IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
	)	Crim. App. Dkt. No. 201000366
v.	)	
	)	USCA Dkt. No. 11-5003/NA
Thomas J. HAYES, Midshipman First Class U.S. Navy, Appellee	)	

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

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, because Appellee's approved sentence included a dismissal. The Judge Advocate General of the United States Navy has certified the above issues to this Court. Accordingly, this Court has jurisdiction pursuant to Article 67(a)(2), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(2).

Statement of the Case

A military judge, sitting as a general court-martial, convicted Appellee of eleven specifications of selling military property without authority and ten specifications of theft of military property, in violation of Articles 108 and 121, UCMJ, 10 U.S.C. §§ 908 and 921. The Military Judge sentenced Appellee to confinement for 36 months, forfeitures of all pay and allowances, a fine of $28,000, and a dismissal. The Convening Authority approved the sentence as adjudged and, except for the dismissal, ordered the sentence executed.

The Record of Trial was docketed with the lower court on June 22, 2010. After Appellee and the Government submitted briefs, the lower court rendered its decision without hearing oral argument or ordering supplemental briefs. *United States v. Hayes*, No. 201000366, 2011 CCA LEXIS __ (N-M. Ct. Crim. App. Jan. 27, 2011). The lower court set aside the findings of guilty and the sentence and authorized a rehearing.

On February 28, 2011, the Government filed a certificate of review signed by The Judge Advocate General of the Navy with this Court.

Statement of Facts

Between September 2008 and February 2009, Appellee routinely stole laboratory equipment from a United States Naval Academy classroom and sold the items on eBay. (J.A. at 5-31.)

Appellee, a midshipman at the Naval Academy, noticed that the Communications Engineering Studio Lab in Rickover Hall contained unsecured laboratory equipment. (J.A. 6.) Soon after, he developed an operation where he posted a lab item for sale on eBay and waited for the highest bidder to win the internet auction. Next, he would go to the classroom and steal the item. (J.A. 5-31.) Finally, he shipped the item from the Naval Academy mailroom and awaited electronic payment. (J.A. 33.)

At his court-martial, Appellee repeatedly testified during the plea colloquy that no person or circumstance forced him to commit these crimes. (J.A. 38-57, 59-60, 62, 64, 66-67, 69, 71.) Appellee's signed Stipulation of Fact stated, in part, "I could have stopped myself from committing any or all of these crimes. I was not compelled to commit these crimes. Instead, I knowingly decided to commit each of these offenses." (J.A. 6, 31.) Appellee knew that he had no legal justification or excuse for stealing military property and selling it for profit on eBay. (J.A. 43-44, 46-53, 56-57, 59, 61, 63, 65, 68, 70-71.) Appellee told the Military Judge that he simply seized the opportunity to provide his mother financial assistance: "The first time [stealing and selling military property] . . . it was purely curiosity, you know, . . . and I was like, 'Well, my mom needs money, there's all these extra things laying around.'" (J.A. 77.) In his sworn NCIS statements, Appellee stated that

he earned approximately $13,000 from his sales, and admitted that he only shared "most" of his ill-gotten gains with his mother. (J.A. 33-36.)

During presentencing, Appellee immediately established that he had no defense or excuse: "Sir, I would just like to say that I am by no means making any excuse for my actions and I take full responsibility for the things that I've done." (J.A. 74.) He continued, "With that being said, I would like to . . . give some background" for the "poor——poor decisions." (J.A. 74.)

Appellee explained that in the fall of his third year at the Naval Academy his mother called him often and requested financial support. (J.A. 75-77, 81.) Appellee sought advice from several sources, including his uncle, counselors at the Midshipman Development Center, and a Navy Chaplain. (J.A. 76-77.) All parties advised him that his mother needed to handle her own financial responsibilities. (J.A. 77.)

