnote of this Court's decision in United States v. Berri, 33 M.J. 337, 341 n.9 (C.M.A. 1991). In addressing the appellant's argument regarding the *mens rea* of the offense in that case, this Court commented in a footnote that unconsciousness "itself can be asserted as a defense. At common law, lack of unconsciousness was considered part of the '*actus reus*,' the criminal act, because the act had to be 'voluntary.'" Id. This Court went on to state, however, "[w]hat the status of unconsciousness might be under the Uniform Code of Military Justice, we do not decide here." Id. Other than this brief footnote, this Court focused primarily on *mens rea* and the specific intent crime at issue in that case.

Years after the decision in Berry, the Air Force Court of Criminal Appeals (AFCCA) dealt squarely with the voluntariness issue in United States v. Harvey, 66 M.J. 585 (A.F. Ct. Crim. App. 2008), *rev. denied*, 67 M.J. 249 (C.A.A.F. 2009). In that case, AFCCA was presented with an appellant who had argued at both trial and on appeal "that the military judge committed error when she refused to give a defense drafted instruction highlighting the defense's claim of a sleep disorder." Harvey, 66 M.J. at 587. The instruction that the appellant had sought stated in relevant part:

> The evidence in this case has raised an issue whether the accused had a medical condition, sleep disorder, and the required state of mind with respect to the offenses of which he is charged. You must consider all of the relevant facts and circumstances. A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act. A bodily movement or movements during unconsciousness or sleep are not voluntary acts within the meaning of this definition.

Id. (emphasis in original). Thus, the appellant in that case was asserting that his sleep disorder constituted "automatism and thus was a special defense under the UCMJ," which entitled him to an affirmative instruction. Id. AFCCA reviewed the existing cases addressing the issue of unconscious acts,[4] as well as a number of law review articles on the subject.[5] Id. AFCCA ultimately concluded the following:

> Like our sister service in Riege, we too find nothing in those cases indicating that unconsciousness merits different consideration from that given any other mental disorder. This conclusion is further supported by the 1986 amendments to Article 50a, UCMJ, 10 U.S.C. § 850a, which eliminated the volitional prong of the sanity defense, and by our superior court's ruling in Berri, 33 M.J. 337.

[4] United States v. Berri, 33 M.J. 337, 343 (C.M.A. 1991); United States v. Riege, 5 M.J. 938 (N.C.M.R. 1978); United States v. Anderson, 13 C.M.A. 258 (C.M.A. 1962); United States v. Johnson, 7 C.M.A. 499 (C.M.A. 1957).

[5] Major Jeremy A. Ball, Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers, 2005 Army Law. 1 (2005); Mike Horn, A Rude Awakening: What to Do With the Sleepwalking Defense?, 46 B.C. L. Rev. 149 (2004); Major Michael J. Davidson and Captain Steve Walters, United States v. Berri: The Automatism Defense Rears Its Ugly Little Head, 1993 Army Law. 17 (1993).

Id. (citing Drafter's Analysis, Manual for Courts-Martial, United States (MCM), A21-64 (2005 ed.)). AFCCA went on to state, "we also conclude that unconsciousness is but one of the many disorders encompassed by the defense of insanity and only merits instruction if the defense has properly met their burden on raising it [under] R.C.M. 916(k)(3)." Id.

Appellant in this case sought an instruction extremely similar to the requested instruction in Harvey. Unlike Harvey, however, the military judge in this case determined that an instruction was warranted, just not the instruction requested by Appellant. In perfect harmony with Harvey, the military judge at Appellant's trial found that the evidence related to unconsciousness merited an instruction identical to that of any other mental disorder.

AFCCA in Harvey believed its conclusion to be in line with United States v. Riege, 5 M.J. 938 (N.C.M.R. 1978). Harvey, 66 M.J. at 587. The United States Navy Court of Military Review (NCMR) in Riege was faced with the issue of whether one must be conscious in order to commit a crime. Riege, 5 M.J. at 940. The appellant in Riege claimed one must be conscious and that "[t]he defense of unconsciousness therefore bars conviction of even general-intent offenses." Id. at 941. The NCMR swiftly concluded, "We find no indication that military law recognizes any special defense of unconsciousness." Id. In support of its

finding, the Navy Court quoted from Henry Weihofen, author of Mental Disorder as a Criminal Defense:

> Is there room for a new legal principle, discrete from the 'insanity' defense, based on lack of consciousness and governed by a distinct legal rule? Psychiatrically, the distinction is unsound, and legally it seems to add a refinement that is unsubstantial and unhelpful. The legal rules governing insanity as a defense should be broad enough to deal adequately with the various types of disorder, but no sound reason appears for splitting off some disorders and treating them as if they were something other than mental disorders.

Riege, 5 M.J. at 941 (quoting H. Weihofen, Mental Disorder as a Criminal Defense 121, 122 (1954)).

