IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant, v. Thomas J. HAYES Midshipman First Class (MIDN, 1C) U.S. Navy, Appellee.	**BRIEF ON BEHALF OF APPELLEE** Crim.App. No. 201000366 USCA Dkt. No. 11-5003/NA

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

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Index

Table of Authorities

State Court Cases

Federal Statutes

Manual For Courts-Martial

Other

Issues Presented

I

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT'S UNSWORN STATEMENT DURING PRESENTENCING RAISED THE "POSSIBLE DEFENSE" OF DURESS.

II

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED, AS A MATTER OF LAW, WHEN IT FOUND THAT THE ACCUSED'S UNSWORN STATEMENT RAISED THE POSSIBILITY OF A DEFENSE WHEN THE FACTS ON THE RECORD DID NOT ESTABLISH A PRIMA FACIE CASE FOR DURESS.

III

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN IT SET ASIDE THE FINDINGS AND SENTENCE DUE TO THE MILITARY JUDGE'S FAILURE TO INVESTIGATE APPELLANT'S PLEA FOR THE POSSIBILITY OF A DURESS DEFENSE BECAUSE SUICIDE CANNOT, AS A MATTER OF LAW, BE THE THREAT NECESSARY TO ESTABLISH THE DEFENSE OF DURESS.

Statement of Statutory Jurisdiction

The lower court reviewed Appellee's case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

A military judge, sitting as a general court-martial, tried Appellee on March 4, 2010. Consistent with his pleas, he was found guilty of violating Articles 108 and 121, UCMJ.[1] The military judge sentenced him to forfeit all pay and allowances, a fine of $28,000, 36 months confinement, and a dismissal.[2] In his undated action, the convening authority approved the sentence as adjudged and, except for the dismissal, ordered it executed.[3]

In its January 2011 opinion, NMCCA set aside the findings and the sentence, and authorized a rehearing.[4] On February 28, 2011, the Judge Advocate General of the Navy certified three issues to this Court.

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[1] JA at 72.
[2] JA at 80.
[3] JA at 89-90.
[4] JA at 4.

Statement of Facts

Midshipman (MIDN) Hayes's mother (Mrs. Jackson)[5] was plagued by financial problems. She started asking him for money during his freshman year at the Naval Academy, and he provided it when he could.[6] To keep his mother's creditors at bay, MIDN Hayes worked 45-50 hours a week during summer breaks to supplement her income.[7] Despite these efforts, his mother lost her car and personal belongings and could not pay her mortgage.[8] Fearing the loss of her home, she called him daily to stress that—as her eldest son—he was responsible for helping her.[9] He would respond that he couldn't help and made excuses to end the call.[10]

Uncertain of what to do, MIDN Hayes sought advice from the Chaplain and Midshipmen Development Center counselors.[11] They advised him that his mother needed to care for herself and that he needed to focus on graduating.[12] But his mom kept calling and asking for money. Her pleas escalated to the point that she was actually sobbing on the phone while telling Appellant that she didn't want to live anymore and was thinking of suicide.[13] MIDN Hayes did not know how to handle this.[14] His father died when he

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[5] JA at 81.
[6] JA at 75-76.
[7] JA at 75.
[8] JA at 76.
[9] *Id.*
[10] JA at 76.
[11] JA at 76-77.
[12] JA at 77.
[13] *Id.*
[14] *Id.*

was 11 and he feared losing his mother too.[15] Likewise, he worried his three younger siblings would lose their mother.[16] During sentencing, he stated:

> I know it wasn't right, but in my state of mind I just—I just couldn't differentiate the difference between doing the right things for—for home or doing the right thing that's going to make the phone calls stop, or doing the right thing for being a Midshipman.[17]
>
> . . .
>
> I'm not—I didn't know how to deal with somebody who's threatening to end their life or threatening to, you know, not be there anymore. And that's—that's the pressures that I was feeling at that time, sir . . .[18]

The defense also submitted a letter from Mrs. Jackson in which she indicated:

- her home was taken from her;
- she felt it was her son's duty to come to her financial rescue;
- she asked him for money daily; and
- when he was not providing for her, she made him feel guilty and increased the pressure with constant phone calls "telling him my thoughts about ending my life."[19]

Despite MIDN Hayes's sentencing statements and his mother's letter, the military judge did not question him or his defense counsel on the defenses of duress and lack of mental responsibility.

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[15] JA at 77.
[16] *Id.*
[17] JA at 77-78.
[18] JA at 78.
[19] JA at 81.