Next, Appellee asserted that his mother "would call crying" and tell him "that she didn't want to live anymore" and that she was "thinking about" taking her own life. (J.A. 77.) Appellee stated that his mother's comments led to "many sleepless nights." (J.A. 77.) Appellee expressed that he "didn't know how to deal with somebody who's threatening to end their life or . . . not be there anymore." (J.A. 78.) He stated that he

"couldn't differentiate the difference" between doing the right things "for home," or to "make the phone calls stop," or "for being a Midshipman." (J.A. 77-78.)

Finally, Appellee begged for a lenient sentence: "And that's——that's the pressures that I was feeling at the time . . . and I hope that the court shows some sort of compassion for—— for those things . . . I should be punished, and I know that and I understand that." (J.A. 78.)

Appellee submitted a signed statement from his mother during presentencing. (J.A. 81.) Appellee's mother confirmed that she placed pressure on her son to assist her financially, demanded that he visit her, and "made him feel guilty and increased the pressure with constant phone calls and telling him my thoughts about ending my life." (J.A. 81.)

The Military Judge did not reopen the providence inquiry or reject Appellee's pleas. (J.A. 78-79.) Neither Trial Counsel nor Trial Defense Counsel requested the Military Judge reopen the providence inquiry or reject Appellee's pleas. (J.A. 78-79.)

On May 12, 2010, Appellee prepared, signed, and submitted a clemency request to the Convening Authority. (J.A. 78-81.) Appellee explained the pressures that motivated him to steal and sell military property. Appellee disavowed a defense of duress or coercion: "Sir, by no means do I wish to ever make excuses for my actions because I am the only one that made me go and

steal those items. I do ask that you consider all of me, and not just the me [sic] that is a thief." (J.A. 84-85.)

Other facts necessary for a resolution of the issues presented are included in the argument below.

Summary of Argument

An appellate court will not disturb a military judge's decision to accept a guilty plea unless there is a substantial basis in law or fact to question the plea. An appellate court will find a substantial basis to question the plea when there is "substantial conflict" between the plea and matters raised by the accused or other evidence on the record. Such conflict can exist when an accused raises a "possible defense" at any time during the trial.

To ensure that an accused's pleas are knowing, voluntary, and intelligent, the military judge must resolve the inconsistency created by a possible defense. It is desirable for a military judge to inquire into even the mere possibility of a defense. An appellate court, however, will only disturb findings where the military judge did not reconcile the guilty plea with matters that raise a "possible defense" as opposed to the "mere possibility" of a defense.

Distinguishing between the two requires a contextual analysis; however, it is not wholly subjective. Both the plain meaning of the terms and this Court's precedent strongly suggest

that the distinction lies in whether the prima facie elements of a defense are present within the record of trial. While the evidence or other matters do not have to raise a complete or perfect defense to the charges, the required contextual analysis would suggest that, at a minimum, the prima facie elements of a defense exist. Absent a prima facie defense, the matters raise, at most, the "mere possibility" of a defense, which will not jeopardize the plea on appeal. To suggest otherwise subjects the distinction between the "mere possibility" of a defenses and a "possible defense" to a wholly subjective analysis, in which one panel of the appellate court may find a mere possibility while another may find a possible defense, leading to endless appellate challenges and inconsistent precedent.

Here, Appellee did not raise a prima facie duress defense because: (1) there was no nexus between the threatened harm and his actions; (2) his actions were avoidable; (3) his mother did not threaten immediate death or immediate serious bodily injury; (4) he did not give all his wrongful earnings to his mother, and thus, indicated that he had other motives to commit these crimes; and, (5) he did not indicate that his apprehension continued throughout the six months.

Furthermore, a suicide threat, as a matter of law, cannot give rise to a duress defense. In *United States v. Jeffers*, this Court implied that a suicide threat could be the threat

necessary to raise a duress defense. However, in *United States v. Washington*, this Court held that to give rise to a duress defense, the threatened harm must emanate from another person's unlawful act. Here, Appellee's references to his mother's threats cannot raise a possible defense of duress because his mother did not threaten an unlawful act against Appellee or another innocent person. If duress requires an unlawful threat made against the accused or another innocent person, then a suicide threat, as a matter of law, cannot be the threat necessary to raise a duress defense.

