**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| U N I T E D S T A T E S, Appellee | ) | RESPONSE BRIEF ON BEHALF OF APPELLEE |
| v. | ) | Crim. App. Dkt. No. 20090083 |
| Specialist (E-4) **KENNETH L. GOODMAN** United States Army, Appellant | ) | **USCA Dkt. No. 11-0389/AR** |


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

## Granted Issues[1]

WHETHER APPELLANT'S PLEA OF GUILTY TO FAILURE TO OBEY A GENERAL REGULATION (CHARGE I) WAS IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO SECURE A DISCLAIMER OF THE MISTAKE OF FACT DEFENSE WHEN IT WAS RAISED DURING THE PROVIDENCY INQUIRY.

## Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ).[2] This Court has jurisdiction under Article 67(a)(3), UCMJ,[3] because it granted appellant's petition for review.

## Statement of the Case

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas[4] of failure to obey a general regulation, maltreatment (two specifications), making a false official statement, indecent exposure, and bigamy in violation of Articles 92, 93, 107, and 134, UCMJ.[5] Contrary to his plea, the military judge convicted appellant of wrongful

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[1] In accordance with this Court's 11 May 2011 order, Issue II will not be briefed.
[2] 10 U.S.C. § 866 (2008).
[3] 10 U.S.C. § 867(a) (2008).
[4] J.A. at 10.
[5] J.A. at 7-9, 29.

sexual contact, in violation of Article 120, UCMJ.[6] The military judge sentenced appellant to confinement for 12 months, reduction to Private (E-1), and a bad-conduct discharge.[7] The convening authority approved only 11 months confinement and the remainder of the adjudged sentence.[8]

## Statement of the Facts

Appellant was a Military Police Officer attached to his unit's Headquarters as a Personnel Clerk.[9] As the Personnel Clerk, he was responsible for assisting Soldiers who were in-processing his unit. PFC L arrived to the appellant's unit on or about 12 January 2008.[10] Appellant did not know PFC L but had heard from other Soldiers that she had a reputation for promiscuity.[11] Almost immediately after PFC L's arrival, appellant made several sexually charged comments to her.[12] These comments were about shaving genitalia and requesting sexual intercourse.[13] Appellant also told PFC L that he could "take care of [her] better than [her] husband" which meant that he could better satisfy her sexually.[14]

At the beginning of the providence inquiry, appellant stated that PFC L and him always talked about sexual topics

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[6] J.A. at 29.
[7] J.A. at 30.
[8] J.A. at 36.
[9] J.A. at 32.
[10] J.A. at 23.
[11] *Id.*
[12] J.A. at 32-33.
[13] J.A. at 14.
[14] J.A. at 33.

while at work.[15] He also stated that he did not think she was offended and that PFC L did not indicate that she was unreceptive to his comments.[16] Based upon appellant's responses, the military judge told counsel that he was "having some difficulty with . . . the providency of the plea."[17]

The Military Judge then conducted further inquiry into appellant's inconsistent comments. Eventually, appellant told the military judge that he barely knew PFC L and that they had only engaged in idle "chitchatting" of a non-sexual nature before he started the sexual talk.[18] According to appellant, PFC L was only being friendly and he "turned it sexual in nature."[19] As for PFC L's banter, appellant admitted that PFC L's subsequent responses were a "defense mechanism" to cover her discomfort and that he indeed created a "very hostile work environment."[20] Ultimately, appellant admitted that when he initiated the sexual talk, he had no reasonable basis to believe PFC L would be receptive to those types of comments.[21]

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[15] J.A. at 15.
[16] J.A. at 17.
[17] *Id.*
[18] J.A. at 24.
[19] J.A. at 26.
[20] J.A. 27-28.
[21] J.A. at 26.

