IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Army, *Appellee* v. Sergeant (E-5) **JOSEPH R. HAVERTY** United States Army, *Appellant*	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20130559 USCA Dkt. No. 16-0423/AR

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Issue Presented:

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice [hereinafter, UCMJ], 10 U.S.C. § 866(b) (2012). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On June 14, 2013, a panel consisting of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of violation of a lawful regulation, one specification of cruelty and maltreatment, one specification of aggravated sexual contact, one specification of abusive sexual contact, one specification of indecent viewing, one specification of larceny, and one specification of assault consummated by a battery, in violation of Articles 92, 93, 120, 120c, 121, and 128, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892, 893, 920c, 921, and 928 (2012). (JA 17, 215). The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 120 days, and to be discharged from the service with a bad-conduct discharge. (JA 12). The convening authority approved the sentence as adjudged. (JA 12).

On January 29, 2016, the Army Court dismissed the Specification of Additional Charge II, abusive sexual contact, as an unreasonable multiplication of charges with the Specification of Charge II, aggravated sexual contact. (JA 4-5). The Army Court found relief was appropriate due to the government's post-trial delay and affirmed the remaining findings of guilt. (JA 4-5). Finally, the Army Court reassessed and affirmed only so much of the sentence as provided for a bad-

conduct discharge, confinement for ninety days, forfeiture of all pay and allowances, and reduction to the grade of E-1. (JA 5).

Appellant petitioned this court for review on March 28, 2016, and filed a supplement to the petition for review on April 18, 2016. This court granted appellant's petition for review. *United States v. Haverty*, No. 16-04234/AR (C.A.A.F. June 10, 2016) (order). The Army Court did not consider the current assignment of error, alleged for the first time in the matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), filed in appellant's Supplement to Petition for Grant of Review on April 18, 2016.

Statement of Facts

A. Background

On September 26, 2012, Specialist (SPC) BB arrived at her first duty assignment, Fort Bragg, North Carolina. (JA 32). On the same day SPC BB met appellant who was assigned as her squad leader. (JA 33-34). The next morning, 27 September 2012, appellant helped SPC BB move from one barracks room to another. (JA 35). Appellant and SPC BB went shopping at the PX to get some items for her room. (JA 36). While at the PX appellant made SPC BB feel uncomfortable by picking up boxes of condoms and talking about them. (JA 36). When appellant left he told SPC BB he would be on post the next day and that he would call her to help SPC BB get her gear ready for JRTC. (JA 39). Specialist

BB's roommate was not in her room and SPC BB spent the first night in her new barracks room by herself. (JA 40).

The next morning, September 28, 2012, SPC BB and a couple of friends went to Target and the PX to get more things. (JA 41). Appellant met up with SPC BB as she was walking to her barracks room. (JA 41). Appellant followed SPC BB to her room as he helped her with her bags. (JA 42).

Inside SPC BB's barracks room, appellant grabbed a beer, sat on SPC BB's bed, and kicked off his shoes. (JA 43). Appellant began putting together some of SPC BB's TA-50 and SPC BB began taking the tags off of some of the things she bought. (JA 44). Approximately twenty or thirty minutes later, appellant went into the kitchen and called SPC BB by saying, "Cherry Fuck, get in here." (JA 44-45). Appellant previously referred to SPC BB as "Cherry Fuck" multiple times. (JA 45). When SPC BB walked in the kitchen, she saw a juice glass filled a third of the way with Jim Beam and a double shot glass full of Jim Beam. (JA 46).

Appellant told SPC BB "to take a shot for initiation and that it's not hazing. It's just welcoming into the airborne and things like that." (JA 46). Appellant also told SPC BB that she did not have to keep calling him "Sergeant," when they are not at work. (JA 68). After telling SPC BB to take the shot, she refused, and reminded appellant that she does not drink. (JA 46). Appellant replied by stating that he will not help her put her gear together until she took the shot. (JA 46).

Appellant also stated, "I'm not fucking joking. I'm fucking serious." (JA 50). Appellant repeated this phrase multiple times while in SPC BB's room. (JA 69). Due to the pressure by appellant, SPC BB drank the double shot. (JA 47).

