IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. NICHOLAS S. STEWART Captain (O-3) U.S. Marine Corps, Appellant.	**APPELLANT'S REPLY** Crim.App. No. 201000021 USCA Dkt. No. 11-0440/MC

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

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Argument

I

RCM 917 REQUIRED THE MILITARY JUDGE TO ENTER A FINDING OF NOT GUILTY WHEN HE FOUND BY A PREPONDERANCE OF THE EVIDENCE THAT MS. N CONSENTED TO THE SEXUAL ACT BECAUSE, UNDER *UNITED STATES V. PRATHER*, IT WAS LEGALLY IMPOSSIBLE FOR THE PROSECUTION TO DISPROVE THE DEFENSE BEYOND A REASONABLE DOUBT.

The Government declares that "military law does not provide a mechanism for a trial judge to set aside a finding of guilt solely because the verdict goes against the weight of the evidence[,]" and that "this Court firmly rejected the notion that [military judges] are a 'thirteenth juror' with the power to enter a judgment of acquittal because they disagree with the factual finding reached by the members."[1] True, but irrelevant.

Capt Stewart is not arguing that the military judge had the power to overturn the members' findings; he argues that, before those findings were made, the military judge was required to make a not-guilty finding due to the interplay between (1) his preponderance ruling,[2] (2) *United States v. Prather*,[3] and (3) R.C.M. 917.

In response, the Government argues that the military judge "does not have the power to enter a judgment of acquittal prior to the presentation of evidence."[4] Of course, Capt Stewart does not claim that such power exists; he merely points out that the

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[1] Gov't Brief at 15 (citing *United States v. Griffith*, 27 M.J. 42, 48 (C.M.A. 1988)).

[2] JA at 27.

[3] *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

circumstances required the military judge to enter a not-guilty finding at the close of the Government's case.

The Government then points out that "no case" stands for the proposition that a "finding of a military judge as to the existence of an affirmative defense 'by a preponderance of the evidence'" requires the military judge to enter a not-guilty finding.[5] This is unsurprising since the issue here is one of first impression. Yet in deciding the matter, the Government wants this Court to say that, in the trial framework that the military judge concocted here, he was "not acting as a trier of fact" when he found that consent was proven by a preponderance.[6] But the defect in this logic is plain. Had the members found that consent existed by a preponderance, they would have been acting as fact finders; so the military judge was surely acting in that capacity when he did.

The Government next argues that the military judge's ruling "disregarded the burden shift in the statute . . . ."[7] To the contrary, the military judge required Capt Stewart to show consent by a preponderance. The Government also argues that "the standard enunciated by the military judge [did not] impact Appellant's trial because he received the instructions he asked

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[4] Gov't Brief at 17.
[5] *Id.* at 15-16.
[6] JA at 16.
[7] Gov't Brief at 17.

for . . . ."[8] This is incorrect. The evidence used to secure those instructions was never given to the members by the military judge, stripping them of any meaningful value for Capt Stewart.

Finally, the Government argues that the "standards for whether an affirmative defense has been raised and whether there is insufficient evidence to sustain a conviction under R.C.M. 917 are different . . . ."[9] Appellant agrees, but this is no Government lifeline. The Government cannot escape the fact that the military judge applied the preponderance standard and then ruled that the defense met it, giving rise to the *Prather* legal-impossibility principle, which required a not guilty finding under R.C.M. 917.

II

THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING THE EVIDENCE FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION UNDER SPECIFICATION 2 BECAUSE, IN DOING SO, IT (1) VIOLATED THE *PRATHER* LEGAL-IMPOSSIBILITY PRINCIPLE AND (2) IMPERMISSIBLY FOUND AS FACTS ALLEGATIONS THAT HE WAS FOUND NOT GUILTY OF IN SPECIFICATION 1.

A. There was no invited error.

The Government argues that Capt Stewart invited the *Smith* issue here.[10] Not true. Appellant wanted a single specification where the Government specified its theory of criminality – *substantially incapacitated* or *substantially incapable* – because

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[8] Gov't Brief at 18.
[9] *Id.* at 19.
[10] *Id.* at 20-23.

the MCM requires it, and because there was a danger that members would convict on the specification without agreeing on the theory of criminality.[11] But the motion was denied and, as this Court is aware, the military judge gave the defense two options: (1) keep the specification intact and have the members instructed that they could only return a guilty finding on one theory, but not both, or (2) have the specification severed into two.[12] If severance was chosen and the members convicted on both specifications, then the military judge would merge them for sentencing.[13]

The defense chose severance because it feared that the members would be unable to properly follow the instruction that the military judge said he would give if the specification was left intact and, as the military judge recognized, because he denied the defense's original motion.[14] Yet without a defense request, the military judge reversed his ruling on how he would instruct on the two specifications.[15] That is, rather than instructing the members that they could find Capt Stewart guilty of both specifications (which the military judge said would result in the specifications being merged for sentencing), he instructed that a guilty finding could be returned for only one