In the court below, MIDN Hayes argued that his pleas were improvident because he raised two possible defenses that set up matters inconsistent with his pleas, which the military judge failed to resolve.[20] In setting aside the findings and the sentence, the lower court found that MIDN Hayes raised the potential defense of duress.[21] It did not decide if the lack-of-mental-responsibility defense was raised.

Summary of Argument

At common-law, the duress defense sprang from the interplay between three parties: A acts unlawfully for fear that if he doesn't, B will harm C. Here, MIDN Hayes engaged in unlawful conduct for fear that if he didn't, his mother would commit suicide, a two-party format.

The R.C.M. 916(h) duress defense should apply here because the proper focus is the accused's apprehension, not the number of people involved. Whether an accused reasonably fears that another will be seriously harmed or killed if he fails to act unlawfully is not affected by a head count. Thus, any argument against the duress defense applying where two persons are involved would rail against the three-party scheme with equal force. As a result, there is no principled reason to preclude the duress defense here.

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[20] Appellee's NMCCA Brief of 23 August 2010, at 5.

Standard of Review

This Court reviews "a military judge's decision to accept a guilty plea for an abuse of discretion and reviews questions of law arising from the guilty plea *de novo*." In so doing, it applies the "substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the [appellee's] guilty plea."[22]

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[21] JA at 3.

[22] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Argument

III

THE DURESS DEFENSE SHOULD BE AVAILABLE TO AN ACCUSED THAT ACTED UNLAWFULLY FOR FEAR THAT HIS MOTHER WOULD COMMIT SUICIDE IF HE DID NOT COMMIT THE ACT.

"The person who acts under duress acts in a way that the law disapproves and seeks to discourage, but he acts under circumstances which make conviction and punishment inappropriate and unfair."[23]

R.C.M. 916(h) provides that "it is a defense . . . that the accused's participation in [an] 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."[24] This rule is similar to the duress-defense standard found in § 2.09 of the Model Penal Code.

A. The rule lobbied for by the Government could not be applied equally to military servicemen. It would also be unwieldy.

The Government seeks to mix *United States v. Washington*,[25] (the duress-defense threat should "emanate from the unlawful act of another person") with *United States v. Mitchell*, where the Army Court of Military Review found that a person committing suicide cannot be an "innocent person."[26] It then uses this proposed legal concoction to claim that the duress defense is

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[23] BLACK'S LAW DICTIONARY, 542 (8th ed. 2004).

[24] RULE FOR COURTS-MARTIAL 916(h), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

[25] 57 M.J. 394, 398 (C.A.A.F. 2002); *see* Gov't Brief at 22.

[26] *United States v. Mitchell*, 34 M.J. 970, 973 (A.C.M.R. 1992);

foreclosed here because: (1) suicide is not a crime, and (2) Mrs. Jackson is not an innocent person because her harm would be self-inflicted.[27] Not true.

Suicide remains a crime in "Virginia as it does in a number of other common-law states."[28] Thus, whether Mrs. Jackson's suicide would be criminal, would depend on where she committed the act. And common-law states, such as Virginia, treat someone of unsound mind that commits suicide as an innocent person: "not guilty of the common-law crime of suicide."[29] So while the suicide would remain unlawful, the person committing it would be deemed an innocent person due to mental infirmity. Under these circumstances the duress defense would fall squarely within the rule asked for by the Government. But the rule's clumsiness becomes apparent rapidly.

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see Gov't Brief at 23-24.

[27] Gov't Brief at 22-23.

[28] *Wackwitz v. Roy*, 418 S.E.2d 861, 864 (Va. 1992) (citing *Southern Life & Health Ins. Co. v. Wynn*, 194 So. 421 (Ala. Ct. App. 1940); *Commonwealth v. Mink*, 123 Mass. 422, 428-29 (1877), *overruled in part by* 556 N.E.2d 973 (Mass. 1990); *State v. Willis*, 121 S.E.2d 854, 856-57 (N.C. 1961); *State v. Carney*, 55 A. 44, 45 (N.J. 1903); *State v. Levelle*, 13 S.E. 319, 321 (S.C. 1891), *overruled on other grounds by* 406 S.E.2d 315 (S.C. 1991)).