## Summary of Argument

Although appellant's initial statements during the providence inquiry were inconsistent with his plea, the military judge's further inquiry clearly established that appellant initiated the sexual talk and that PFC L was not a willing participant. Appellant's providency at the beginning must be viewed in light of what he also said after the military judge further inquired into his seemingly inconsistent statements. Viewing the providency in its entire context, appellant's rationalizing statements did not reasonably raise a mistake of fact defense.

Even if appellant raised the specter of a defense, appellant's admission why he initiated the sexual talk shows that his mistake of fact claim was unreasonable under the circumstances. On balance, appellant's entire providency at best establishes the "mere possibility" of a defense. Therefore, the military judge did not abuse his discretion when he resolved the inconsistency with further factual inquiry.

## Standard Review and Applicable Law

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion.[22] Questions of law arising from a guilty plea are reviewed *de novo*.[23] On appeal, a guilty plea should not be overturned unless the appellant can show a "substantial basis" in law or fact to question the plea.[24]

Once a military judge has accepted a plea as provident and has entered findings based on it, this Court will not reverse findings or reject the plea unless there is a substantial conflict between the plea and the accused's statements or other evidence on the record.[25] The "mere possibility" of a defense is not a sufficient basis to reject the plea as improvident.[26]

## Argument

### I. The military judge properly resolved any inconsistencies or potential defenses by further inquiring into appellant's initial statements.

The military judge correctly applied the law by further inquiring into appellant's testimony that potentially raised a

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[22] *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F.1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F.1995)).
[23] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).
[24] *Id.*
[25] *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).
[26] *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

mistake of fact defense.[27] The military judge did not abuse his discretion when he concluded that the evidence, on the whole, did not reasonably raise a defense. Since the military judge conducted a thorough factual inquiry to clarify appellant's initial comments, he thereby resolved any inconsistencies and properly accepted appellant's plea.

Rule for Courts-Martial (R.C.M.) 902(e) requires the military judge to conduct a factual inquiry of the accused under oath to establish the factual basis of his plea.[28] The providence inquiry into a guilty plea must establish that the accused believes and admits that he is guilty of the offense and that the accused's own factual account objectively supports the plea.[29] If an accused sets up a matter that is inconsistent with his plea at any time during the proceedings, the military judge must either resolve the apparent inconsistency or reject the plea.[30] Testimony or other evidence raising possible affirmative defenses likewise requires further inquiry by the military judge

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[27] *Cf. Inabinette*, 66 M.J. at 323-24 (concluding that the military judge correctly applied the law by inquiring into potentially contradictory testimony from an accused allowing him to properly accept the plea without a disclaimer of the potentially defense).

[28] Manual for Courts-Martial, United States, R.C.M. 910(e) (2008)[hereinafter MCM].

[29] *United States v. Higgins*, 40 MJ. 67, 68 (C.M.A. 1994) (citations omitted). Manual for Courts-Martial, United States, R.C.M. 910(e) (2008)[hereinafter MCM].

[30] *United States v. Phillippe*, 63 M.J. at 309 (C.A.A.F. 2006) (quoting *Garcia*, 44 M.J. at 498); UCMJ, art. 45(a).

to resolve any ambiguity or inconsistency.[31] After the military judge has made the required inquiry, the military judge can then conclude that the apparent inconsistency or ambiguity has been resolved and accept the plea.[32]

This court affords military judges "broad discretion" in deciding whether or not to accept a guilty plea.[33] The Rules for Courts-Martial recognize that while military judges must establish a factual basis in order to accept the plea, the "means for establishing it are broader."[34] If a possible defense arises, the military judge has discretion regarding how to go about resolving those inconsistencies. After an inconsistency arises, as long as the military judge obtains an adequate factual basis to resolve the inconsistency, he does not abuse his discretion accepting the plea.[35] In reviewing the adequacy of the factual inquiry, this court affords the military judge "significant deference."[36]

The record shows that the military judge conducted a sufficient inquiry after he recognized that appellant raised a matter inconsistent with his plea. Despite appellant's initial