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[11] JA at 13, 16.
[12] JA at 16-23.
[13] JA at 24.
[14] JA at 25.
[15] JA at 187.

of the specifications, not both.[16] And then, based on the Army Benchbook, the military judge defined *substantially incapacitated* and *substantially incapable* identically for the members,[17] which Capt Stewart objected to: "If the President thought those were the same concepts, he wouldn't have separated them out, sir. He wouldn't have said, *one* of the following."[18]

Thus, the *Smith* issue here is a result of the prosecutor's drafting of the specification and the military judge's decisions on how to deal with it. It was the prosecution that chose to put two theories of criminality in the same specification; it was the military judge that denied Capt Stewart's request to have the prosecution specify its theory of criminality in a single specification; and it was the military judge who, on his own, reversed his prior ruling and instructed the members that they could only find Capt Stewart guilty of one specification, which created the opportunity for the *Smith* issue to spring up.

Put briefly, had the military judge granted the defense's request to have the prosecution elect its theory of criminality in a single specification, or instructed the members that they could only convict or acquit on *both* specifications, there would be no *Smith* issue. So surely it is not Capt Stewart's fault that there is. The invited-error doctrine is therefore inapplicable.

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[16] JA at 82, 187.
[17] JA at 21, 172, 177.
[18] JA at 22 (emphasis added).

B. The *Smith* principle applies here.

In arguing that *Smith* does not apply, the Government clings to the differences between this case and *Smith* and its progeny.[19] But as Capt Stewart explained in his initial brief, these differences do not foreclose *Smith's* application.[20] The *Smith* principle is straightforward: a reviewing court is prohibited from finding "as fact any allegation in a specification for which the fact-finder below has found the accused not guilty."[21] So when the Government proclaims, "Of course, had the Members convicted Appellant of Specification 1, but acquitted him of Specification 2, Appellant would have no argument[,]"[22] Capt Stewart agrees. But that is not what happened.

Here it was certain that, if NMCCA affirmed the Specification 2 guilty finding, it would find as fact the very allegations that members found Capt Stewart not guilty of in Specification 1. This was unavoidable because substantially incapacitated and substantially incapable were defined identically for the members by the military judge.

Yet the Government, while candidly conceding that "an appellate court may not find facts that contradict a finding of not guilty reached by the trier of fact[,]" argues that this

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[19] Gov't Brief at 23-26.
[20] Appellant's Brief of September 8, 2011 at 15-16.
[21] *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citing *United States v. Smith*, 39 M.J. 448, 451 (C.M.A. 1994)) (additional citation omitted).
[22] Gov't Brief at 22.

principle is inapplicable here because "the Specifications at issue did not allege the same theory of liability."[23] The Government says this is because Congress defined substantially incapacitated and substantially incapable as "separate possible elements."[24] If that is true, the members certainly didn't know it because the military judge gave the same definition for both.

The Government further argues that, even if the members' findings were inconsistent, "[a]n inconsistent verdict is not *normally* cause for relief because the members may simply have given Appellant 'a break.'"[25] But it can hardly be considered "a break" for Capt Stewart to be found not guilty of the first specification but guilty of the second, identical specification, particularly when they were instructed that they could not find him guilty of both. More importantly, the Government plucks the "gave-him-a-break" language from *United States v. Lyon*, an opinion that actually undermines its argument.

Lyon is a strange case. There the accused was found guilty by members of attempted extortion, but not guilty of robbery and another extortion count.[26] This Court highlighted that these verdicts were inconsistent because, based on the facts presented, Lyon should have been convicted of every charge, or "entirely

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[23] Gov't Brief at 26 (citation omitted).
[24] *Id.* at 27.
[25] *Id.* (emphasis added) (citing *United States v. Lyon*, 15 C.M.A. 307, 313 (C.M.A. 1965)) (additional citation omitted).
[26] *Lyon*, 35 C.M.R. at 280.

exonerated."[27] This Court explained that the catalyst for the inconsistent verdicts was the law officer's improper instructions to the members:

> The essence of the Government's charge was that the accused, in order to extort payment of [a] note, twice threatened to and did in fact falsely accuse Sergeant Williams of dishonorable failure to pay an indebtedness, a criminal offense in violation of Code, supra, Article 134. . . . The accused, as we have stated, made out his case on the proposition that the debt was just, due, and owing him. But the law officer at no time pointed out the effect of the evidence, if believed, on the accused's criminal liability. In short, he failed fairly to explain that if the debt in fact existed, as accused alleged, his efforts to utilize well-recognized and legal means to enforce its collection would not amount, in law, to the offense charged.[28]

Thus, this Court ruled that reversal was necessary because, had the law officer properly instructed the members, "they might have come to another conclusion," and "[m]ore is not required in order to show harm to [an] accused's substantial rights."[29]

Here, because the specifications were identical, Capt Stewart should have been convicted of both or entirely exonerated, just like in *Lyon*. But because of the military judge's instructions, the members were put in a position where they could, and did, find Capt Stewart guilty of conduct they had already found him not guilty of. Had the members been properly instructed that they had to return an all-or-nothing verdict, they might have acquitted Capt Stewart of both specifications.

