IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20210638
Private (E-1) **LUKE A. WATKINS,** United States Army, Appellant	Tried at Fort Hood,[1] Texas, on 12 August, 27 September, 30 November, and 1–3 December 2021, before a general court-martial convened by Commander, III Corps, Lieutenant Colonel Tiffany Pond, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

WHETHER THE MILITARY JUDGE IN APPELLANT'S CASE COMMITTED PLAIN ERROR BY INSTRUCTING THE PANEL TO APPLY AN OBJECTIVE STANDARD TO THE QUESTION OF WHETHER APPELLANT COMMUNICATED A THREAT, IN LIGHT OF *COUNTERMAN V. COLORADO*, 600 U.S. ___ (2023).

Statement of the Case

On 30 November and 1–3 December 2021, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of four specifications of insubordinate conduct toward a noncommissioned officer (NCO)

[1] At the time of trial, the installation was named Fort Hood. On 9 May 2023, the installation was officially renamed to Fort Cavazos.

and one specification of communicating a threat, in violation of Articles 91 and 115, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 891, 915 (2018).[2] (R. at 692; Charge Sheet). The military judge sentenced appellant to confinement for 140 days and a bad-conduct discharge. (R. at 714–15). The military judge credited appellant with 150 days of pretrial confinement credit. (R. at 715). On 15 December 2021, the convening authority took no action on the adjudged sentence. (Action). On 3 January 2022, the military judge entered judgment. (Judgment).

Appellant and appellee filed a brief on 21 February 2023 and 26 June 2023, respectively. On 27 June 2023, the Supreme Court of the United States issued its ruling in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023). On 10 July 2023, appellant moved for leave to file a supplemental brief based on this ruling. On 13 July 2023, this Court granted appellant's motion. Appellant filed a supplemental brief on 26 July 2023.[3]

Statement of Facts

The government incorporates paragraphs A-B in its recitation of the facts from its 26 June 2023 brief and provides additional facts below:

On 25 June 2021, appellant said to SGT [redacted], "I'm going to stab you in the

[2] The panel acquitted appellant of one specification of sexual assault. (R. at 692).
[3] On 2 August 2023, this Court specified an additional issue. In accordance with this Court's order, appellant and appellee filed briefs addressing the specified issue on 11 August and 17 August 2023, respectively.

neck." (R. at 455–56). The victim and two other witnesses—SGT [redacted] and SGT [redacted]—observed this interaction and testified about it at trial. (R. at 511–12, 518–19). Defense had the opportunity to cross-examine each of these witnesses on appellant's behaviors. (R. at 457–60, 512–13, 520).

At the close of evidence, the military judge instructed the panel on the elements and definitions of communicating a threat and ignorance or mistake concerning his knowledge that the victims were NCOs using the standard Benchbook instruction.[4] (R. at 598–600; App. Ex. LXVII at 6–7). She also instructed the panel on ignorance or mistake concerning appellant's knowledge that the victims were NCOs for the Article 91 offenses. (R. at 600–01; App. Ex. LXVII at 7–8). Neither party objected to the standard instructions. (R. at 582–83).

During closing arguments, both parties addressed whether appellant had the requisite mens rea for each of the charged offenses. (R. at 643–44, 650, 653–56, 676–77). Defense further argued ignorance or mistake relating to the Article 115 charge. (R. at 650).

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[4] Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3A-39-1 (29 Feb. 2020) [Benchbook].

COMMUNICATED A THREAT, IN LIGHT OF *COUNTERMAN V. COLORADO*, 600 U.S. ___ (2023).

Standard of Review

An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019)) (quotations omitted). On direct review, courts apply the clear law at the time of the appeal, not the time of trial. *Tovarchavez*, 78 M.J. at 462. Appellant must establish (1) there is error (2) that is clear or obvious and (3) results in material prejudice to his substantial rights. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F 2011); *United States v. Upham*, 66 M.J. 83 (C.A.A.F 2008). Whether there is instructional error is a question of law reviewed de novo. *United States v. Stanley*, 71 M.J. 60, 62 (C.A.A.F 2012).

