IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Senior Airman (E-4)
TRENTLEE D. MCCLOUR
USAF,
Appellant.

USCA Dkt. No. 16-0455/AF

Crim. App. No. 38704

BRIEF IN SUPPORT OF PETITION GRANTED

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UNITED STATES, *Appellee*,	)	APPELLANT'S BRIEF
v.	)	USCA Dkt. No. 16-0455/AF
Senior Airman (E-4) **TRENTLEE D. MCCLOUR,** USAF, *Appellant.*	)	Crim. App. No. 38704

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

Granted Issue

WHETHER AFCCA ERRED WHEN IT FAILED TO GRANT RELIEF WHERE THE MILITARY JUDGE INSTRUCTED THE MEMBERS, "IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED, YOU MUST FIND HIM GUILTY," WHERE SUCH AN INSTRUCTION IS IN VIOLATION OF *UNITED STATES V. MARTIN LINEN SUPPLY CO.*, 430 U.S. 564, 572-73 (1977) AND THERE IS INCONSISTENT APPLICATION BETWEEN THE SERVICES OF THE INSTRUCTIONS RELATING TO WHEN MEMBERS MUST OR SHOULD CONVICT AN ACCUSED.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On 9 April, 30 June, and 1-3 July 2014, Appellant was tried at a general court-martial by officer and enlisted members at Joint Base Pearl Harbor-Hickam, Hawaii. Appellant was found guilty of one charge and one specification in violation of Article 120 (abusive sexual contact), UCMJ, 10 U.S.C. § 920. JA at 59. Appellant was acquitted of one specification of rape and the lesser included offense of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. *Id*. Appellant was sentenced to a bad conduct discharge, reduction to E-1, forfeiture of all pay and allowances, and to be confined for 180 days. JA at 27. On 23 October 2014, the convening authority approved the sentence as adjudged. JA at 11-12.

On 11 February 2016, the Air Force Court of Criminal Appeals (AFCCA) affirmed the approved findings and sentence. JA at 10. The Appellate Records Branch notified the Appellate Defense Division that a copy of the Court's decision was deposited in the United States mail by first-class certified mail to the last address provided by Appellant on 12 February 2016.

On 11 April 2016, Appellant filed a Petition with this Court and a Motion to File the Supplement Separately. On 13 April 2016, this Court granted Appellant's motion extending the time to file the supplement until 2 May 2016. On 28 April 2016, Appellant filed a motion for an Enlargement of Time to File Supplement. On 29 April 2016, this Court granted Appellant's motion extending

the time to file until 17 May 2016. On 23 June 2016, this Court granted Appellant's petition for review. On 21 July 2016, Appellant filed a motion for an Enlargement of Time to file a brief on the granted issue. On 25 July 2016, this Court granted Appellant's motion extending time to file until 3 August 2016.

Statement of Facts

During preliminary findings instructions, the military judge instructed the members:

> A "reasonable doubt" is a conscientious doubt based upon reason and common sense, and arising from the state of evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of any offense charged, you *must* find him guilty.

JA at 29 (emphasis added). The military judge did not provide notice to the parties of his intent to use the word "must" in that instruction.

During findings instructions, the military judge repeated the same instruction. JA at 30. The military judge also instructed the panel, "[e]ach of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience."

Id. Trial defense counsel did not object or move for a mistrial during either instruction. JA at 29, 30.

Additional facts necessary to the resolution of the issue are presented below.

Summary of Argument

The AFCCA erred in failing to grant relief because the military judge's instruction was plain and obvious error and not harmless beyond a reasonable doubt. The military judge erred in instructing the panel that, if convinced of the accused's guilt beyond a reasonable doubt, they must find the accused guilty. By instructing in this manner, the military judge exceeded the scope under Article 51(c), UCMJ, 10 U.S.C. § 851(c). By instructing the panel that they "must" return a verdict of guilty, the military judge took from the panel an essential element of its function because this instruction violates the prohibition against a military judge directing a verdict, no matter how overwhelming the evidence, in favor of the government. *United States v. Hayward*, 420 F.2d 142, 145 (D.C. Cir. 1969); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977).