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[27] *Lyon*, 35 C.M.R. at 285.
[28] *Id.* at 280, 284-85 (internal citations omitted).
[29] *Id.* at 285.

III

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY REQUIRING THE DEFENSE TO PRESENT EVIDENCE ON THE DEFENSE OF CONSENT AT AN ARTICLE 39(a) SESSION PRIOR TO TRIAL.

A. Capt Stewart's NCIS statement was admitted into evidence, or he was at least led to believe that it was.

The Government claims that "Appellant never moved the trial court to admit his statement and Appellant conceded during an Article 39(a) session that he could not admit the statement."[30] We disagree. First, it was unnecessary for Capt Stewart to request that his NCIS statement be admitted into evidence. It was already admitted when, after the military judge improperly demanded consent evidence from the defense, he accepted the statement and used it to rule that the defense had met its preponderance burden.

And second, Capt Stewart did not concede that he could not admit the NCIS statement. What his counsel said was, "I don't *think* that I can admit it . . . ."[31] More importantly, wrangling over the meaning of this comment is an empty exercise, as it was made before the military judge accepted the statement as evidence that Ms. N consented.[32]

The Government also claims that Capt Stewart was required, but failed, to "publish" the statement to the members.[33] But it

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[30] Gov't Brief at 30 (citing JA at 182).
[31] JA at 182 (emphasis added).
[32] *See* JA at 27, 182.
[33] Gov't Brief at 34.

does not cite a single case or rule of evidence to support this notion, while zipping past the fact that the military judge failed to provide the members with the very evidence he used to rule that the consent-defense instruction would be given, in violation of this Court's *Elfayoumi* holding that military judges have "the constitutional and statutory duty to ensure that an accused receives a fair trial."[34]

B. *Liburd's reasoning applies here.*

The Government claims that *Liburd* does not apply because the error claimed here deals with the military judge's procedure, while *Liburd* concerns prosecutorial misconduct.[35] But the Government misses the point by hanging on this distinction. The thrust of the issue in *Liburd* was not prosecutorial misconduct; it was whether the trial was so infected with "'unfairness as to make the resulting conviction a denial of due process.'"[36] Yet the Government's brief does not address this aspect of *Liburd* at all.

As a result, Capt Stewart finds it sufficient to merely reemphasize the point made in his initial brief: the effect of the accused's reliance on the prosecutor's promise in *Liburd*, and Capt Stewart's reliance on the apparent admission of his NCIS statement here, could hardly be more similar—both caused disastrous defense trial strategies. And the attendant

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[34] *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008).
[35] Gov't Brief at 34.
[36] *United States v. Liburd*, 607 F.3d 339, 346 (3rd Cir. 2010).

consequence is that Capt Stewart's trial was so stripped of fairness that his conviction amounts to a denial of due process, just like in *Liburd*.

Conclusion

All Capt Stewart wanted, and was entitled to, was a fair trial. He objected to the original specification, requesting that the prosecution elect its theory of criminality, as the MCM requires.[37] The request was denied.[38] He objected to being required to produce consent evidence with members absent and before the prosecution's case,[39] but the judge demanded it. So Capt Stewart provided his NCIS statement, which the military judge accepted and used to rule that he would issue the consent-defense instruction. Then, when Capt Stewart attempted to direct the members to that statement – the evidence he relied upon to craft his trial strategy – the military judge refused to allow the members to see it, leading to the ruinous argument highlighted in Capt Stewart's original brief.[40]

Finally, NMCCA, like the trial court, failed to recognize that a not-guilty finding was required because of the interplay between the preponderance ruling, the *Prather* legal-impossibility principle, and R.C.M. 917. And at the same time, the lower court did not see that under *Smith*, it could not conduct a factual-

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[37] JA at 13, 16.
[38] JA at 16-23.
[39] JA at 28.
[40] *See* Appellant's Brief of September 8, 2011 at 24.

sufficiency review of Capt Stewart's case.

This Court should set aside Capt Stewart's conviction and sentence, and dismiss the charge with prejudice under Issue I or II.

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Certificate of Filing and Service

I certify that the foregoing brief was hand-delivered to the Court, and that a copy was hand-delivered to Appellate Government Division and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 15, 2011.

Certificate of Compliance

This brief complies with the page limitations of Rule 24(b). This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface with 12-point-Courier-New font.

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