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[31] *Phillippe*, 63 M.J. at 310. *See also United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (citing *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976); *United States v. Dunbar*, 20 USCMA 478, 43 CMR 318 (1971)).
[32] *Phillippe*, 63 M.J. at 310.
[33] *United States v. Diaz*, 69 M.J. 127, 134 (C.A.A.F 2010) (citing *Inabinette*, 66 M.J. at 322).
[34] MCM, R.C.M. 910(e) analysis at A21-60 (2008).
[35] *See Inabinette*, 66 M.J. at 322 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).
[36] *Id.*

statements during providency, the military judge's further inquiry revealed that appellant initiated the sexually explicit talk and that PFC L was not receptive to his comments from the beginning.[37] In appellant's own words, any subsequent banter by PFC L was her "defense mechanism" to his sexually charged comments because she didn't know how to deflect them."[38]

Ultimately, appellant explained to the military judge how these comments truly started:

> MJ: Okay, so she took some actions to include giving you a hug, that made you believe that she would be receptive to these types of sexually charged comments?
>
> ACC: Yes, sir, and always - - sir, if I'm standing in the corner doing something, she'll come over there - - it would be a group of people - - she'll come over there and talk to me and ask - - me questions about - - non-military in nature. It's like, "Oh, where are you from?" I just guess, chitchatting, sir.
>
> MJ: Okay. Was - - was - - - -
> [The accused conferred with defense counsel.]
>
> ACC: Sir, she was trying to be friendly and I turned it sexual in nature.
>
> MJ: And that—that was my question. Were any of her comments that she was making of a sexual nature?
>
> ACC: No, sir, I initiated that.
>
> MJ: So you started that?

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[37] J.A. at 27-28.
[38] J.A. at 27.

ACC: Yes, sir.

MJ: So she was merely asking where are you from, trying to find out—trying to be friendly?

ACC: Yes, sir.

MJ: In a non-sexual manner?

ACC: Yes. Yes, sir.[39]

Under these circumstances, the military judge did not have to secure a disclaimer of the mistake-of-fact defense. Appellant admitted that he had no reason to believe PFC L would be receptive to his sexually charged comments. He also repudiated his earlier assertion that PFC L engaged in mutual banter. On the contrary, appellant admitted that PFC L's subsequent responses were a "defense mechanism" to his unwelcome comments. Considering all of the facts gleaned under further inquiry and the significant deference given to judges in these cases, this court should not reverse the military judge's acceptance of appellant's plea.

## II. Appellant's plea viewed in its entire context shows that any mistake of fact was unreasonable under the circumstances.

The full context of appellant's providence inquiry must be considered before deciding whether a substantial conflict

[39] J.A. at 25-26.

exists.[40] Appellant's statements, including his *de facto* disclaimer at the end of his providency, must be taken at "face value" in reviewing whether his plea was provident.[41] After the military judge's further inquiry, appellant effectively abandoned his earlier assertion that PFC L was a willing and mutual participant in the sexual banter.

Taking into account the record as a whole, appellant only raised the "mere possibility" of a mistake of fact defense. If a substantial conflict existed at the beginning of his plea, it was indeed eliminated when appellant admitted that he initiated the sexual talk and explained that PFC L's banter was her way of defusing his unwelcome comments.[42] All in all, appellant's providency, at best, establishes the "mere possibility" of a conflict between his plea and the evidence which is not a sufficient basis to overturn a guilty plea.[43]

Even if appellant raised a mistake-of-fact defense, the military judge did not have to explain the defense and secure a disclaimer so long as he "adequately resolved the issues during the providence inquiry."[44] In *United States v. Inabinette*, the military judge heard testimony from a medical doctor during a guilty plea proceeding that potentially raised a mental

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[40] *United States v. Smauley*, 42 M.J. 449, 452 (C.A.A.F. 1995).
[41] *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976).
[42] J.A. at 26-27.
[43] *United States v. Phillippe*, 63 M.J. at 309 (C.A.A.F. 2006).
[44] *See United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997).