Accordingly, this Court should reverse the lower court's decision.

Argument

I. and II.[1]

AN ACCUSED RAISES A "POSSIBLE DEFENSE" WHEN HE LAYS OUT A PRIMA FACIE CASE FOR A DEFENSE. THE LOWER COURT ERRED WHEN IT FOUND APPELLEE'S UNSWORN STATEMENT CREATED SUBSTANTIAL CONFLICT WITH HIS GUILTY PLEAS BECAUSE PRESENTENCING EVIDENCE RAISED ONLY THE "MERE POSSIBILITY" OF A DURESS DEFENSE.

A. Standard of Review.

While an appellate court reviews questions of law de novo, it affords a military judge broad discretion in whether or not to accept a plea. *United States v. Conliffe,* 67 M.J. 127, 131 (C.A.A.F. 2009) (citing *United States v. Inabinette,* 66 M.J.

[1] Presented Issues I and II have been combined into this section.

320, 322 (C.A.A.F. 2008)). "Once the military judge has accepted a plea as provident and has entered findings based on it, an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record." *United States v. Shaw*, 64 M.J, 460, 462 (C.A.A.F. 2007) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

"The standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion." *Inabinette,* 66 M.J. at 322. A military judge abuses his discretion if he accepts a guilty plea without an "adequate basis in law and fact to support the plea." *Id.* A military judge's determinations of law "arising during or after the plea inquiry are reviewed de novo." *Id.*

B. Law.

1. The "possibility of a defense" raises conflict with a guilty plea, but the "mere possibility" of one does not.

If an accused "sets up matter inconsistent with the plea" at any time during a guilty plea proceeding, the military judge must either resolve the conflict or reject the plea. Article 45(a), UCMJ, 10 U.S.C. § 845(a); *see* Rule for Courts-Martial (R.C.M.) 910(h)(2), Manual for Courts-Martial, (United States, 2008 ed.). Should the accused's statements or material in the record indicate a defense might exist, the military judge "must

determine whether that information raises either a conflict with the plea and thus the possibility of a defense or only the 'mere possibility' of conflict." *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citing *Shaw*, 64 M.J at 462). The "possibility of a defense" conflicts with a guilty plea and the military judge must inquire into the defense. *Riddle*, 67 M.J. at 338. Conversely, the "mere possibility" of a defense does not raise conflict with the plea. *Id*.

2. If the accused establishes a prima facie defense, then a "possible defense" exists. But if the accused fails to establish a prima facie defense, only the "mere possibility" of a defense exists.

In deciding the providence of a plea, the military judge must refrain from assessing if an accused has raised a plausible or credible defense; it only matters whether the statement raises conflict with the guilty plea. *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983). Whether the matter raises the "possibility of a defense" or only the "mere possibility" of one is a contextual determination made by the military judge. *Riddle*, 67 M.J. at 338 (citing *Shaw*, 64 M.J at 464). This current contextual analysis lends itself to confusion. The Government invites this Court to clarify the distinction and expressly hold that an accused sets up a "possible defense" when he lays out a prima facie case for a defense. A prima facie

standard would help trial and appellate courts distinguish between a "possible defense" and the "mere possibility" of one.