SPC BB and appellant went into her bedroom and continued to put gear together and organize the things SPC BB purchased. (JA 47). Appellant asked SPC BB about her barracks roommate and SPC BB replied that she had not seen her. (JA 47). Appellant eventually went back into the kitchen, poured the same amounts of Jim Beam into a juice glass and a double shot glass, and called, "Cherry Fuck, get in here." (JA 49). Both times appellant called SPC BB into the kitchen he used a "commanding voice." (JA 50). SPC BB told appellant she had already taken her "initiation" shot. (JA 49). Appellant told SPC BB, that if she did not take the shot he would not help her run errands or put together her gear. (JA 50). SPC BB reluctantly took the second shot. (JA 50).

As SPC BB and appellant left the barracks to go back to the store, SPC BB ran into a friend outside. (JA 51-52). SPC BB whispered to her, "Don't leave me." (JA 52). Specialist BB and her friend rode with appellant in his truck to a couple of stores. (JA 53).

After shopping SPC BB's friend left SPC BB to return to her barracks room. (JA 54). Upon returning to SPC BB's room, appellant went into the kitchen and poured the same amounts of Jim Beam. (JA 55). Again, appellant called, "Cherry

Fuck, get in here," using the same commanding tone of voice that he used the previous two times. (JA 55-56). Specialist BB felt intoxicated from the previous shots and she told appellant that she "fel[t] pretty buzzed" and that she could not take another shot. (JA 55-56). Appellant told SPC BB there was no way that she was drunk and if she took the third shot it could be her last. (JA 57). Specialist BB poured the shot glass into appellant's juice glass. (JA 57). Appellant then poured the Jim Beam into the cap of the bottle and said, "That's barely even a shot. You can take that." (JA 57). Specialist BB conceded and drank the alcohol. (JA 57).

After taking the last shot of alcohol, SPC BB felt warm in her face and flush. (JA 58). Appellant asked her if she knew how to do a patient assessment. (JA 58). Appellant decided to demonstrate the patient assessment using SPC BB as the hypothetical casualty. (JA 59). Specialist BB told him "no," and that she would study the procedure later. (JA 59). Appellant directed SPC BB to lay down on the floor. (JA 59). Appellant then continued to commit acts for which he was later found guilty: cruelty and maltreatment, aggravated sexual contact, abusive sexual contact, indecent viewing, and assault consummated by battery. (JA 215).

B. Trial

In the Specification of Charge I, appellant was charged with violating a lawful general regulation, "to wit: paragraph 4-20(a), Army Regulation 600-20,

dated 18 March 2008, by wrongfully requiring [SPC BB] to consume alcohol." (JA 6). Paragraph 4-20.a. prohibits hazing within the Army. (JA 234); Army Reg. 600-20, Personnel-General: Army Command Policy (Mar. 8, 2008/Rapid Action Revision Aug. 4, 2011) [hereinafter AR 600-20]. This paragraph defines hazing as:

> [A]ny conduct whereby one military member or employee, regardless of Service or rank, unnecessarily causes another military member or employee, regardless of Service or rank, to suffer or be exposed to an activity that is cruel, abusive, oppressive, or harmful.

AR 600-20 para. 4-20.a. This paragraph also gives examples of hazing stating:

> Hazing includes, but is not limited, to any form of initiation "rite of passage" or congratulatory act that involves: . . . requiring the consumption of excessive amounts of food, alcohol, drugs, or other substances . . . .

AR 600-20 para. 4-20.a.(1).

The military judge granted the government's motion to take judicial notice of AR 600-20, para. 4-20. (JA 126). The trial counsel then published the entire paragraph to the panel. (JA 126-129).

During the government's case-in-chief, the military judge admitted a counseling statement that appellant's company commander gave to him prior to the incident. (JA 102-105, 109). Within the counseling statement there was a verbatim copy of AR 600-20, para. 4-20, which the panel had during deliberations. (JA 110, 172, 236-37). Appellant's company commander testified that the word

"cherry" was used in his company to refer to new soldiers, but he was attempting to get rid of the phrase. (JA 113).