This instruction was constitutionally deficient because it deprived Appellant of his rights under the Due Process Clause to the Fifth Amendment to the Constitution. This error is not harmless because the military judge's instruction included an improper description of the burden of proof. This error was avoidable given the existence of a legally sufficient instruction contained in the *Military*

Judge's Benchbook, an Army publication. DA Pamphlet 27-9 (2010). The military judge deviated from this instruction, despite Air Force guidance to utilize the *Benchbook.* This deviation has caused a split between the services. In answering the question of "must" versus "should", this Court should hold the more protective "should" language appropriate, particularly in light of unique nature of the military environment and case law that has found that servicemembers, deprived some of the protections of citizens, require additional safeguards

Argument

AFCCA ERRED IN FAILING TO GRANT RELIEF WHEN THE MILITARY JUDGE INSTRUCTED THE MEMBERS, "IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED, YOU MUST FIND HIM GUILTY."

Standard of Review

Instructional errors are reviewed de novo. *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016). A military judge's instructions are evaluated "in the context of the overall message conveyed" to the members. *See United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (quoting *Humanik v. Beyer*, 871 F.2d 432, 441 (3d Cir. 1989)).

When there "were no objections to the instructions[,] absent plain error, [this Court holds] there was a waiver. To establish plain error appellant must demonstrate: that there was 'error'; that such error was 'plain, clear, or obvious';

and that the error 'affected' appellant's 'substantial rights.'" *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995).

"If instructional error is found [when] there are constitutional dimensions at play, [the appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *United States v. Wolford*, 52 M.J. 418, 420 (C.A.A.F. 2006) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)).

Law and Analysis

> In a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary and abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgement in a manner contrary to the interests of the accused.

Martin Linen Supply Co., 430 U.S. at 572-73.

"Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). "By instructing the jurors that they *must* find the defendant guilty if they determined that the evidence placed him at the scene of the crime, [a trial] court [takes] from the jury an essential element of its function." *Hayward*, 420

F.2d at 145 (emphasis in original). "Instructions to the jury . . . should avoid the use of language that suggests to the jury that it is obliged to return a guilty verdict." *United States v. Mejar-Matrecios*, 618 F.2d 81, 85 (9th Cir. 1980).

By telling the panel that it "must" convict if the evidence left them firmly convinced of guilt, the military judge effectively "directed the jury to come forward with . . . a verdict [of conviction.]" *See Martin Linen Supply Co.*, 430 U.S. at 572-73. In doing so, the military judge suggested to the panel "that it [was] obliged to return a guilty verdict" and thereby took from the panel "an essential element of its function." *See Hayward*, 420 F.2d at 145; *Mejar-Matrecios*, 618 F.2d at 85. This was improper.

A judge "may not direct a verdict for the [government], no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. In enacting, Article 51, UCMJ, Congress required a military judge, before any vote is taken on the findings, to instruct panel members of *three* things the panel *must* do. First, the panel *must* presume the accused "to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt." 10 USC § 851(c)(1). Second, if "there is a reasonable doubt as to the guilt of the accused, the doubt *must* be resolved in favor of the accused and he *must* be acquitted." 10 USC § 851(c)(2)(emphasis added). Finally, if "there is a reasonable doubt as to the

degree of guilt, the finding *must* be in a lower degree as to which there is no reasonable doubt." 10 USC § 851(c)(3)(emphasis added).[1]

Nowhere in the statute is the military judge required, encouraged, or even *authorized* to instruct panel members that if the panel is firmly convinced the accused is guilty of the offenses charged they *must* find him guilty. Quite the contrary, following the principle *expressio unius est exclusio alterius*,[2] where Congress has expressly legislated a specific list of actions a panel *must* take, any other actions the panel *must* take are excluded and a military judge should not add instructions that materially alter the statute. All of the actions a panel *must* take in Article 51(c), UCMJ, are for the benefit and protection of the military accused. None of the provisions of Article 51(c), UCMJ, require that a panel *must* take an action to the *detriment* of an accused. Certainly, a plain reading shows that Congress did not legislate that a panel *must* find an accused guilty, whatever the state of the evidence. By legislating the three things a panel must do in favor of an accused, but never requiring a finding of guilt, Congress constructed military

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[1] The military judge is further required to instruct that "the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States." 10 USC § 851(c)(4).