An accused sets up a prima facie defense by raising some evidence to satisfy each element. If, at any time during the proceeding, an accused "lays out the elements of a possible defense," a military judge has a duty to inquire further to resolve the apparent inconsistency. *United States v. Phillippe*, 63 M.J. 307, 310-311 (C.A.A.F. 2006); *see also Shaw*, 64 M.J. at 462 ("The existence of an apparent and complete defense is necessarily inconsistent with a plea of guilty."). An accused, however, is not required to establish a complete defense because "[e]ven if an accused does not volunteer all the facts necessary to establish a defense, if he sets up matter raising a possible defense, then the military judge is obligated to make further inquiry to resolve any apparent ambiguity or inconsistency." *Phillippe*, 63 M.J. at 310; *see also United States v. Olinger*, 50 M.J. 365, 367 (C.A.A.F. 1999) (finding that the appellant's unsworn statement that he went UA and missed movement because he feared for his wife's life was not inconsistent with his guilty pleas because he "did not provide any further details indicating an immediate threat . . . or that there were no alternative" options to committing the offenses).

This Court's precedent suggests that a "possible defense" is one that triggers each element of a defense, making a prima

facie case for that defense, but does not necessarily establish a complete defense. *See Phillippe*, 63 M.J. at 310-311. Conversely, where this Court has found the "mere possibility" of a defense, the accused did not establish a prima facie defense. *See Riddle*, 67 M.J. at 338; *Shaw*, 64 M.J. at 462; *Olinger*, 50 M.J. at 367; *Garcia*, 44 M.J. at 498.

C. Discussion.

This section will address why the lower court erred when it: (1) ignored its own precedent and, (2) misinterpreted this Court's precedent and wrongly determined that Appellee's unsworn statement raised a possible duress defense, instead of the mere possibility of one.

1. The Court of Criminal Appeals ignored its precedent.

The lower court's unpublished opinion erroneously ignored its own precedent as established in its published opinions in *United States v. Collins*, 37 M.J. 1072 (N-M.C.M.R. 1993), and *United States v. Barnes*, 60 M.J. 950, 955 (N-M. Ct. Crim. App. 2005). In *Collins*, the appellant pled guilty to unauthorized absence and breaking restriction. At presentencing, the appellant suggested that he committed the crimes because he was concerned for his fiancée's life. The lower court found that no duress defense was raised: "In reaching this conclusion, we adopt the reasoning of our Army brethren in limiting the

application of the duress defense to those instances in which the coercion is imposed by a third party, not by the accused or another innocent person." *Id*. at 1073 (citing *United States v. Mitchell*, 34 M.J. 970 (A.C.M.R. 1992). Despite this binding precedent, the lower court determined that Appellee's apprehension caused by his mother's threat could somehow be the threat necessary to raise the possible defense of duress.

Just six years ago, the Navy-Marine Corps Court of Criminal Appeals reaffirmed that to raise duress, "the coercion imposed must be by a third party and not by the accused or another innocent person." *Barnes*, 60 M.J. at 955. This decision clearly makes the "innocent person" and the "third party/coercer" two separate and distinct human beings. Despite this binding precedent, in finding that Appellee's statements raised the possible defense of duress, the lower court implied that Appellee's mother could have been (1) the innocent person (if Appellee acted because he feared for his mother's life) *and*, (2) the person coercing Appellee (if she threatened Appellee that she would kill herself).[2]

[2] In the third presented issue, the Government presents a more thorough analysis as to why suicide cannot be the basis for a duress defense.

2. Appellee's unsworn statement did not raise the possible defense of duress because he did not set up a prima facie case for duress.

As discussed above, an accused must set up a prima facie defense by raising some evidence to satisfy each element. *See Phillippe*, 63 M.J. at 310-311; Appellant's Br. at 11-12. Where the accused has not established a prima facie defense, only the "mere possibility" of conflict exists. *See Riddle*, 67 M.J. at 338; *Shaw*, 64 M.J. at 462; *Olinger*, 50 M.J. at 367; *Garcia*, 44 M.J. at 498.