The CID agent who interviewed appellant about the allegations, Special Agent (SA) TN, testified. (JA 119, 121). Special Agent TN recalled that appellant admitted asking SPC BB multiple times to drink alcohol and that he "lightly pressured her into drinking." (JA 122). Special Agent TN also recalled confronting appellant with the allegation that he told SPC BB "You will drink, you fucking cherry. . . . [I]t's not hazing; it's a rite of passage," and appellant replied that he "said something close to it." (JA 123).

Appellant testified on the merits and admitted to giving SPC BB shots of alcohol. (JA 149, 152). Appellant admitted that SPC BB initially refused the shots he poured for her, but eventually took them because he continued to offer them. (JA 149, 152). On cross examination, appellant admitted that he pressured SPC BB to take the shots and that he called her "Cherry Fuck" multiple times. (JA 156-58). Finally, appellant attempted to mitigate his actions by saying that he did not intend to get SPC BB drunk and that he only offered SPC BB alcohol because he wanted to "relax" and wanted her "to be relaxed too." (JA 168).

C. The military judge's instructions.

Neither party objected to the military judge's instructions or requested additional instructions. (JA 173). Regarding the Specification of Charge I, the military judge instructed:

> In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:
>
> (1) That there was in existence a certain lawful general regulation in the following terms: Army Regulation 600-20, paragraph 4-20(a), dated 18 March 2008, which prohibits requiring the consumption of excessive amounts of alcohol as an initiation rite of passage;
>
> (2) That the accused had a duty to obey such regulation; and
>
> (3) That on or about 28 September 2012, at Fort Bragg, North Carolina, the accused violated this lawful general regulation by wrongfully requiring Specialist [BB] to consume alcohol.
>
> As a matter of law, the regulation in this case as described in the specification, if in fact there was such a regulation, was a lawful regulation.
>
> General regulations are those regulations which are generally applicable to an armed force and which are properly published by the Secretary of Defense or a military department.
>
> You may only find the accused guilty of violating a general order only if you are satisfied beyond a reasonable doubt that the regulation was general.

(JA 176-177, 216-217). When instructing the panel on the Specification of Charge III, the military judge stated the following:

> [F]ourth, that the accused's conduct was wrongful.
>
> "Wrongful" means without legal justification or lawful authorization.
>
> An act is done "knowingly" when it is done intentionally and on purpose. An act done as a result of a mistake or accident is not done "knowingly."

(JA 180, 218-219). When instructing the panel on the Specification of Charge IV, the military judge stated the following:

> A taking is wrongful only if done without the consent of the owner and with a criminal state of mind.
>
> In determining whether the taking was wrongful, you should consider all the facts and circumstances presented by the evidence.

(JA 182, 220).

After the elements of the offenses, the military judge instructed the panel:

> I remind you that earlier I have taken judicial notice of Army Regulation 600-20, paragraph 4-20. This means that you are permitted to recognize and consider that portion of the regulation without further proof. It should be considered by you as evidence with all other evidence in this case. You may but are not required to accept as conclusive any matter which I have judicially noticed.

(JA 189, 223).

Granted Issue

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO INSTRUCT THE PANEL ON THE MENS REA REQUIRED FOR AN ARTICLE 92, UCMJ, VIOLATION OF ARMY REGULATION 600-20, WHICH PROHIBITS REQUIRING THE CONSUMPTION OF EXCESSIVE AMOUNTS OF ALCOHOL AS AN INITIATION RITE OF PASSAGE

Summary of Argument

First, because of the unique nature of the offense of violating a lawful general regulation in the military, the principles stated by the Supreme Court in *Elonis v. United States*, 135 S. Ct. 2001 (2015) are satisfied where the government is required to prove general intent in order to obtain a conviction under Article 92, UCMJ. Second, the military judge's instructions to the panel sufficiently flagged the need to consider the general intent requirement when determining appellant's guilt or innocence. *See United States v. Caldwell*, 75 M.J. 276, 278 (C.A.A.F. 2016).

Standard of Review

Questions of statutory interpretation are reviewed by this Court de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). "This Court reviews a military judge's decision to give an instruction, as well as the substance of an instruction, de novo." *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999) (citing *United States v. Maxwell*, 45 M.J. 406, 424-25 (C.A.A.F. 1996)).