In its decision in this case, AFCCA correctly noted that "[n]otwithstanding the reference to an '*actus reus*' defense in the Berri footnote, military cases (most of which involve epilepsy) published in the 50-plus years prior to [the] Harvey decision do not contradict that case's rejection of an *actus reus* approach."[6] (J.A. at 8-9.) For example, in 1995, this Court was asked by an appellant to find "that the evidence [in his case] is not sufficient upon which any rational factfinder could have found beyond a reasonable doubt that he possessed the required *mens rea* for the charged offense." United States v. Campos, 42 M.J. 253, 257 (C.A.A.F. 1995). There, the appellant had offered the testimony of expert psychiatrists regarding his

[6] Following its analysis, AFCCA provided an extensive string-cite reflecting the 50-plus year history of this issue as it regards mental responsibility.

stress-related conduct. Id. at 256-57. This Court reviewed it as such:

> The evidence thus summarized was offered by the defense as rebuttal to the prosecution's evidence of criminal *mens rea* underlying appellant's offenses, which the Government was required to prove beyond a reasonable doubt. Appellant specifically did "not claim[] insanity or anything like it." Rather, defense counsel expressly represented to the military judge: "What we are doing is introducing evidence, which on its face, rebuts whatever minute inference of intent could come from the Government's case in chief."

Id. at 257 (emphasis added). In essence, the appellant in Campos had raised the issue of partial mental responsibility. R.C.M. 916(k)(2) holds that a mental condition not rising to the level of a lack of mental responsibility as defined in R.C.M. 916(k)(1) is not an affirmative defense; however, as the discussion section states immediately after, a mental condition "may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense" in specific intent cases. *See, e.g.*, United States v. Axelson, 65 M.J. 501, 516 (A. Ct. Crim. App. 2007)("partial mental responsibility rebuts only a specific intent *mens rea* element"). That said, this Court in Campos was only concerned with whether the appellant's evidence at trial had raised a defense to the *mens rea* element of the offense and to what degree.

Appellant cites this Court's decision in United States v. Rooks, 29 M.J. 291 (C.M.A. 1989) to correctly support the proposition that "seizures attendant to epilepsy render an accused unable to form the *mens rea* required for conviction." Rooks, 29 M.J. at 292. But Appellant neglects to point out for this Court that, in Rooks, the Court was concerned with the fact that there was "no indication in the record that the possibility of epilepsy had been considered" by a sanity board. Id. at 292-93. Here, unlike in Rooks, a second sanity board was specifically convened and oriented towards a possible incapacity defense relating to a postical state (not an incapacity defense relating to the epileptic seizure itself). Thus, Appellant's comparison of his case to Rooks is specious. The comparison also underscores the fact that epilepsy, and, by extension, postical states, are viewed by this Court as mental incapacity issues under Article 50a, UCMJ and R.C.M. 916(k)(1), not separate defenses required to be affirmatively instructed.

The military judge in this case correctly noted, consistent with the Rules for Court-Martial, that partial mental responsibility is not a defense to a general intent crime. (J.A. at 161.) The military judge wisely recognized that the testimony at trial had given rise to an issue of lack of mental responsibility, which related exclusively to the *mens rea* of the offense. (Id.) Providing the mental responsibility instruction

thus ensured that Appellant had an informed panel, while also avoiding any confusion as to how testimony relating to Appellant's mental condition could be considered.

This, of course, in no way precluded the defense from arguing their proffered theory--that postictal violence is involuntary (*i.e.*, unintentional) violence or aggression that is sometimes shown by patients who have suffered a seizure. Appellant called a medical doctor to lend support to his defense regarding the voluntariness of his actions. In fact, the final question asked by defense counsel during his direct examination was, "And assuming for a moment that those two things are true, would he have been conscious and acting voluntarily at the time?" (J.A. at 110.) Appellant's claim that he was "deprived" of a defense (App. Br. at 11) is completely unfounded.

The defense's requested instruction failed the first prong of Damatta-Olivera and Carruthers because instructing the members that the *actus reus* of the offense had been called into question would not have been a "correct" recitation of the law. Additionally, Appellant's new argument on appeal--that the judge was required to give a special instruction regarding *mens rea*--also would be an incorrect recitation of the law:[7] If that

[7] R.C.M. 916(k)(3): "The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense."

proposed instruction were allowed, it would wholesale create a new mental responsibility standard for general intent crimes.

Standing alone, the instructions given at trial discussing the fact Appellant's actions had to be "unlawful" substantially covered what the defense was, in reality, attacking: That the Government did not prove beyond a reasonable doubt that Appellant had the sufficient *mens rea* to complete the offense.[8] Additionally, any failure by the military judge to instruct on a newly-minted voluntariness instruction did not deprive Appellant of his ability to attack general intent.