Law and Argument

Counterman v. Colorado does not apply to this case. 143 S. Ct. 2106 (2023). To the extent this Court finds it does apply, Article 115, UCMJ, and its case law are consistent with *Counterman's* holding. In application, the military judge instructed the panel with the standard instruction for communicating a threat. Even if this Court finds the military judge committed instructional error, it was harmless beyond a reasonable doubt under the facts of this case.

A. *Counterman v. Colorado* requires prosecutors to prove a subjective intent in true threat cases which is no more demanding than recklessness.

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Nevertheless, "[t]he First Amendment permits restrictions upon the content of speech in a few limited areas. Among these historic and traditional categories of unprotected expressions is true threats. True threats are serious expressions conveying that a speaker means to commit an act of unlawful violence." *Counterman*, 143 S. Ct. 2106, at *2110 (quoting *Virginia v. Black*, 538 U.S. 343, 359) (citations omitted). The "true" in that term distinguishes what is at issue from jests, "hyperbole," or other statements that when taken in context do not convey a real possibility that violence will follow. *Id.* at 5–6 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

Counterman held that the State must prove the defendant had some subjective understanding of his statements' threatening character. *Id.* at *4–5. In so holding, the majority opinion acknowledged the State's ability to prosecute some objectively dangerous communications would be outweighed in favor of preventing a chilling effect on speech. *Id*. at *2, 10 ("A speaker's fear of mistaking whether a statement is a true threat, fear of the legal system getting that judgment wrong, and fear of incurring legal costs all may lead a speaker to swallow words that are in fact not true threats.").

Turning to the question of what level of subjective intent was required, the Court held that the First Amendment required no more demanding a showing than recklessness. *Id*., at *4–5. While the Court found that the First Amendment shielded a speaker who was merely negligent (i.e., a speaker was not, but should have been, aware of a substantial risk that others will understand his words as threats), the prosecution is not required to prove purpose (i.e., a person acts purposefully when he wants his words to be received as threats) or knowledge (i.e., a person acts knowingly when he knows to a practical certainty that others will take his words as threats). *Id*., at *10–11 n.5.

The Court reasoned that "[a] reckless defendant has done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm." *Id*., at *12. Thus, to prosecute a true threat, the State must prove the speaker was aware that others could regard his statements as threatening violence and delivers them anyway. *Id.*

B. The rationale in *Counterman* does not apply to this case because the Colorado stalking statute and Article 115, UCMJ are distinct.[5]

The legislation considered in *Counterman* was a Colorado stalking statute

[5] Moreover, *Counterman* did not arise from and therefore, did not address the military context whose differing character of its community members and mission may justify a more restrictive application of First Amendment protections. *See Parker v. Levy*, 417 U.S. 733, 759 (1974) ("The armed forces depend on a command structure that at times must commit men to combat, not only hazarding

that the Court ultimately found was unconstitutional because the State had no requirement to prove a subjective intent.[6] *Counterman*, 143 S. Ct. 2106, at *2112 (citing P*eople v. Cross*, 127 P. 3d 71, 76 (Colo. 2006)); *see generally* Colo. Rev. Stat. §18–3–602(1)(c) (2016). The text of the statute provided in part:

> (1) A person commits stalking if directly, or indirectly through another person, the person knowingly:
> [. . .]
> (c) Repeatedly . . . makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.

Colo. Rev. Stat. §18–3–602(1)(c) (2016).

In contrast, not only is the Uniform Code of Military Justice a separate and distinct legislation that creates a different system of laws for the military, but Congress required "both an objective expression of intent and a subjective intent" to prove Article 115, UCMJ. *See* Benchbook, Note 1. The text of the statute provides: "Any person subject to this chapter who wrongfully communicates a

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their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civilian population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."); s*ee generally* Article 88-90, 92, 133, UCMJ.