[29] *Wackwitz*, 418 S.E.2d at 865; *see also Southern Life & Health Ins. Co.*, 194 So. at 422 ("Felo de se, or suicide, is where a man of the age of discretion . . . and compos mentis voluntarily kills himself. . . . * * * If he lose his memory by sickness, infirmity, or accident, and kills himself, he is not felo de se; neither can he be said to commit murder upon himself or any other.") (citation omitted); *Willis*, 121 S.E.2d at 857 (court noting that insanity is a defense to suicide); *Levelle*, 13 S.E. at 320 (court noting that "every sane man is presumed to intend the . . . consequences of any act which he purposely does"), *overruled on other grounds by* 406 S.E.2d 315 (S.C. 1991).

First, it treats similarly situated military accused differently based solely on the place the suicide occurs, making its equal application to armed forces accused impossible.

Second, it would require the trial judge to determine whether the suicidal person was an innocent person due to mental infirmity, an unwieldy task that would mutate into a mini-trial.

And third, such a rule would defy common notions of civility and justice. For example, A puts a gun to her head and demands that B break a window or she will kill herself. Under the rule sought by the Government, the duress defense would be unavailable to B if he complied to save A's life. Put differently, under the Government's rule the defense would be available to an accused spurred to crime by a stranger's threat to kill another stranger if the accused refused to act criminally, but not to the accused that acted unlawfully to prevent his own mother's suicide. Surely these are not the desired results.

B. The better rule springs from this Court's decision in *United States v. Jeffers*, NMCCA's decisions in *United States v. Johnson* and *United States v. Russell*, and the Model Penal Code.

In *Jeffers*, the appellant was given a lawful no-contact order with a PV1 P, which he violated when she came to his room and he did not have her leave because she was threatening suicide.[30] Although Jeffers took the suicide threat seriously, he did not contact authorities or anyone in his chain of command, nor did he think that his unsuccessful attempts to calm PV1 P

violated the no-contact order.[31] Under these circumstances, this Court found that "the military judge properly instructed the members that duress was a defense to appellant's failure to obey his commander's order . . . ."[32]

And NMCCA has recognized — as in *Jeffers* — that the duress defense can derive from apprehension caused by another's suicide threats:

- *United States v. Johnson* (1988): because the military judge failed to inquire on the possible defense of duress when the accused indicated that he went UA to take care of his suicidal girlfriend, the plea was improvident;[33]
- *United States v. Russell* (1990): plea improvident where the military judge failed to inquire about a duress defense after the accused indicated that he went UA because his wife was suicidal.[34]

This Court should adopt the duress-defense tenet found in these cases. The Seventh Circuit has.[35] And that rule is superior to the common law three-party scheme[36] because it properly places the analysis on the accused's apprehension. As the Supreme Court explained in *Dixon v. United States*, the duress-defense rationale "is that the defendant ought to be excused when he 'is the victim

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[30] *United States v. Jeffers*, 57 M.J. 13, 14 (C.A.A.F. 2002).
[31] *Id.* at 14.
[32] *Id.* at 15.
[33] 1988 CMR LEXIS 1004, unpublished op. (N.M.C.M.R. 27 Dec 1988).
[34] 1990 CMR LEXIS 1174, unpublished op. (N.M.C.M.R. 29 Jan 1990).
[35] *See United States v. Toney*, 27 F.3d 1245, 1247-49 (7th Cir. 1994) (court treating duress/coercion defense as viable where accused claimed to have acted unlawfully to prevent his girlfriend from committing suicide).
[36] *See United States v. Rankins*, 34 M.J. 326, 329 (C.M.A. 1992) ("At common law the duress defense applied only to cases where

of a threat that a person of reasonable moral strength could not fairly be expected to resist.'"[37] The defense "allows the defendant to "'avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.'"[38]

Undeniably, whether two or three persons are involved does not alter the coercive condition's existence. And to preclude the defense where a threat of suicide creates that condition would unjustifiably shift the analysis from "whether a person of reasonable moral strength could resist," to a head-counting exercise.

Further, the Government cannot conjure up any argument to justify precluding the duress defense under the threatened-suicide scenario found here that would not apply with equal force to precluding the defense under the three-party scheme. At best, it could argue that the duress defense finds its origins in the common-law, which developed the three-party scheme. But as Justice Holmes taught, a rule should not linger on merely because it is old:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it

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the coercion was asserted by third persons.").

[37] *Dixon v. United States*, 548 U.S. 1, 14, n. 9 (2006) (quoting 2 W. Lafave, Substantive Criminal Law § 9.7, at 72 (2d ed. 2003)).

[38] *Id.* at 7 (quoting *United States v. Bailey*, 444 U.S. 394, 402 (1980)).

