IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

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

Crim. App. No. 38704
USCA Dkt. No. 16-0455/AF

REPLY BRIEF OF BEHALF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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

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

Pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby submits his reply to the government's answer.

1. **Since 1987 the majority of federal circuits that use either *should* or *must* in their standard criminal jury instructions have adopted *should*. This Court should join that majority.**

The government's argument that "must" is not legal error is premised on the fact that the instruction given by the military judge is taken from the Federal Judicial Pattern Criminal Jury Instruction, drafted in 1987, which was referenced in *United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994), and has been endorsed by AFCCA and the NMCCA. (Gov't Br. at 30.) This argument fails to acknowledge the outdated nature of the instruction and that the majority of federal circuits have since moved away from this instructions and its "must" language, with at least three circuits adopting "should" in their standard criminal jury

instructions.[1] *See* Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 3.02 (2016) ("On the other hand, if, after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of [defendant]'s guilt of a particular crime, you *should* find [him/her] guilty of that crime") (Appendix A); Model Criminal Jury Instructions for the Third Circuit § 1.13 (2013) ("If, after hearing all the evidence, you are convinced that the government has proved (name) guilty beyond a reasonable doubt, you *should* return a verdict of guilty.")[2]; Pattern Criminal Jury Instructions for the Seventh Circuit § 4.01 (2013) ("If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you *should* find the defendant guilty [of that charge].") (Appendix B). Additionally, the treatise Modern Federal Jury

[1] There are no available pattern or model instructions for the Second, Fourth, and DC Circuits, while the Fifth Circuit pattern instructions are silent on the matter. Three other Circuits use neither must nor should. *See* Pattern Criminal Jury Instructions for the Sixth Circuit § 1.05 (2014) ("If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict."); Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, § 3.5 (2016) ("On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty."); Eleventh Circuit Pattern Jury Instructions § 2.1 (2010) ("If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.)"

[2]Available online at: www.ca3.uscourts.gov.

Instructions-Criminal § 4.02 (2016) applies the "should" language. ("On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of the defendant's guilt with respect to a particular charge against him, you should find the defendant guilty of that charge.") (Appendix C).

The government places far too much weight on this Court's twenty-two-year-old decision in *Meeks*, which found no error in an instruction that similarly concluded with "you should find the accused guilty." *Meeks*, 41 M.J. at 155. In a footnote, this Court suggested a pattern instruction advanced by the Federal Judicial Center in 1987, provided a possible alternative to address the "moral certainty" language challenged in *Meeks*.

The government concedes the Court's footnote was "essentially dicta," (Gov't Br. at 30) as to the language at issue—"moral certainty"—but asserts both the AFCCA and NMCCA rightly concluded this dicta endorsed the use of the "must" language not at issue in *Meeks*. Even if such an argument had merit in the waning years of the last century, over twenty years later, this Court faces a significantly different landscape with nearly every Federal Circuit opining on the issue of "must" versus "should," either explicitly or implicitly, and a revised version of the Modern Federal Jury Instructions. Even in Circuits where courts have once held that it is permissible for a trial court to instruct the jury that it "has

a duty" to find an accused guilty if convinced of an accused's guilt beyond a reasonable doubt, arguably language akin to "must," Circuits have reversed course and updated their model instructions to reflect a preference for "should." *Cf. United States v. Appolon*, 695 F.3d 44, 65 (1st Cir. 2012); *United States v. Johnson*, 462 F.2d 423, 429 (3d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973). It is in that context that the question of the propriety of the "must" instruction for military panel members in the Armed Forces arises.

The government spends much of its argument on the fact that the instruction as a whole did not prejudice Appellant because the panel was instructed Appellant must be given the benefit of the doubt. Govt. Br. at 12, 23-25. However, merely, advising the panel that Appellant must be given the benefit of the doubt does not eradicate the otherwise problematic nature of the military judge's instruction. A defendant may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Therefore, a criminal defendant is unequivocally entitled to an acquittal if the government fails to prove any element of the crime beyond a reasonable down, and an instruction should not imply otherwise.

The military judge's instruction created the likelihood that the members applied a lower burden of proof. In addition to instructing "must," the military

judge's deviated from the standard instruction requiring evidentiary certainty and introduced the concept of being "firmly convinced." Furthermore, the judge's instruction required a "real possibility" of innocence. At least two Federal Circuits have criticized the "firmly convinced" and "real possibility" language for diluting the government's burden of proof and/or impermissibly shift the burden of proof to the defense. *See United States v. Porter,* 821 F.2d 968 (4th Cir. 1987) (finding error in the District Court's instruction of reasonable doubt that introduced "the unnecessary concepts of being 'firmly convinced' of guilt and a 'real possibility' of innocence"); *United States v. McBride*, 786 F.2d 45, 52 (2d Cir. 1986) ("suggesting caution" in the use of the "real possibility" language, "as it may provide a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense"). In *State v. Perez,* the Court held the phrase "real possibility" did in fact clash with the presumption of innocence and the nature of doubt (i.e. a reasonable doubt) with which jurors must be concerned. Such conflict required reversal. 90 Haw. 113 (Haw. Ct. App. 1998) *rev. on other grounds.*