[6] Notably, Colorado criminalizes threats under two statutes: stalking and menacing. *Compare* Colo. Rev. Stat. §18–3–206 (2016) ("A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury.") *and* Colo. Rev. Stat. §18–3–602(1)(c) (2016) *with* Article 115, UCMJ, 10 U.S.C. § 915 (2018) *and* Article 130, UCMJ, 10 U.S.C. § 930 (2018).

threat to injure the person . . . shall be punished as a court-martial may direct." The elements of this offense include:

> (a) That the accused communicated certain language expressing a present determination or intent to injure the person . . . presently or in the future
> (b) That the communication was made known to that person or to a third person; and
> (c) That the communication was wrongful.

Benchbook. The first element requires an objective inquiry, analyzing the existence of a threat from the viewpoint of a reasonable person in the recipient's place. *United States v. Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577, at *9 (C.A.A.F. 2023) (quoting *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995)) (internal quotation marks and alterations omitted). The third element of wrongfulness relates to appellant's subjective intent. Article 115, UCMJ, explanation; *Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577, at *7 (citing *United States v. Rapert*, 75 M.J. 164, 169 (C.A.A.F. 2016)). Because of this two-prong approach, the concerns in *Counterman* are not present.

C. To the extent this Court finds *Counterman* applies, Congress already requires military prosecutors to prove a subjective intent greater than recklessness under Article 115, UCMJ.

The Court of Appeals for the Armed Forces [CAAF] has explained the subjective element of wrongfulness required a mens rea higher than negligence. 75 M.J. 164, 168–69 (C.A.A.F. 2016). The Court in *Harrington* further explained, "the key question is not whether the speaker intended to carry out the object of the

threat, but rather 'whether the speaker intended his or her words to be understood as sincere.'" __ M.J. ___, 2023 CAAF LEXIS 577, at *7 (quoting *Rapert*, 75 M.J. at 169 n.10). Of note, *Harrington* makes no reference to *Counterman* and instead supports the proposition in *Rapert*, making the holdings in both CAAF cases clear precedent in this case. *Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577; *Rapert*, 75 M.J. 164, 169.

This element is satisfied if the appellant "transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat." Article 115, UCMJ, explanation. The government must prove appellant's statement was "not made in jest, as idle banter, or for an innocent or legitimate purpose" that contradicts the expressed intent to commit the act when viewed under the circumstances. 75 M.J. at 169; *see* Article 115, UCMJ, explanation. Thus, if the Court finds the need for the government to prove a subjective belief on the part of appellant, then that protection identified in *Counterman* already applies to servicemembers.

D. There was no plain error because the military judge instructed the panel on the prosecution's burden to prove wrongfulness.

In this case, the military judge committed no instructional error. She instructed the panel with the standard Benchbook instructions and repeatedly told

them the prosecution had the burden of proof.[7] (R. at 598–600, 608–12). She further provided all the elements of Article 115, UCMJ, namely:

> A communication is wrongful if the accused transmitted it for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat. A communication is not wrongful if it is made under circumstances that reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act.

(R. at 599-600). Moreover, unlike in *United States v. Prather*, there was no burden shifting, expressly or impliedly. 69 M.J. 338 (C.A.A.F. 2011). Instead, this instruction is consistent with *Rapert* and *Harrington* and in harmony with *Counterman*. *Compare Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577 *and Rapert*, 75 M.J. 164 *with Counterman*, 143 S. Ct. 2106.

Absent evidence to the contrary, panel members are presumed to comply with the judge's instructions. *United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014). Therefore, because the panel convicted appellant of the charge of "communicating a threat," the panel necessarily found that appellant made the statement for the purpose of issuing a threat or with the knowledge it would be viewed as a threat and not in jest or for an innocent or legitimate purpose.

E. Even if this Court finds the military judge committed instructional error, there was no prejudice to the appellant as his threat constitutes what *Counterman* deems unprotected speech.

Where an erroneous instruction raises constitutional error, courts assess two

[7] Neither party objected to these instructions. (R. at 582–83).

factors to determine prejudice: whether the matter was contested and whether the element at issue was established by overwhelming evidence. *Upham*, 66 M.J. at 87 (citing *Neder v. United States*, 527 U.S. 1, 17 (1999)).