> was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[39]

The Government wants this Court to blindly imitate the past.

But the common-law design is outdated. A broader and more enlightened approach is required. Taking such an approach would not be new to the armed forces. The old rule that the duress defense applied only if the "fear of the accused was that the accused would be harmed,"[40] was changed because it was "too narrow, as the fear of injury to relatives or others may be a basis for this defense."[41]

The even better rule — found in *Jeffers*, *Johnson*, *Russell*, and the Seventh Circuit — is also set in § 3.02 of the Model Penal Code (MPC), which makes an unlawful act justified if it was a lesser choice of evils:

> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

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[39] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[40] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 21, A21-65 (R.C.M. 916(h) analysis).

[41] *Id.* (citing *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976).

> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils . . ., the justification afforded by this Section is unavailable . . . for any offense for which recklessness or negligence . . . suffices to establish culpability.[42]

As this Court highlighted in *United States v. Rankins*, many American jurisdictions follow the MPC's "broader choice-of-evils defense" standard, which "is not limited to any particular source of danger."[43] Military law should as well.

This Court has often considered the MPC when deciding issues, citing to that Code in 79 of its opinions.[44] For example, this Court has considered the MPC in determining:

- the affirmative defense to theft analysis;[45]
- the parameters of the parental-discipline defense;[46]
- whether "substantial step" satisfies the requirement for attempt and whether "impossibility" is a defense for attempt or conspiracy;[47] and
- that mistake of fact about consent must be reasonable and honest.[48]

This Court should again agree with the MPC and, in accord with *Jeffers*, *Johnson*, *Russell*, and the Seventh Circuit, hold that the

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[42] *See also* Model Penal Code § 3.01, *Justification as an Affirmative Defense*.

[43] *United States v. Rankins*, 34 M.J. 326, 330 (C.M.A. 1992) (footnote omitted).

[44] Determined by searching "Model Penal Code" on LEXIS, Apr. 2, 2011.

[45] *United States v. Boddie*, 49 M.J. 310, 312-13 (C.A.A.F. 1998).

[46] *United States v. Rivera*, 54 M.J. 489, 491 (C.A.A.F. 2001); *United States v. Brown*, 26 M.J. 148, 150-51 (C.M.A. 1988); *United States v. Robertson*, 36 M.J. 190, 191-92 (C.M.A. 1992).

[47] *United States v. Valigura*, 54 M.J. 187, 190, n. 4 (C.A.A.F. 2000).

duress defense can emanate from a suicide threat. The rule sought by the Government is antiquated, ungainly, and impractical.

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[48] *United States v. Peterson*, 47 M.J. 231, 235 (1997).

I & II

NMCCA CORRECTLY FOUND THAT A POTENTIAL DURESS DEFENSE WAS RAISED; A *PRIMA-FACIE* CASE DID NOT NEED TO BE ESTABLISHED AND, EVEN IF IT DID, IT WAS ESTABLISHED HERE.

If MIDN Hayes prevails on issue III, then NMCCA correctly found that a potential duress defense was raised here..

A. The Government desires a new rule, not clarification of when a "possible defense" or "mere possibility of a defense" is raised, which, as a contextual determination, cannot be made clearer.

The Government claims that when matters raise the "possibility of a defense" or the "mere possibility" of one is confusing and requires clarification.[49] Although these phrases are facially similar, this Court clearly articulated their different meanings in *United States v. Shaw*: whether a statement by an accused raises a "possible defense" or the "mere possibility of a defense," is a "contextual determination."[50]

In *Shaw*, this Court found that the appellant's unsubstantiated passing reference to a diagnosis of bipolar disorder raised only the "mere possibility of a defense," and therefore was not inconsistent with the accused's plea.[51]

Similarly, a "mere possibility of a defense" is raised when statements are vague or speculative. In *United States v. Olinger*, the accused made a "*speculative comment* that at the time he absented himself, he felt that his wife's 'depression *might*

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[49] Gov't Brief at 10.
[50] *United States v. Shaw*, 64 M.J. 460, 464 (C.A.A.F. 2007).
[51] *Id.* at 462-64.

kill her from the stress if [he] went on . . . deployment.'"[52] This Court held that such "vague speculation" as to what *might* have happened to his wife raised only the "mere possibility" of the duress defense.[53]

The rule in *Shaw* is straightforward: whether a statement by an accused raises a "possible defense" or the "mere possibility of a defense" depends on the circumstances of each case.[54] This Court cannot possibly make that standard clearer, and has provided service courts ample guidance in applying it.[55]

What the Government wants is a new rule: "that an accused sets up a 'possible defense' when he lays out a *prima-facie* case for a defense."[56] It argues that with this rule the "confusion" that the "current contextual analysis lends itself to" would be alleviated.[57] But it is hard to take this argument seriously because whether a *prima-facie* case is made would still be a contextual determination. The Government unwittingly

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[52] *United States v. Olinger*, 50 M.J. 365, 367 (C.A.A.F. 1999) (emphasis added).