In their brief, the government asserts Appellant has failed to meet his burden to demonstrate how military conditions necessitate a different rule than that prevailing in the civilian community. Govt. Br. at 26 (citing *Courtney v. Williams,* 1 M.J. 267, 270 (C.M.A. 1976)). However, given the trend among the Federal

Circuits, it is government and not the Appellant that is arguing for a rule distinct from that prevailing in the civilian community. Appellant instead suggests that, given the special weight of orders and hortatory commands within the military, it is the military system, even more than the civilian community, which needs additional safeguards afforded by the "should" language. This is not only in line with the general notion that service members at courts-martial, denied some rights provided to other citizens, require additional safeguards, but is also in line with the majority of Federal Circuits which have explicitly or implicitly rejected the use of "must" in their own reasonable doubt instructions. Appellant requests this Court follow the majority of Federal Circuits and similarly reject the military judge's use of "must."

2. The Uniform Code of Military Justice was adopted to foster uniformity between the services. Permitting inconsistent jury instructions between the services is antithetical to that goal.

The government's brief asserts the fact that there are differences in how the "various Armed Services define reasonable doubt is ultimately irrelevant to the resolution of this issue." Govt. Br. at 29 n. 8. This is not so.[3] The Uniform Code of Military Justice (UCMJ) was enacted in 1950 with an express purpose of uniformity in application of the law among the military services. *See* Act of May

[3] The government must, at the very least, assert a rational basis for why it disparately treats uniformed personnel who are similarly situated. *See e.g. Frontiero v. Richardson*, 411 U.S. 677 (1973).

5, 1950, ch. 169, 64 Stat. 107 (preamble to the UCMJ explaining the UCMJ is an Act "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard"). The vision of uniformity, embodied specifically in Article 36(b)[4], UCMJ, is best understood as establishing the rules and regulations governing all courts-martial, so that courts-martial convened by the Navy must be uniform with the rules and regulations governing courts-martial convened by the Army, and so forth.

This Court understood that vision in *Meeks*. It is hard to imagine a procedural aspect of trial that more squarely implicates an accused's substantive rights than the reasonable doubt instruction. Such uniformity was accomplished when the Army published the *Military Judges' Benchbook (Benchbook)*, which includes pattern jury instructions, including a reasonable doubt instruction and scripts for military judges conducting courts-martial. DA Pamphlet 53 (30 Sep 96).[5] Although not legally binding, the *Benchbook* is considered persuasive

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[4] Article 36, UCMJ, states, in relevant part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial…may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

[5] Appellant notes only two years after this Court recommended the services revisit their reasonable doubt instruction, the Army published a *Benchbook* with what

authority and it was incorporated into Air Force courts-martial practice through Air Force Instruction (AFI), which directed practitioners to utilize the *Benchbook.*[6] JA at 71. This Court has long recognized the value of the *Benchbook* in resolving cases. *See United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) (contrasting *Benchbook* Instruction 3-29 with R.C.M. 801(e) regarding the question of lawfulness as a question of law to be determined by the military judge).

By contrast, there is no similar authority for the "Air Force Electronic Benchbook" (AFEB) cited by the government. The origin of the AFEB is unknown. The AFEB is not published and has not, accordingly, been subjected to the review or scrutiny of a Service publication, nor has it been incorporated into Air Force courts-martial through AFI. Not only is the AFEB externally inconsistent with the Army *Benchbook*, it is internally inconsistent. While the non-capital reasonable doubt instruction mirrors the "must" instruction, the capital reasonable doubt instruction reads:

> A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means

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became quickly recognized as a "standard instruction" on reasonable doubt, which included the word "should" not "must." *United States v. Sanchez*, 50 M.J. 506, 509 (AFCCA 1999).

[6] The government has conceded the persuasive authority of the *Benchbook* for pattern instructions in two recent pleadings before the Air Force Court. *United States v. Grenald*, ACM S32283 (Gov. Mot. for Recon., 15 Aug 16) (Appendix D).

> 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(s), 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 should find the accused guilty.

AFEB – Capital – 8-3-11 (2016) (emphasis added).[7]

With the exception of the first two sentences, in capital cases, the AFEB instruction is identical to the Army *Benchbook* instruction. This results in not only unequal treatment of service members between the Air Force and the Army, with Army accuseds receiving more favorable instructions, but results in Air Force accuseds receiving disparate treatment from each other depending on the crimes listed on the charging instrument. This is exactly what this Court sought to avoid in *Meeks*. Absent a clear explanation for why the Air Force has deviated from the established standard set forth by the Army, with its heightened protection for all service members, this Court should reject "must" in favor of "should" and ensure uniformity between and within the services.

Respectfully submitted,

[7] Available at: https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/(JAGCNetDocID)/Electronic+Benchbook?OpenDocument

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 12 September 2016.

Respectfully submitted,

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