"Where there is no objection to an instruction at trial, [this Court] reviews for plain error." *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (citing *United States v. Turnstall*, 72 M.J. 191, 193 (C.A.A.F. 2013)). "Under a plain error analysis, the [appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant].'" *Id.* at 32 (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). Appellant bears the burden of demonstrating he meets all three prongs of the plain error test. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). If appellant meets his burden then the government must demonstrate that the instructional error as to the elements of the offense was harmless beyond a reasonable doubt. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008).

Law and Analysis

"It is a fundamental principle of criminal law that 'wrongdoing must be conscious to be criminal.'" *Caldwell*, 75 M.J. at 280 (quoting *Elonis*, 135 S. Ct. at 2009) (citation omitted and internal quotations omitted). This principle "does not mean that an accused must know that his actions constitute criminal conduct. Rather, an accused must have knowledge of 'the facts that make his conduct fit the definition of the offense.'" *Id.*, at 281 n.4 (quoting *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994).

In applying this principle, the Supreme Court instructed, "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." *Elonis*, 135 S. Ct. at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)). "A 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct—awareness of some wrongdoing.'" *Elonis*, 135 S. Ct. at 2011 (quoting *Staples*, 511 U.S. at 606-607). Under a negligence standard, "liability turn[s] on . . . [what] a 'reasonable person' [thinks] . . . regardless of what the defendant thinks[.]" *Id.* By comparison, general intent is proof of knowledge with respect to the actus reus of the crime. *Carter,* 530 U.S. at 269. Under a general intent standard, "once this mental state and actus reus are shown, the concerns underlying the presumption in favor of scienter are fully satisfied." *Id.*

A. In the military context, inferring general intent for the requisite mens rea for a violation a lawful general regulation under Article 92, UCMJ, sufficiently separates wrongful from otherwise innocent conduct.

The Supreme Court has repeatedly noted that "the military constitutes a specialized community governed by a separate discipline from that of the civilian." *Parker v. Levy*, 417 U.S. 733, 744 (1974) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). The Supreme Court has found that "the different character of the

military community and of the military mission requires a different application of [constitutional] protections. *Id.* at 758. This Court has reflected the Supreme Court's distinction between military and civilian life in stating, "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past." *United States v. Heyward*, 22 M.J. 35, 37 (C.M.A. 1986) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)). "The armed forces depend on a command structure that at times must commit men to combat, not only hazardous their lives but ultimately involving the security of the Nation itself." *United States v. Priest*, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972).

1. This court has already interpreted Article 92, UCMJ, as a general intent offense even though the statute is silent on the requisite mens rea.

This Court has found a violation of a general regulation under Article 92, UCMJ, to be a general intent offense. *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011); *United States v. Brown*, 22 M.J. 448, 451 (C.M.A. 1996).

In multiple cases, the Supreme Court has inferred general intent to be the requisite mens rea where it was not explicitly stated. This Court recognized the Supreme Court's decision in *Carter* to infer only general intent into a statute:

> There, the Supreme Court considered whether a conviction under 18 U.S.C. § 2113(a), which criminalizes taking "by force and violence" items of value belonging to

> or in the care of a bank, requires proof of intent to steal. The Supreme Court held that once the Government proves that a defendant forcibly took money, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of . . . 'otherwise innocent'" conduct. Thus, the Supreme Court held, the general intent requirement contained in the statute was sufficient.

Caldwell, 75 M.J. at 281 (citing *Carter,* 530 U.S. at 261, 269-270). In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the Supreme Court upheld a quasi-criminal ordinance challenged on the basis of being unduly vague. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-500 (1982). Parts of the ordinance required a retailer to obtain a license if it sold items that are "designed or marketed for use with illegal cannabis or drugs." *Id.* at 500. The Supreme Court upheld the ordinance and inferred that the requisite mens rea was only the general intent of a retailer to sell items designed for use with illegal cannabis or drugs as the "designed . . . for use" language referred to the intent of the manufacturer, not the intent of the retailer. *Id.* at 501.

Federal Circuits have found, "In the absence of an explicit statement that a crime requires specific intent, courts often hold that only general intent is needed." *United States v. Lewis*, 780 F.2d 1140, 1142-1143 (4th Cir. 1986). *See also United States v. Martinez*, 49 F.3d 1398, 1401 (9th Cir. 1995).