[53] *Id.*

[54] *Shaw*, 64 M.J. at 464.

[55] *See, e.g., United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008) (appellant's diagnosis of Cyclothymic disorder, without more, constituted a "mere possibility" of a defense); *Shaw*, 64 M.J. at 462-64 (appellant's unsubstantiated passing reference to a diagnosis of bipolar disorder raised only the "mere possibility of a defense"); *Olinger*, 50 M.J. at 367 (appellant's speculative comment that he went UA because he felt that his wife's depression might kill her if he deployed, raised only the "mere possibility" of the duress defense); *United States v. Prater*, 32 M.J 433 (C.M.A. 1991) (appellant's claim that he was entitled to the "exculpatory no" defense, with no supporting facts on the record raised the mere possibility of a defense).

[56] Gov't Brief at 10.

acknowledges this by candidly conceding that matters were raised that "contradicted" MIDN Hayes's plea and then plunging into a contextual analysis to try and show why the contradiction did not establish a *prima-facie* case for duress.[58]

Thus, in the end, the contextual analysis would remain—only the rule would change. And that change would drastically alter the military justice landscape, discussed next.

1. *The prima-facie-case rule the Government asks for would require overturning well-settled law.*

A *prima-facie* case is one "that will prevail until contradicted and overcome by other evidence."[59] So the rule the Government desires is: a defense is raised if it would *prevail* absent additional evidence negating it. This would require overturning *United States v. Lee*, where this Court explained that — in the providence context — it is irrelevant if an accused raises a defense that is plausible or credible; it need only be inconsistent:

> The majority opinion in the court below seems to have mistakenly viewed the issue to be whether appellant raised a defense . . . which was plausible or credible. However, in deciding a providence issue, the sole question is whether appellant made a statement during the trial which was in conflict with his guilty plea. It is unnecessary that his statement be credible; instead, it only need be inconsistent.[60]

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[57] Gov't Brief at 10.

[58] *Id.* at 18-21.

[59] BLACK'S LAW DICTIONARY, 1189 (6th ed. 1990).

[60] *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983).

The Government's rule would require overturning *Lee* because, if a defense is only raised if it would prevail without being negated by more evidence, that defense would have to be – out of logical necessity and contrary to *Lee* – plausible and credible.

And overturning *Lee* would undermine *United States v. Care*, which emphasizes that "[b]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[61] Under the Government's rule, an accused's guilty plea would be voluntary even if under the facts developed in his case he has a possible defense, does not understand that he does, and is never informed of that fact while pleading guilty.

This Court has moved to guard against such treatment, warning military judges that Article 45(a) requires that they be "vigilant in rejecting irregular, inconsistent, improvident or unintelligent guilty pleas[;]"[62] and that they have "the duty to explain to a military accused possible defenses that might be raised" and should not accept the plea unless the accused admits facts that negate them.[63]

Similarly, "R.C.M. 910(h)(2) underscores the military judge's obligation by requiring that '[i]f after findings but

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[61] *United States v. Care*, 40 C.M.R. 247, *539 (C.M.A. 1969) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).
[62] *United States v. Smith*, 44 M.J. 387, 392 (C.A.A.F. 1996) (internal quotations omitted).
[63] *United States v. Biscoe*, 47 M.J. 398, 402-03 (C.A.A.F. 1998); *see also Smith*, 44 M.J. at 392; R.C.M. 910(e), Discussion.

before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea.'"[64]

It is tremendously important to give such particular attention to guilty pleas in the military justice system because:

> [T]here may be subtle pressures inherent to the military environment that may influence the manner in which servicemembers exercise (and waive) their rights. The providence inquiry and a judge's explanation of possible defenses are established procedures to ensure servicemembers knowingly and voluntarily admit to all elements of a formal charge.[65]

Thus, this Court emphasized in *United States v. Phillippe* that a *prima-facie* case is not required to trigger further inquiry by the military judge:

> Even 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. Only after the military judge has made this inquiry can he then determine whether the apparent inconsistency or ambiguity has been resolved.[66]

The new rule sought by the Government would require abandoning this well-reasoned principle.