"The defense of duress applies when the accused has a (1) 'reasonable apprehension' that (2) 'the accused or another innocent person' would (3) 'immediately' suffer death or serious bodily injury if the accused 'did not commit the act.'" *United States v. Thompson*, 63 M.J. 228, 232 (C.A.A.F. 2006) (quoting *United States v. Vasquez*, 48 M.J. 426, 430 (C.A.A.F. 1998)). "The immediacy element of the defense is designed to encourage individuals promptly to report threats, rather than breaking the law themselves . . . it ensures a nexus or causal relationship between the threat and the wrongful act." *Vasquez*, 48 M.J. at 430.

a. There was no nexus between the "threat" and Appellee's crimes, so Appellee did not have a "reasonable apprehension."

In *Olinger*, the appellant pled guilty to unauthorized absence and missing movement. In his unsworn statement at

presentencing, the appellant told the military judge that his wife suffered from depression and took Prozac, an antidepressant drug. He told the court "at the time I went UA I felt that her depression might kill her from the stress if I [deployed as scheduled]." *Olinger*, 50 M.J. at 366. The military judge did not investigate the appellant's statement. In *Olinger*, this Court affirmed the appellant's convictions because his statements raised only the "mere possibility" of a defense of duress.

Here, there was no "reasonable apprehension" because there was no nexus between the threat and Appellee's crimes. Appellee's unsworn statement and his mother's letter indicated that his mother experienced suicidal ideations and requested money from Appellee. That is not the same as his mother threatening to kill herself *unless* he stole lab equipment from the Naval Academy and sold it. It is not even the same as his mother threatening to kill herself *unless* Appellee gave her money.

Thus, as in *Olinger*, Appellee's statements that his he was concerned for her life were vague and speculative. The Record establishes that Appellee dreamed up this scheme, and then planned and executed it alone. Appellee never suggested in his unsworn statement that his mother played any active role in his crimes. In fact, the silent Record indicates Appellee's mother

did not know he was committing these offenses. (J.A. 74-78, 81.)

Appellee did not indicate that he could only assist his mother by stealing lab equipment and selling it on eBay. *See Olinger*, 50 M.J. at 367 (finding the only "mere possibility" of a duress defense where the appellant "did not provide any further details . . . that there were no alternative sources of assistance for his wife other than his unauthorized absence and missing movement."). Appellee actually stated that he stumbled upon the scheme and the opportunity was too good to pass on. (J.A. 77.) Appellee asked others at the Naval Academy how *he* could help his mother. However, he did not state or imply that he called the police, mental health professionals, or exhausted family contacts in an effort for *others* to help his mother. Thus, like in *Olinger*, Appellee's statement did not indicate that there were no alternative sources of assistance than his crimes. Therefore, Appellee did not establish a prima facie showing of the first prong for a defense of duress.

b. <u>Even if a suicide threat can be the threat necessary to establish a duress defense, under these facts the "threat" fails because Appellee did not indicate any subjective belief that his mother would suffer immediate death or immediate serious bodily injury</u>.

The immediacy of the harm necessary to raise a duress defense may vary with the circumstances. R.C.M. 916(h),

Discussion. "For example, a threat to kill a person's wife the next day may be immediate if the person has no opportunity to contact law enforcement officials or otherwise protect the intended victim or avoid committing the offense before then." *Id*.

Here, the immediacy element is missing because (1) Appellee did not state or suggest that his mother made specific suicide threats, as to time, place or manner, and, (2) Appellee's mother did not provide any evidence of an immediate threat. (J.A. 81.) Appellee never stated or implied that he did not have time to contact law enforcement, mental health professionals or family to help his mother. He did not indicate that he felt this was the only option or that he had exhausted all avenues of relief.

While Appellee suggested that he feared for his mother's life, Appellee's fear does not, without more, amount to fear of immediate death. *See United States v. Logan*, 22 C.M.A. 349, 351 (C.M.A. 1973) (finding that appellant's unsworn statements that he stole a jeep, in part, because he feared for his family's safety, lacked "any real foundation in them for a well-grounded apprehension of immediate death or serious bodily harm if he did not participate in the venture.")