responsibility defense.[45] Alerted to the possibility of a defense, the military judge conducted further inquiry into the doctor's testimony and also questioned the accused, but did not further elaborate upon the mental responsibility defense before accepting the accused's guilty plea.[46] This Court held that the accused's plea, without a disclaimer, was nonetheless adequate in light of the further inquiry into the potentially contradictory testimony.[47]

Similarly, in *United States v. Peterson*, an accused raised a potential mistake of fact defense when explaining why he committed a sexual assault. During the accused's unsworn statement he stated, "At the time, sir, I believe[d] that I was invited, but now, I believe that I wasn't invited on that evening."[48] Upon receipt of this statement, the military judge did not secure a disclaimer to the mistake of fact defense and accepted appellant's plea.

On review, the *Peterson* court found no substantial conflict between the plea and appellant's statement.[49] The court noted that, in a general intent crime, any mistake of fact defense based upon appellant's belief must be both subjectively held and

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[45] *Inabinette*, 66 M.J. at 323.
[46] *Id.*
[47] *Id.* at 323-24.
[48] *Peterson*, 47 M.J. at 234.
[49] *Id.* at 235.

reasonable in light of all the circumstances.[50] The court declared that, "[a]part from this one bare assertion . . . nothing exists in the record which would indicate that appellant ever held either a subjective or an objectively reasonable belief of having been 'invited,' so as to have raised any more than a mere possibility of a defense at trial" and that his statements were mere rationalization.[51]

Here, as in *Peterson,* a review of the circumstances of this case cuts against appellant's assertion that he had a reasonable belief that PFC L would be receptive to his sexually explicit comments. The conversations between appellant and PFC L were of a non-sexual nature, or as appellant says, "chitchatting," until he decided to initiate the overt sexual talk about shaving her genitals and satisfying her sexually. Clearly, PFC L's reputation for promiscuity is not a reasonable basis to conclude that she would be receptive to these kinds of comments at work. Rather, under these circumstances, it was unreasonable for appellant to mistake PFC L's small-talk as an invitation to make sexually explicit comments. As appellant himself aptly admitted, PFC L was only "trying to be friendly and I made it sexual."[52]

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[50] *Id.* at 234-35.
[51] *Id.* at 235.
[52] J.A. at 26.

Appellant's position on appeal that PFC L's friendly behavior was an invitation for him to make sexually explicit comments is merely an attempt to rationalize his behavior. This Court has recognized:

> Often, an accused is reluctant to admit to a particular aspect of an offense. However, that should not vitiate his guilty plea if he recognizes that the evidence against him will prove the point, and he admits his guilt to the offense.
>
> We should not overlook human nature as we go about the business of justice. One aspect of human beings is that we rationalize our behavior and, although sometimes the rationalization is "inconsistent" with the plea," more often than not it is an effort by the accused to justify his misbehavior.[53]

Assuming arguendo that this Court decides that appellant's claim has merit, the Court should return the case to the Army Court for a sentence reassessment. In this case, the Army Court can affirm the approved sentence.[54] Since, appellant did not challenge and remains convicted of the more serious specifications on the charge sheet including, wrongful sexual contact, there was not a significant change to the penalty landscape.

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[53] *Peterson*, 47 M.J. at 235 (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

[54] *United States v. Buber*, 62 M.J. 476, 477 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)) (citations omitted); *United States v. Moffeit*, 63 M.J. 40, 43 (C.A.A.F. 2006) (Baker, J. concurring) (identifying a non-exhaustive list of factors relevant to sentence reassessment).

In sum, the entire providence inquiry and appellant's stipulation of fact reveal that no substantial conflict exists between the plea and evidence. Disclaimers are not legally required when the potential inconsistencies are *factually* resolved during the providence inquiry. Therefore, the military judge did not abuse his discretion in accepting appellant's guilty plea.

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the findings and approved sentence.

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