"A corollary to the principle that subordinates must obey their superiors is the principle that superiors must not maltreat their subordinates. . . . [T]he provisions of Article 93, UCMJ, [ ] has sought to preserve the integrity of the superior-subordinate relationship. *Caldwell*, 75 M.J. at 282. Considering the military context, it is just as essential for Article 92, UCMJ, to preserve the integrity of lawful general regulations, enacted by order of the service secretaries or senior commanders, as it is for Article 93, UCMJ, to preserve the integrity of the superior-subordinate relationship. Since this Court has already found a violation of a lawful general regulation to be a general intent offense and Article 92, UCMJ, preserves similar unique military exigencies as Article 93, UCMJ, this court should continue to interpret Article 92, UCMJ, as a general intent offense.

2. This court should use the language from AR 600-20, paragraph 4-20, to infer that hazing is a general intent offense.

There is a long history of courts of criminal appeals overcoming challenges that source regulations of Article 92, UCMJ, offenses are vague or overly-broad by inferring mens rea requirements from the language of the regulation to separate wrongful from innocent conduct. *E.g.*, *United States v. Cannon*, 13 M.J. 777, 778 (C.M.R. 1982), *pet. denied*, 14 M.J. 226 (C.M.A. 1982) (to separate wrongful from innocent conduct, inferred from the language of a regulation prohibiting possession of instruments or devices the specific intent to possess these items to administer prohibited drugs); *United States v. Caporale*, 73 M.J. 501, 505 (A.F. Ct. Crim.

App. 2013) (to separate wrongful from innocent conduct, inferred from the language of a regulation prohibiting the use and possession of intoxicating substances the specific intent to possess these items with the intent to alter mood or function).

Courts of criminal appeals have also interpreted regulations that are silent on intent to require no intent or at most general intent. Following the precedent set by the Supreme Court in *Flipside*, the Air Force Court of Military Review upheld a conviction for violation of Air Force Regulation 30-2, which prohibited the possession of drug paraphernalia that was "designed to be used" in an illegal manner. *United States v. Hester*, 17 M.J. 1094, 1096 (A.F.C.M.R. 1984). The court did not infer intent into the regulation, but upheld the conviction based on what seemed to be general intent evidence: that a bong has no other legitimate purpose except to use drugs, and that marijuana was found within the same house as the bong. *Id.* In *United States v. Barnes*, the Army Court of Military Review upheld a conviction for violation of a regulation which prohibited operating a motor vehicle when the operator's license was revoked. *United States v. Barnes*, 24 M.J. 534 (A.C.M.R. 1987) *pet. denied*, 25 M.J. 219 (C.M.A. 1987). The court cited "the unique need for discipline in the military" and found no mens rea was required in the regulation. *Id.* at 536 n.1.

"In interpreting regulations, we apply the general rules of statutory construction." *United States v. Estrada*, 69 M.J. 45 (C.A.A.F. 2010). "When the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Recognizing the different character of the military community and of the military mission, AR 600-20, para. 4-20, was drafted to prohibit what is objectively considered hazing. The language in the regulation states the Army is a "values-based organization where everyone is encouraged to do what is right by treating others as they should be treated—with dignity and respect. Hazing is fundamentally in opposition to our values and is prohibited." AR 600-20, para. 4-20. Additionally, the regulation provides examples of what hazing includes, "but is not limited to." AR 600-20, para. 4-20.a.(1). This broad language demonstrates the Secretary of the Army's attempt to eliminate all forms of hazing regardless of whether the individual believed his actions qualified as hazing.

In *Caldwell*, this Court found knowledge requirements within the language of Article 93, UCMJ. *Caldwell*, 75 M.J. at 281. This Court held:

> [U]nder Article 93, UCMJ, the Government must prove that: (a) the accused *knew* that the alleged victim was subject to his or her orders; (b) the accused *knew* that he or she was making statements or engaging in certain

> conduct in respect to that subordinate; and (c) *when viewed objectively under all the circumstances*, those statements or actions were unwarranted, unjustified, and unnecessary for any lawful purpose and caused, or reasonably could have caused, physical or mental harm or suffering.