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[64] *Shaw*, 64 M.J. at 464 (Effron, C.J., dissenting).

[65] *Id.* (quoting *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006) (quoting *United States v. Pinero*, 60 M.J. 31, 33 (C.A.A.F. 2004)).

[66] *Phillippe*, 63 M.J. at 310 (citing *Prater*, 32 M.J. at 436).

B. Even under the *prima-facie*-case rule sought by the Government, the duress defense was raised here.

The Government argues that MIDN Hayes did not have a reasonable apprehension that his mother would immediately commit suicide if he failed to act as he did.[67] No so. NMCCA found as fact that MIDN Hayes's "statement indicated that he was under apprehension and fearful that his mother would commit suicide, and (2) that he committed his acts in order to prevent that from happening, indicating some immediacy in his mind as to the prospective threat."[68] And because "[f]actual determinations by Courts of Military Review are binding on this Court" unless arbitrary and capricious,[69] the Government's argument collapses under the weight of a record rife with facts supporting NMCCA's findings.

Conclusion

The best duress-defense rule is found in *Jeffers*, *Johnson*, *Russell*, the Seventh Circuit, and the MPC's "choice-of-evils" justification, which allows an accused to advance the defense when he acts unlawfully to prevent a suicide. This Court should embrace that rule and affirm the lower court's decision.

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[67] Gov't Brief at 15-17.

[68] JA at 4.

[69] *Washington*, 57 M.J. at 406 (Sullivan, Sr.J., dissenting) (citing *United States v. Baldwin*, 37 C.M.R. 336 (C.M.A. 1967) (court finding that it is bound by board of review's factual determinations unless arbitrary and capricious) (additional citations omitted).

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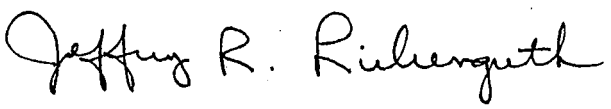

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UNITED STATES V. **Phillip D. JOHNSON, 554 81 2137 Hull Maintenance Technician Third Class (E-4), U.S. Navy**

NMCM 88 3894

UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW

1988 CMR LEXIS 1004

December 27, 1988

JUDGES: [*1] BEFORE LEO J. COUGHLIN, R. A. STRICKLAND, J. E. RUBENS

OPINION

PER CURIAM:

In accordance with his pleas the appellant was found guilty of two specifications of unauthorized absence (from 14 February to 23 February 1988 and from 10 March to 14 May 1988) in violation of Article 86, Uniform Code of Military Justice. He was sentenced to be reduced to pay grade E-1, to forfeit $ 425.00 pay per month for 2 months, to be confined for 40 days, and to be discharged with a bad-conduct discharge.

Although this case is before us without specific assignment of error our review of the record of trial reveals that the findings of guilty may not be affirmed in view of both case law and the Rules for Courts-Martial (R.C.M.), Manual for Courts-Martial, United States, 1984. R.C.M. 916(h) provides as follows with respect to the affirmative defense of coercion or duress:

It is a defense to any offense except killing an innocent person 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 [*2] 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.

The following comments of the appellant during the presentencing procedure raised the defense of duress:

ACCUSED: Yes, sir. The reason I went UA wasn't to do anything towards the Navy or get back at the Navy for anything. It was to take care of a girlfriend of mine who is suicidal. She has a medical history of that, and when I am away from her, say, we go underway, she seems to be worse. I get a letter from her saying that she was going to -- she was thinking about committing suicide and things of this sort. I don't have that letter with me, so I can't prove that; but that's basically the reason that I did go for, you know, just for fear of her life.

* * *

I realize that I did make a mistake going UA. It's not the way to handle things, but I can't change that. It's already been done, and I just thought maybe I could explain more the reason I went UA and that I'm not the type of person to slack off because I'm being restricted to my ship.

[*3] Before going UA, I had to make a choice between the Navy and my girlfriend, and I might have made the wrong choice, but I chose my girlfriend instead, and now I am here in this court.

In his argument on the sentence the trial defense counsel raised this same matter involving the defense of duress:

DC: Your Honor, the accused's -- Petty Officer Johnson's total period of unauthorized absence was two months and two weeks. Petty Officer Johnson does not deserve to be confined for an extensive period of time. As he explained in his unsworn statement, he had serious problems with his girlfriend. She was even contemplating suicide. Faced with that decision , he chose to help

his girlfriend out even though it meant a serious problem for him, leaving the Navy.