Appellant was in no way hindered from casting doubt as to each and every element of the charged offense. The instructions provided recognized that "[a]n act of force or violence is unlawful if done without legal justification or excuse." (J.A. at 193.) Further, the judge defined a "battery" as an "assault in which bodily harm is inflicted" that is both unlawful and intentional. (J.A. at 194.) During closing argument, defense counsel sought to exploit the unintentional nature of Appellant's conduct by arguing such an excuse existed by virtue of Appellant's epilepsy. (J.A. at 186.) This fact alone makes this case entirely different than Berri, where the military

[8] "Even when the accused interposes the affirmative defense of lack of mental responsibility, the prosecution must still sustain its initial burden of establishing, beyond a reasonable doubt, every element of the offense--including *mens rea*." United States v. Berri, 33 M.J. 337, 342 (C.M.A. 1991)(internal citations omitted).

judge specifically restricted the member's consideration of psychiatric testimony on *mens rea*. *See* Berri, 33 M.J. at 338.

Appropriately, the military judge instructed that the prosecution bore the burden of proving each and every element beyond a reasonable doubt, including that Appellant's conduct be intentional. (J.A. at 201.) He also appropriately and correctly instructed the members on Appellant's duty to prove by clear and convincing evidence that a mental incapacity existed. At the end of the day, though, despite the skilled efforts of Appellant's counsel, the members did not buy Appellant's theory and simply found that no reasonable doubt existed.

2. Assuming, *arguendo*, the military judge erred by failing to provide the defense's proposed instruction, the error was not prejudicial.

In United States v. Mance, 26 M.J. 244 (C.M.A. 1988) and later in United States v. Glover, 50 M.J. 476 (C.A.A.F. 1999), this Court held that if a military judge omits entirely "any instruction on an element of the charged offense, [the] error may not be tested for harmlessness." Glover, 26 M.J. at 478 (quoting Mance, 26 M.J. at 255). But, in United States v. Payne, 73 M.J. 19 (C.A.A.F. 2014), this Court expressly overruled Mance based on Supreme Court precedent, and held that "omission of an instruction regarding an element may be tested for harmless error." Payne, 73 M.J. at 25-26 (citing Neder v. United States, 527 U.S. 1, 17 (1999)). Therefore, it follows

that if omission of an element of an offense can be tested for harmlessness, then the alleged omission of a defense can also be tested for harmlessness. *See, e.g.*, United States v. Dearing, 63 M.J. 478, 484-85 (C.A.A.F. 2006)(omission of self-defense instruction tested for harmlessness).

Once it is determined that a specific instruction is "required but not given, the test for determining whether this constitutional error [is] harmless is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. (quoting United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002)). If the evidence supporting guilt is both overwhelming and uncontested, such that the verdict would have been the same absent the error, the error is harmless beyond a reasonable doubt. Payne, 73 M.J. at 26 (quoting Neder, 527 U.S. at 17).

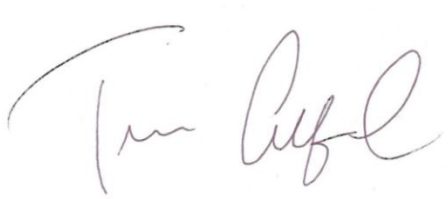
At bottom, Appellant requested an instruction concerning only the *actus reus* of the offense at trial: "This [voluntariness] evidence was not offered to demonstrate or refute whether the accused is mentally responsible for his conduct." (J.A. at 192.) The senior defense counsel stated expressly, "The consciousness doesn't go to *mens rea*. It goes to the *actus reus*." (J.A at 155.) This is a clear example of an "intentional relinquishment of a known right" on behalf of Appellant. *See* United States v. Harcrow, 66 M.J. 154, 156

(C.A.A.F. 2008). Thus, he should not now on appeal be able to reverse course and argue he was entitled to an instruction concerning *mens rea*.

If, however, this Court believes the specific *mens rea* issue was not waived, Appellant was still able to argue to the members and present evidence that his epilepsy and the postical state called into question whether he intentionally hit his wife. So, even though he was not given his desired instruction, there can be no prejudice because he was allowed to argue the theory that the Government had not proved general intent beyond a reasonable doubt. Further, even if he had been entitled to his proposed instruction, the evidence adduced at trial never supported the defense theory, nor did it create reasonable doubt as to general intent: On cross-examination, Dr. Lucey, the defense's expert, testified it was "highly improbable" that Appellant was in a postical state when he attacked VJG since his actions after the assault--putting clothes on, talking, and calmly walking out of his bedroom--were inconsistent with a person experiencing a postical phase. (J.A. at 114-15.) Therefore, consistent with this Court's decision in Payne, 73 M.J. at 26, and the Supreme Court's holding in Neder, 527 U.S. at 17, the evidence supporting guilt in this case was both overwhelming and uncontested, and the verdict would have been the same with or without the defense's proposed instruction.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.



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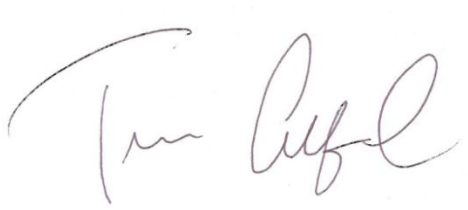
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 12 May 2014.



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