[2] *See e.g. United States v. Murphy*, 74 M.J. 302, 309-10 (C.A.A.F. 2015)(Erdman, J., concurring)(noting that the canon of statutory construction *expressio unius est exclusio alterius*, provides guidance in interpreting the omission of a term and that

panels closer to federal juries, with an "overriding responsibility … to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *Martin Linen Supply Co*., 430 U.S. at 572-73.

What the military judge has done in instructing a panel that they *must* find an accused guilty, in the same paragraph and on the same footing that the military judge instructed on the presumption of innocence, reasonable doubt, and burden of proof, is to impermissibly expand the class of things a panel *must* do. Even if Congress could, Congress did not impose a duty or require that a military panel *must* find an accused guilty if the panel is "firmly convinced" of the accused's guilt. Where, as here, a military judge invades the field that Congress has expressly occupied, the military judge plainly errs when he usurps legislative authority and expands the class of actions a panel *must* take.

After telling the panel that they must convict Appellant, if convinced beyond a reasonable doubt, the military judge then instructed the members: "[e]ach of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, *and your own conscience*." JA at 30. (emphasis added). At that point, the military judge had instructed the members, in a conflicting fashion, that they were required to

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language omitted in an otherwise comprehensive statutory scheme is presumed

convict if the government met its burden of proof, but they were also permitted, and indeed required, to vote in accordance with their conscience. While the law presumes members follow the military judge's instructions (*United States v. Loving,* 41 M.J. 213, 235 (C.A.A.F. 1994), citing, *United States v. Holt,* 33 M.J. 400, 408 (C.M.A. 1991)), we cannot know what instructions have been followed when military judges provide conflicting and erroneous guidance.

By instructing the members in this muddled and conflicting fashion, the military judge's beyond a beyond-a-reasonable doubt instruction was constitutionally deficient. *See Sullivan* 508 U.S. 277-282 (holding a constitutionally deficient reasonable-doubt instruction cannot be harmless error). The Due Process Clause of the Fifth Amendment to the Constitution protects an accused against conviction of a crime except when the Government proves the accused's guilt beyond reasonable doubt. *See, e.g., In re Winship,* 397 U.S. 358 (1970). At the most basic level, Appellant was entitled to a panel that was properly instructed as to reasonable doubt. Article 51, UCMJ, 10 USC § 851(c). More troubling, when the military judge directed the members to come forward with a verdict of guilty, there was no guarantee that it was a panel and not the military judge rendering a verdict in Appellant's case.

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intentional)(citations omitted).

This error was not harmless and requires reversal. While not all constitutional errors in the course of a criminal trial require reversal, some will always invalidate the conviction. *Chapman v. California,* 386 U.S. 18, 24 (1967) "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Kreutzer,* 61 M.J. at 298. An error is not harmless beyond a reasonable doubt when "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *United States v. Moran,* 65 M.J. 178, 187 (C.A.A.F. 2007) (internal quotation marks omitted) (quoting *Chapman* 386 U.S. at 24). The question to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict. *Chapman,* 386 U.S. at 24 (analyzing effect of error on "verdict obtained"). The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was attributable to the error." *Sullivan*, 508 U.S. at 279. (emphasis omitted). In cases, such as the instant case, where an instructional error consists of an improper description of the burden of proof, all findings are vitiated. *Sullivan*, 508 U.S. at 280.

This Court should note that the military judge's error was completely avoidable given the existence of a legally-correct standard instruction in the *Military Judge's Benchbook*, an Army publication. Air Force Instruction (AFI) 51-201, *Administration of Military Justice,* 30 July 2015, directs legal practitioners to follow the *Military Judge's Benchbook*.[3] The military judge should have heeded the common sense caution that "[e]mbellishing the standard formulation is unnecessary and should be avoided." *Commonwealth v. Healy*, 444 N.E.2d 957, 959 (1983). The standard instruction provided in the *Military Judge's Benchbook* at 2-5-12 follows that guidance, instructing that members "should" convict if the government meets its burden, but not that they "must":

> "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you <u>should</u> find the accused guilty.