The lower court erred because it engaged in speculation beyond the Record so that it could find some evidence of an immediate threat of harm. This Court has stated that it "will

not speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." *Olinger*, 50 M.J. at 367 (quoting *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995)). Despite this, the lower court speculated that because Appellee suggested that he committed these crimes to prevent his mother's suicide, he necessarily indicated "some immediacy in his mind as to the prospective threat." *Hayes*, 2011 CCA LEXIS, at *4.

A "possible defense" was not raised because there was no evidence to suggest Appellee believed that his mother would be "immediately killed or would immediately suffer serious bodily injury" if he did not commit his crimes. R.C.M. 916(h). Thus, Appellee failed to make a prima facie showing of the third prong of duress.

c. The Military Judge did not err when he accepted Appellee's plea because the evidence before the Military Judge contradicted Appellee's unsworn statement, so it raised, at most, the "mere possibility" of a duress defense.

In *Shaw*, this Court addressed whether an appellant's reference to his bipolar condition during his unsworn statement set up matter raising a possible defense. In *Shaw*, the appellant told the military judge that he was brutally beat into a coma, diagnosed with bipolar disorder, and soon after, "that's when I started to get in trouble." *Shaw*, 64 M.J. at 461. This Court held that the appellant's unsworn statements raised only

the "mere possibility" of a defense of lack of mental responsibility. In *Shaw*, this Court noted that "evidence the military judge had before him"——that appellant was awarded non-judicial punishment for a 20-day unauthorized absence before he was attacked and diagnosed with bipolar disorder——contradicted the appellant's unsworn suggestion that his bipolar disorder triggered his bad behavior. *Id*. at 464, n.5.

Appellee's case is similar to *Shaw*. Here, Appellee's unsworn statement referenced his concern for his mother's life. However, like in *Shaw*, the evidence before the Military Judge contradicted Appellee's unsworn assertions. The Court of Criminal Appeals erred because it afforded no weight to Appellee's lengthy plea colloquy and signed Stipulation of Fact. In each, Appellee admitted all the facts necessary to satisfy the elements of all charges and specifications.

In the plea colloquy, Appellee expressly disavowed the essence of a duress defense when he repeatedly testified that no one forced him to steal and sell military property. Additionally, Appellee told NCIS that he only gave his mother "most" of illegal earnings, which proved that he did not commit his crimes solely to help her. (J.A. 33.) Thus, Appellee's unsworn statement, in light of other evidence the military judge had before him, did not raise the possible defense of duress. *See Shaw*, 64 M.J. at 464, n.5.

Appellee did not indicate continuous apprehension of his mother's immediate death each time he committed crimes between September 2008 and February 2009. In fact, Appellee indicated that his crimes were born of motive and opportunity: "The first time——it was purely curiosity . . . and I was like, 'Well, my mom needs money, there's all these extra things laying around.'" Motive plus opportunity equals just that. It does not equal a possible duress defense. The lower court created conflict where none existed.

"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." *Garcia*, 44 M.J. at 498 (quoting *United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987) (Cox, J., concurring)).

The lower court conflated Appellee's rationalization of his behavior with the raising of a possible defense. Appellee's unsworn statement explained why his crimes——his actions——were bad, but he was not. Appellee never stated or implied that anyone forced him to commit these crimes. In fact, Appellee immediately staked the perimeter for his statement's interpretation:

> Sir, I would just like to say that I am by no means making any excuses for my actions and I take full responsibility for the things that I've done. With that being said, I would like to——to give some background as to what's going on in my life at the time I made these poor——poor decisions.

(J.A. 74.) Considered in proper context, the remainder of Appellee's unsworn statement did not raise conflict with his guilty pleas.

III.