These comments of the appellant and his defense counsel raised the defense of duress. It was thus incumbent upon the military judge to reopen the providency inquiry in order to ascertain whether the duress defense still potentially existed upon further questioning of the accused and, if so, to reject the accused's pleas of guilty. Having not done so, the state of the record is such that a defense of duress may exist to both [*4] of the appellant's alleged unauthorized absences and, therefore, the findings may not be approved by this Court. *United States v. Catoe, 50 C.M.R. 318 (ACMR 1975).*

Accordingly, the findings and sentence are set aside. A rehearing is authorized.

UNITED STATES v. Nathan S. RUSSELL, Fireman Apprentice (E-2), U.S. Navy

NMCM No. 90 1836

UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW

1990 CMR LEXIS 1174

October 29, 1990, Decided

PRIOR HISTORY: [*1] Sentence adjudged 28 March 1990. Military Judge: Mark R. Dawson. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS CARL VINSON (CVN 70).

COUNSEL: LT PETER VAN HARTESVELDT, JAGC, USNR, Appellate Defense Counsel

LT L. LYNN JOWERS, JAGC, USN, Appellate Government Counsel

LCDR NEAL H. NELSON, Jr., JAGC, USNR-R, Appellate Government Counsel

JUDGES: KENT A. WILLEVER, Chief Judge. R. A. STRICKLAND, Senior Judge. JAMES E. ORR, Judge

OPINION BY: PER CURIAM

OPINION

In accordance with his pleas the appellant was found guilty of one specification of unauthorized absence, from 27 November 1989 until he was apprehended on 31 January 1990, in violation of Article 86, Uniform Code of Military Justice (UCMJ), and one specification of missing movement by neglect, on 1 February 1990, in violation of Article 87, UCMJ. He was sentenced to be reduced to pay grade E-1, to forfeit $ 300.00 pay per month for two months, to be confined for two months, and to be discharged with a bad-conduct discharge. In accordance with his pretrial agreement, the convening authority suspended all confinement in excess of 60 days for one year, but otherwise approved the sentence as adjudged.

The following [*2] issue is raised before us:

WHETHER THE APPELLANT'S PLEAS OF GUILTY WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO MAKE ADEQUATE INQUIRY WHEN APPELLANT'S UNSWORN STATEMENT RAISED THE DEFENSE OF DURESS?

In regard to the special or affirmative defense of coercion or duress, Rule for Court-Martial 916(h) states:

It is a defense to any offense except killing an innocent person 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.

During the presentencing portion of the hearing, the appellant made an unsworn statement in which he said that while he was still on authorized leave and at Chicago International Airport, he called his wife and she told him that she couldn't handle the appellant [*3] being away again and that she just wanted her life to be over with if the appellant wasn't there. The appellant then said that he got on a bus and went home to his wife, that she was acting strangely when he got home, and that the following morning, when the appellant woke up, his wife was trying to cut her wrists with a razor blade. The appellant also stated that he thought at that time that he might be able to have his leave extended and get his wife straightened out, but he was unable to get the extension. He said that this incident was the third time his wife had

attempted suicide and that she had previously seen two psychiatrists.

Immediately following the appellant's unsworn statement, the military judge accepted Defense Exhibit A into evidence. That exhibit is a letter, dated 27 February 1990, the appellant wrote to his commanding officer seeking to explain his absence. In the letter, the appellant states that he was afraid that his wife would try to commit suicide again, that the two psychiatrists had helped his wife for awhile, but that she began to fall back into a depression when she found out about the appellant leaving for another six months, that his wife begins [*4] taking drugs when she gets depressed and that it seems to the appellant that he is the only one who can keep her away from that behavior.

After reading Defense Exhibit A, the military judge reopened his inquiry into the providency of the appellant's pleas and questioned the appellant and his defense counsel concerning the possible defense of impossibility due to the overbooking of flights in Chicago and the possible termination of the absence by the appellant's contact with a local reserve center two days after the appellant's authorized leave had expired. After satisfying himself that the appellant's pleas were not improvident in regard to those aspects of the appellant's unsworn statement and Defense Exhibit A, the military judge concluded his inquiry and found the pleas to be provident. At no time did the military judge mention the possibility of the defense of coercion or duress either to the appellant or to his defense counsel.