DA PAM 27-9, Ch 2, §V, para 2-5-12 (2010). (emphasis added)

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[3] AFI 51-201, para 3.4.7. directs litigants to consult the MCM, Part IV, and the *Military Judge's Benchbook* when drafting charges and specifications for legal sufficiency. Logically, if this is a legally sufficient source of law for charging instruments, it would also be legally sufficient for instructions.

In the instant case, the military judge departed from the *Military Judge's Benchbook's* standard instruction 2-5-12. JA at 29, 30. The judge departed in a way which made his reasonable doubt instructions in this case, both his preliminary instructions on findings and his substantive closing instructions; violate the Supreme Court's holdings on the issue. Trial defense counsel was not required to lodge an objection given the fact that the instructions were so plainly in violation of published precedent, and because the instructions in question concern a topic of fundamental importance to any criminal trial – the burden of proof is placed upon the government. Had the standard instruction been used, this issue would not exist.

Moreover, by deviating from the established instruction, drafted by the Army and incorporated into the Air Force through Air Force Instruction, the military judge created legal inconsistency among the services. Because of the trial judge's use of a non-standard instruction, Appellant was not afforded trial before a panel which was properly instructed as to the government's burden of proof.

AFCCA failed to evaluate the propriety of the military judge's instructions either in the context of the overall "message conveyed" to the members or in light of binding Supreme Court precedent. *See Prather*, 69 M.J. at 344. Instead, AFCCA rendered their decision based on a prior decision in *United States v. Sanchez*, 50 M.J. 506, 512 (A.F. Ct. Crim. App. 1999) and a footnote in *United*

States v. Meeks, 41 M.J. 150, 157 n.2 (C.M.A. 1994), which states only that the "Armed Forces should reexamine their reasonable doubt instruction," provides one possible option, and does not at all address the question of "must" versus "should."

AFCCA erred when it decided *Sanchez* based on a misunderstanding of this Court's decision in *United States v. Hardy*, 46 M.J. 67 (C.A.A.F. 1997). The *Hardy* decision does not speak to the question of whether a military judge could instruct a panel that they "must convict," thereby instructing them they lacked nullification power. To the contrary, the *Hardy* decision merely found that a defendant was not entitled to have a panel advised of their inherent ability to exercise the power to nullify:

> [A]lthough "civilian juries and court-martial members always have had the power to disregard instructions on matters of law given them by the judge, generally it has been held that they need not be advised as to this power, even upon request by a defendant."

Hardy, 46 M.J. at 70 (citing *United States v. Mead*, 16 M.J. 270, 275 (C.M.A. 1983). Accordingly, *Sanchez* was decided in error and should be disregarded.

By instructing the panel members that they "must" convict if the government meets its burden, the military judge instructed the panel they did not have the power to disregard instructions on matters of law. In particular, they could not nullify. This violated Appellants legal right to a panel that is authorized

to disregard the law. Court-martial members always have the power to disregard instructions on matters of law, in addition to Appellant's right to general verdicts and the prohibition against directed verdicts. *Hardy*, 46 M.J. at 70.

The footnote in *Meeks* is also unpersuasive as it does not speak to the question of "must" versus "should". Rather, *Meeks* provides one possibility should the Armed Forces revisit the reasonable-doubt instruction. That suggestion originates from the Federal Judicial Center, Pattern Criminal Jury Instruction 17-18 (1987) (instruction 21), *quoted* from *Victor v. Nebraska,* 114 U.S. 1239 (1994) (Ginsburg, J., concurring in part and concurring in the judgement). In her concurring opinion in *Victor,* Justice Ginsburg discusses the origins of Pattern Criminal Jury Instruction 17-18 and highlights the concerns with the efficacy of any reasonable doubt instruction, noting that the Supreme Court admonished any attempt to define reasonable doubt. *See, e.g., Holland v. United States,* 348 U.S. 121, 140 (1954) ("attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury"), quoting *Miles v. United States,* 103 U.S. 304, 312 (1881).