Id. In this case, a similar knowledge requirement can be found in the language of AR 600-20, para. 4-20, in that the government is required to prove that an accused knew of his conduct in relation to the hazed individual. AR 600-20, para. 4-20.a.(1). The regulation provides examples of conduct that could be considered hazing and that the government must prove that an accused knew he was committing: "physically striking another in order to inflict pain; piercing another's skin in any manner; forcing or requiring the consumption of excessive amounts of food, alcohol, drugs, or other substances; or encouraging another to engage in illegal, harmful, demeaning or dangerous acts. Soliciting or coercing, another to participate in any such activity." AR 600-20, para. 4-20.a.(1). Then the government must prove that conduct "unnecessarily cause[d] another military member or employee, regardless of Service or rank, to suffer or be exposed to an activity that is cruel, abusive, oppressive, or harmful." AR 600-20, para. 4-20.a. However, the government does not have to prove that appellant specifically intended his actions as cruel, abusive, oppressive, harmful, hazing, an initiation, or a rite of passage.

In *Caldwell*, this court held that "a military superior [can] be held criminally responsible for voluntary conduct that is later determined to be abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose, even if the Government does not prove that the superior possessed the specific intent to maltreat." *Caldwell*, 75 M.J. at 282 (quotations omitted). It is the same situation here–an accused can be held criminally responsible for voluntary conduct that is later determined to be cruel, abusive, oppressive, or harmful, even if the government does not prove that the accused specifically intended to haze. AR 600-20, para. 4-20.a.(1). In this case, this Court should infer from the language in the regulation that appellant must have only generally intended to require SPC BB to consume alcohol. Then, because the panel objectively determined that appellant's conduct was hazing it properly found that appellant violated AR 600-20, para. 4-20.

B. The military judge's instructions to the panel sufficiently flagged the need to consider appellant's general intent when determining appellant's guilt or innocence, but if plain error is found it was harmless beyond a reasonable doubt.

A "military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990)). "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). "In reviewing the propriety of an instruction, appellate courts must read each instruction in the context of the entire charge and determine whether the instruction completed its purpose." *Id.* (citing *Jones v. United States*, 527 U.S. 373, 391 (1999)). Instructions are evaluated in the context of the overall message conveyed to the jury. *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (citation and quotations omitted).

If an error is found in the military judge's instructions, it must be "examined in the context of the entire record before a finding of reversible or prejudicial error can be reached." *United States v. Thomas*, 46 M.J. 311, 315 (C.A.A.F. 1997). "In order to constitute plain error, the error must not only be both obvious and substantial, it must also have 'had an unfair prejudicial impact on the jury's deliberations.'" *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). The plain error doctrine "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.*, 21 M.J. at 328-329 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

1. The military judge's instructions were not erroneous as the term "wrongful" and the reference to AR 600-20 sufficiently flagged for the panel the need to consider appellant's general intent.

In this case, the military judge's instructions followed the elements provided in the Military Judge's Benchbook. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 3-16-1 (1 Jan. 2010). "Because the standard Benchbook instructions are based on a careful analysis of the current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record." *United States v. Rush*, 54 M.J. 313, 315 (C.A.A.F. 2011) (quoting the Army Court of Criminal Appeals in *United States v. Rush*, 51 M.J. 605, 609 (Army Ct. Crim. App. 1999)).

The third element in the Benchbook, states, "the military judge should enumerate the specific acts and any state of mind or intent alleged which must be established by the prosecution in order to constitute the violation of the order or regulation." AR 27-9, para. 3-16-1.c. The state of mind or intent alleged by the government was that appellant "wrongfully requir[ed] Specialist [BB] to consume alcohol." (JA 6). This Court has found the term "wrongful" to separate lawful from innocent conduct as it "relate[s] to mens rea and lack of a defense, such as excuse or justification." *United States v. Rapert*, 75 M.J. 164, 165, 168 (C.A.A.F. 2016) (quoting *United States v. King*, 34 M.J. 95, 97 (C.M.A. 1992) (citations omitted); *accord United States v. Thomas*, 65 M.J. 132, 134 (C.A.A.F. 2007) ("The word 'wrongful,' like the words 'willful,' 'malicious,' 'fraudulent,' etc., when used

in criminal statutes, implies a perverted evil mind in the doer of the act.") (citation omitted).