This information from the appellant and his counsel raised the possible defense of duress, and the military judge should have inquired further to determine if the accused had any reasonable opportunity to avoid his unauthorized absence without subjecting [*5] his wife to the harm threatened. *United States v. Palus, 13 M.J. 179 (C.M.A. 1982)*; *United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976)*; *United States v. Johnson*, No. 88 3894 (NMCMR 27 December 1988).

It has been suggested that a better approach to resolving the impact of potential affirmative defenses that arise in guilty plea cases is to consider such matters as suggesting a lack of understanding of the meaning and effect of the guilty plea or that the plea is not knowing and intelligent. *See United States v. Rollins, 28 M.J. 892, 896 n.2 (ACMR 1989).* "Such a rule would permit an accused desiring to forego the risk of raising an affirmative defense in exchange for a favorable plea agreement to disclaim the defense upon proper advice of its constituent elements." *Id.* The military judge in the case before us, however, did not undertake either approach.

Accordingly, the findings and sentence are set aside. A rehearing is authorized.

1 of 1 DOCUMENT

Model Penal Code

PART I. GENERAL PROVISIONS
ARTICLE 2. GENERAL PRINCIPLES OF LIABILITY

Model Penal Code § 2.09

§ 2.09. Duress.

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman acting in the presence of her husband is coerced is abolished.]

(4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.

NOTES:

Explanatory Note

Subsection (1) establishes the affirmative defense of duress, which is applicable if the actor engaged in criminal conduct because he was coerced to do so by the use or threat of unlawful force against himself or another, that a person of reasonable firmness in his situation would have been unable to resist. The standard is thus partially objective; the defense is not established simply by the fact that the defendant was coerced; he must have been coerced in circumstances under which a person of reasonable firmness in his situation would likewise have been unable to resist.

Subsection (2) deprives the actor of his defense if he recklessly placed himself in a situation in which it was probable that he would be subjected to duress. Thus, an actor reckless in this respect can be liable for offenses that carry a higher culpability standard than recklessness. In the case of negligent exposure to the possibility of duress, however, Subsection (2) only permits an offense to be charged for which negligence is sufficient to establish culpability.

Subsection (3) abolishes special rules that still obtained in some jurisdictions concerning the effect of marriage as an automatic basis for claims of coercion. The bracketed sentence is included for those jurisdictions where silence on the point might be construed as continuing present law.

Subsection (4) assures that this section will not be construed to narrow the effect of the choice of evils defense afforded by Section 3.02. This intention is that the defenses of duress and choice of evils will be independently considered, and that the fact that a defense is unavailable under one section will not be relevant to its availability under the other.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 368.

1 of 1 DOCUMENT

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PART I. GENERAL PROVISIONS
ARTICLE 3. GENERAL PRINCIPLES OF JUSTIFICATION

Model Penal Code § 3.01

§ 3.01. Justification an Affirmative Defense; Civil Remedies Unaffected.

(1) In any prosecution based on conduct that is justifiable under this Article, justification is an affirmative defense.

(2) The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct that is available in any civil action.

NOTES:

Explanatory Note

Subsection (1) provides that any claim of justification under Article 3 is an affirmative defense, the procedural consequences of which are set forth in Section 1.12(2). The prosecution need not negative a justification defense until there is evidence supporting the defense, but it must disprove the defense beyond a reasonable doubt if evidence of the defense is introduced.

Subsection (2) makes explicit that justification for the purpose of criminal liability does not preclude civil liability if the law otherwise provides a remedy for the conduct involved.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 5.

PART I. GENERAL PROVISIONS
ARTICLE 3. GENERAL PRINCIPLES OF JUSTIFICATION

Model Penal Code § 3.02

§ 3.02. Justification Generally: Choice of Evils.

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

NOTES:

Explanatory Note

Subsection (1) states a general principle of choice of evils, with limitations on its availability designed to confine its use to appropriate cases. The evil sought to be avoided must be greater than that sought to be prevented by the law defining the offense. The legislature must not have previously foreclosed the choice that was made by resolving the conflict of values at stake.

Subsection (2) applies in this context the general provision of Section 3.09(2). As provided in Subsection (1), the actor's belief in the necessity of his conduct to avoid the contemplated harm is a sufficient basis for his assertion of the defense. Under Subsection (2), however, if the defendant was reckless or negligent in appraising the necessity for his conduct, the justification provided by this section is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. The same provision is made for cases in which the defendant recklessly or negligently brings about the situation requiring the choice of evils.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 9.