Whether or not a reasonable doubt instruction should be given is a larger question. Circuit courts are divided on this issue. "Reasonable doubt is a fundamental concept that does not easily lend itself to refinement or definition." *United States v. Vavlitis,* 9 F.3d 206, 212 (1st Cir. 1993). The meaning of

"reasonable doubt" should be left to the jury to discern." *United States v. Cassiere,* 4 F.3d 1006, 1024 (1st Cir. 1989) ("An instruction which uses the words reasonable doubt without further definition adequately apprises the jury of the proper burden of proof." (citations omitted). Neither the Fourth nor the Seventh Circuit provide a definition of "beyond a reasonable doubt." *See, e.g. United States v. Moss,* 756 F.2d 329 (4th Cir. 1985). The Seventh Circuit has stated that "at best, definitions of unreasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant's constitutional right to have the government prove each element beyond a reasonable doubt." *United States v. Hall,* 854 F.2d 1036, 1039 (7th Cir. 1988). The First Circuit and a panel in the Second Circuit have suggested that reasonable doubt does not require further elaboration. *See, e.g. United States v. Jones,* 674 F.3d 88, 94 (1st Cir. 2012); *United States v. Fields,* 660 F.3d 95, 96-97 (1st Cir. 1999), *United States v. Van Anh,* 523 F.3d 43, 58 (1st Cir. 2008); *United States v. Desimone,* 119 F.3d 217, 226-227 (2d Cir. 1997).

However, the question before this Court, in this case, is not whether there should be a reasonable doubt instruction, but whether the appropriate instruction is that a panel, convinced of an accused's guilt beyond a reasonable doubt, "should" or "must" return a verdict of guilty. Appellant acknowledges that three circuit courts have affirmed the use of "must" in the jury instruction. *See United States v.*

Stegmeier, 701 F.3d 574, 582-83 (8th Cir. 2012); *United States v. Maloney*, 699 F.3d 1130, 1140 (9th Cir. 2012); *United States v. Carr*, 424 F.3d 213, 219-20 (2d Cir. 2005). However, at least one court has held, *inter alia*, that the use of the language "must find the defendant guilty" was improper; proper instruction required "should." *Billeci v. United States*, 184 F.2d 394 (D.C. Cir 1950).

It is those circuits that have chosen to define reasonable doubt that have affirmed the use of "must" in their jury charge. However, as the First and Seventh Circuits caution, an improper instruction of this fundamental concept has the potential to impair a defendant's constitutional right to have the government prove their case beyond a reasonable doubt. *See Vavlitis*, 9 F.3d at 212; *Hall*, 854 at 1039. This concern is of particular import in the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 40-41 (1942) (holding here is no constitutional right to a trial by jury in courts-martial); *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) (recognizing differences between courts-martial and civilian criminal proceedings and observing that "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.").

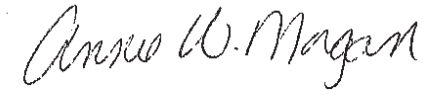
In the military system, more so even than in the civilian system, it is necessary to provide additional safeguards to ensure that every conviction is

supported by proof beyond a reasonable doubt. The necessity to instruct "should" in the military context is analogous to the heightened rights' warnings required for military members suspected of crimes. While *Miranda* warnings alone are sufficient for the civilian community to ensure the voluntariness of a suspect's statement, in the military community, we require that all persons subject to the code warn subjects of the Article 31(b), UCMJ, rights and require military law enforcement agents to warn suspects of both their Article 31(b), UCMJ, rights and their *Miranda-Tempia* rights. *See Miranda v. Arizona*, 384, U.S. 436 (1966); 10 U.S.C. § 831(b); *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

It is in this context that the propriety of the instruction "must" must be evaluated and rejected to eliminate any concern that military members hear the military judges charge that they "must convict" as an order. Rejecting "must" in favor of "should" guarantees that a panel and not a military judge returns a verdict in accordance with the enumerated powers in Article 51(c), UCMJ and ensures uniformity among the services, as recommended by this Court in *Meeks*. 10 U.S.C. § 851(c); *Meeks*, 41 M.J. at 157 n.2.

WHEREFORE, Appellant respectfully requests that this Honorable Court reverse the Air Force Court and set aside the findings and sentence in this case.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 3 August 2016.

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