> CONSISTENT WITH THIS COURT'S HOLDING IN *UNITED STATES V. WASHINGTON*, A DURESS DEFENSE REQUIRES THE THREAT OF IMMEDIATE DEATH OR IMMEDIATE SERIOUS BODILY INJURY TO AN ACCUSED OR ANOTHER INNOCENT PERSON EMANATE FROM ANOTHER PERSON'S UNLAWFUL ACT. SUICIDE IS A LAWFUL ACT. THE THREAT TO COMMIT SUICIDE, THEREFORE, CANNOT BE THE THREAT NECESSARY TO ESTABLISH A DURESS DEFENSE.

A. Law.

1. Duress requires apprehension of immediate death or immediate serious bodily injury against the accused or another innocent person.

Duress may be a possible defense to a crime:

> It is a defense . . . that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

R.C.M. 916(h). "The immediacy element of the defense is designed to encourage individuals promptly to report threats, rather than breaking the law themselves . . . it ensures a nexus or causal relationship between the threat and the wrongful act." *Vasquez*, 48 M.J. at 430.

2. Duress requires that the threat emanate from an unlawful act of another person.

In *United States v. Dixon*, 548 U.S. 1, 5 (2006), the United States Supreme Court "presume[d] the accuracy" of the District Court's description of the duress defense, which required an "unlawful and imminent" threat of death or serious injury. Traditionally, duress applied to "criminal actions performed under an unlawful threat of imminent death or serious bodily injury caused by human forces . . . ." *United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980)).

In the context of "obedience to lawful general orders and essential purposes of military law," the duress defense in R.C.M. 916(h) "should be viewed in a manner consistent with the requirement in prevailing civilian law that a threat emanate from an unlawful act of another person." *United States v. Washington*, 57 M.J. 394, 398 (C.A.A.F. 2002). "Suicide or attempted suicide is not a crime under the criminal statutes of

. . . any state." *Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1624 (Cal. Ct. App. 1992) (citations omitted).

B. Discussion.

This Court has not directly answered whether suicide may be the threat necessary to give rise to duress, but in light of *Washington*, the answer should be no. The Government respectfully invites this Court to hold that a suicide threat cannot, as a matter of law, be the threat necessary to give rise to a duress defense. *Washington* appears to clarify dicta in *United States v. Jeffers*, 53 M.J. 13 (C.A.A.F. 2002), where this Court noted that a military judge properly instructed the members on the duress defense where the appellant raised some evidence that he acted in response to his loved one's threat to kill herself.

In *United States v. Mitchell*, 34 M.J. 970 (A.C.M.R. 1992), the Army Court of Military Review held that a soldier's apprehension from his wife's suicidal ideations could not, as a matter of law, give rise to duress. In *Mitchell*, the appellant pled guilty to desertion and then raised his concerns for his wife during presentencing. The Army court held that duress could not emanate from another person's suicide threat:

> . . . the defense of duress is intended to apply only to cases where the coercion is asserted by third persons. R.C.M. 916(h) requires that an "innocent person would immediately *be killed* or suffer serious bodily injury" (emphasis added) to support the

> defense. It also refers to "harm threatened" to an accused or another innocent person. This supports the conclusion that the defense contemplates harm by another, not self-inflicted injury.

Id. at 973.

Here, the suicide threat cannot be the threat necessary for duress because it was not a threat against him or an "innocent person," as contemplated by the law. When Appellee's mother threatened harm against herself, she did not threaten an "innocent person." Instead, the reasonable interpretation of "another innocent person" requires an accused act to protect another person (and not the person making the threat) from a threat made by a third party.

Appellee's mother threatened harm only against herself. Even if the there was some evidence that Appellee believed the threatened harm was immediate, it should not matter. Appellee's mother did not make an unlawful threat because suicide is a lawful act. Appellee's mother, at most, threatened to commit a lawful act. Thus, the Military Judge was not required to conduct further inquiry into a defense that did not exist. The lower court erred because the underlying threat could not give rise to duress.

Conclusion

Wherefore, the Government respectfully requests that this Court reverse the decision of the lower court.

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