First, the subjective intent element of Article 115, UCMJ was contested. Defense broadly argued:

> There is an important element to these offenses and that's knowledge that [appellant] . . . wrongfully communicated the supposed threat with the required mental state. We heard a parade of the government's own witnesses . . . [a]nd they described a litany of 12 bizarre and erratic behaviors by Private Watkins. They described for you his . . . erratic and confusing speech patterns, his wildly fluctuating demeanor, and obvious confusion on . . . his part as to what was going on. . . . They described a scene and an individual who was in those moments out of touch with reality. And the government would have you believe this was an act.

(R. at 650). During rebuttal, the prosecution asked the panel to consider how SGT [redacted], SGT [redacted], and SGT [redacted] understood appellant's statement and how appellant understood his statement would be perceived:

> [E]ven though he didn't have a weapon in his hand, you heard how the NCOs reacted to it, how they understood it as a threat. You heard . . . how the accused . . . tried to shake Sergeant [redacted]'s hand. . . . [H]e realized what he just did, trying to cover it up and then immediately starts yelling at Sergeant [redacted] again. So the circumstances altogether demonstrated again that aggressiveness toward Sergeant [redacted] while remaining friendly to the person that he likes . . . Sergeant [redacted].

(R. at 676–77).

Second, this element was established by overwhelming evidence that he was aware others could regard his statements as threatening violence and delivered

them anyway. *Counterman*, 143 S. Ct. 2106, at *2117; *Upham*, 66 M.J. at 87. Here, the content of the statement was an unconditional threat of a violent action demonstrating present intent towards SGT [redacted]: "I'm going to stab you in the neck." (R. at 455–56, 511–12, 518–19). Appellant was aware of the character of this communication because the statement was unambiguous in word choice and connotation. *Cf. Counterman*, 143 S. Ct. 2106, at *2114 (referring to "I am going to kill you for showing up late" as a statement that when taken in context does not convey a real possibility violence will follow).

Moreover, the evidence established his statement was a true threat because it was not made in jest, as idle banter, or for an innocent or legitimate purpose. As he said these words, he looked directly at the victim as someone whom he recognized he had disrespected two days prior. (R. at 456). *Cf. Counterman*, 143 S. Ct. 2106, at *2113 n.2 (discussing hypothetical situations where a speaker may be unaware of the character of their communication). Although oscillating between calm and hostile, his demeanor as he delivered this statement was described as harsh, angry, and upset. (R. at 511–12, 518–19). While the victim recalled appellant speaking in a low tone, witnesses standing next to appellant recalled appellant yelling at him to "get out of here" immediately before threatening to stab him in the neck. (R. at 510, 512, 518). Though appellant briefly switched to smiling and shaking the victim's hand after his statement, he

quickly returned to making offensive and particularized demeaning phrases towards the victim. (R. at 455). He also made his statement in the presence of three NCOs and a commissioned officer who were conducting a wellness check. (R. at 456). Two days prior, appellant shoved the victim in the chest in a similar circumstance. (R. at 450, 467). Viewed in totality, his threat was a continuation of selective aggression and provocation towards the victim that surpassed the level of recklessness.

Clearly, appellant's statement fell outside the ambit of protected speech such that the government's interest in prosecuting dangerous communication outweighed concerns of a chilling effect on his speech.[8] *See Counterman*, 143 S. Ct. 2106, at *2117. Thus, assuming arguendo there was error, such error was harmless beyond a reasonable doubt.

[8] As in *Levy*, the interests unique to the military context are implicated by appellant's communication; his statement, "I'm going to stab you in the neck," to a non-commissioned officer who was in the performance of his official duties undermines the effectiveness of response to command. 417 U.S. at 759.

CONCLUSION

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence.

[redacted]

VY T. NGUYEN
CPT, JA
Appellate Attorney, Government Appellate Division

[redacted]

STEWART A. MILLER
CPT, JA
Appellate Attorney, Government Appellate Division

[redacted]

MAJ, JA
Branch Chief, Government Appellate Division

[redacted]

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate Division

CERTIFICATE OF SERVICE, U.S. v. WATKINS (20210638)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 23rd day of August, 2023.

[redacted]

Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]