Although, in this case, the word "wrongful" is not included in the statute, the military judge included it as one of the elements of the offense. (JA 216). In doing so, the military judge flagged the panel's need to consider whether appellant generally intended to require SPC BB to consume alcohol. Considering the overall message conveyed to the panel, the definitions of "wrongful" included in The Specifications of Charge III and IV reinforced the message that the panel should consider appellant's state of mind. (JA 218-220).

Additionally, the military judge referred to AR 600-20 in both the first and third elements of the offense of violation of a general regulation. (JA 216). This reference also flagged for the panel that they must refer to the definition of hazing and examples of hazing given in AR 600-20, para. 4-20. These instructions can reasonably be understood to require the panel members to determine if appellant knew he was requiring SPC BB to consume alcohol. *See* AR 600-20, para. 4-20.a.(1).

Appellant's contends that the military judge's instruction should have stated that the government had to prove appellant specifically intended or recklessly exposed SPC BB to an initiation rite of passage. (Appellant's Br. 16). This is contrary to the broad language of the regulation which seeks to eliminate "any

form of initiation 'rite of passage.'" AR 600-20, para. 4-20.a.(1). "[I]n some instances, the mere requirement in a statute that a defendant commit an act with knowledge of certain facts—i.e., that the defendant possessed 'general intent'—is enough to ensure that innocent conduct can be separated from wrongful conduct." *Caldwell*, 75 M.J. at 281. In this case, establishing that appellant knew he was requiring SPC BB to consume alcohol was sufficient to separate wrongful from innocent conduct. Since the military judge's instruction flagged this general intent requirement, appellant has not met his burden to show the military judge's instructions were erroneous.

2. Any error committed by the military judge was not plain error.

If any error is found in the military judge's instructions, it was not plain or obvious. "In undertaking [the] plain error analysis, [the court] consider[s] whether the error is obvious at the time of appeal, not whether it was obvious at the time of the court-martial." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008). No court has inferred a mens rea requirement into AR 600-20, para. 4-20.

Appellant cites *Elonis* and *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016) as reasons why an error by the military judge must be plain error, but neither of these cases address the mens rea requirements in a violation of a lawful regulation under Article 92, UCMJ, or the mens rea requirements in AR 600-20. There is no case law that currently requires a separate element for a description of

the requisite knowledge for the offense of violating a lawful regulation under Article 92, UCMJ. Appellant has not met his burden of proving that any error was plain or obvious.

3. If plain error is found, it was harmless beyond a reasonable doubt.

There are two factors to consider in concluding whether an error regarding one of the elements of an offense is harmless beyond a reasonable doubt: 1) was the element contested and 2) was the element supported by overwhelming evidence. *Upham*, 66 M.J. at 87-88. Although appellant's mens rea was contested, this element was supported by overwhelming evidence. Specialist BB was a new soldier at her first unit and appellant was her supervisor. (JA 32). While appellant was in SPC BB's barracks room he called her "cherry fuck" multiple times, a term that was used for new and inexperienced soldiers. (JA 45). Appellant told SPC BB "to take a shot for initiation and that it's not hazing." (JA 46). Appellant used a commanding tone of voice when telling SPC BB to come to the kitchen to take a shot of alcohol. (JA 50). He told her multiple times that he would not help her unless she drank. (JA 50). He continued to tell her to drink the alcohol even after she declined and told him that she did not drink. (JA 46). Most of these facts were confirmed by either SA TN's testimony about her interview with appellant or through appellant's own sworn testimony. (JA 119, 121-23, 149, 152, 156-58). There was overwhelming evidence in this case that demonstrated appellant's

general intent and even his specific intent to expose SPC BB to an activity that was cruel, abusive, oppressive, or harmful. Therefore, any error in the military judge's instructions was harmless beyond a reasonable doubt.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm the decision of the Army Court.

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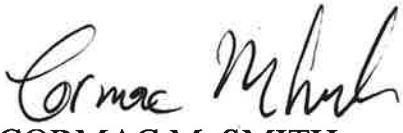

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August 9, 2016

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I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on August 9, 2016.

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