IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Alexander M. WATSON Private First Class (E-2) U.S. Marine Corps, Appellant.	**BRIEF ON BEHALF OF APPELLANT** Crim.App. No. 201000263 USCA Dkt. No. 11-0523/MC

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

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WHETHER APPELLANT'S GUILTY PLEA TO FRAUDULENT ENLISTMENT WAS PROVIDENT.

Statement of Statutory Jurisdiction

The lower court reviewed Private First Class (PFC) Watson's case pursuant to 10 U.S.C. § 866(b)(1). The statutory basis for this Court's jurisdiction is 10 U.S.C. § 867(a)(3).

Statement of the Case

A general court-martial consisting of a military judge alone tried PFC Watson on various dates between November 3, 2009 and January 29, 2010. Consistent with his pleas, he was found guilty of violating Articles 83, 86, and 134 (five specifications) of the UCMJ.[1]

PFC Watson was sentenced to 42 months confinement, reduction to pay-grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.[2] The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered it executed, but suspended execution of confinement in excess of two years for 12 months.[3]

NMCCA affirmed the findings and the sentence in its March 29, 2011 opinion.[4] On May 26, 2011, PFC Watson filed a petition

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[1] JA at 27-28.
[2] JA at 29.
[3] JA at 60.

for grant of review with this Court. On July 19, 2011, this Court granted review of two issues, but only ordered briefs for the issue presented.

Statement of Facts

At the age of thirteen PFC Watson received care at a mental-health center for suicidal thoughts.[5] Four years later he enlisted in the Marine Corps.[6] As part of the enlistment paperwork, he filled out a screening form that asked: "Have you ever been a patient (whether or not formally committed) in any institution primarily devoted to the treatment of mental, emotional, psychological, or personality disorders?"[7] PFC Watson initialed that he had not.[8] When it later came to light that he had, he was charged with and pleaded guilty to fraudulent enlistment.

During the providence inquiry the following colloquy occurred between the military judge and PFC Watson:

> [MJ]: Do you believe that Staff Sergeant David relied on the information you provided him . . . pertaining to your past mental health status with the fact that -
>
> [Watson]: I do, sir.
>
> [MJ]: You do believe that?
>
> [Watson]: Yes, sir.

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[4] *United States v. Watson*, 2011 CCA LEXIS 61, (N.M. Ct. Crim. App. March 29, 2011) (unpublished).
[5] JA at 22, 35.
[6] JA at 30 (enlistment date is November 13, 2007).
[7] JA at 22, 30, 47.
[8] JA at 47.

[MJ]: If you had told the truth to the Staff Sergeant, in fact, that you had been an inpatient at some type of mental health facility, do you believe that *may* have impacted your ability to enlist in the United States Marine Corps?

[Watson]: I do, sir.

[MJ]: Do you believe that's a matter that the Staff Sergeant would have inquired additionally?

[Watson]: Yes, Your Honor.[9]

Further, in his stipulation of fact PFC Watson indicates that:

15. I believe that my enlistment was procured by knowingly concealing the fact that I had been to a mental health facility when I was 13 years old. I believe that this was important information that *could have potentially* disqualified me from enlisting in the Marine Corps depending on the Doctor's evaluation of my mental health record.

16. I do not know whether I would have been enlisted in the Marine Corps if I had told the truth.[10]

Summary of Argument

To plead providently to fraudulent enlistment an accused must admit that, but for his misrepresentation, his enlistment would have been rejected. Here the evidence on the matter is inconsistent, as PFC Watson first indicates that his enlistment was obtained as a result of his misrepresentation, only to then indicate that his enlistment *may* have been obtained because of the misrepresentation. Because the military judge did not resolve this inconsistency, PFC Watson's plea is improvident.

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[9] JA at 23.

[10] JA at 36 (emphasis added).

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*."[11] In so doing, this Court 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 appellant's guilty plea."[12]

Argument

I

PFC WATSON'S GUILTY PLEA TO FRAUDULENT ENLISTMENT IS IMPROVIDENT.

A providence inquiry must establish that the factual circumstances admitted by the accused objectively support his guilty plea.[13] But as this Court highlighted in *United States v. Inabinette*, even if a plea is factually supportable, there may still be a substantial basis in law for questioning it:

> [I]t is possible to have a factually supportable plea yet still have a substantial basis in law for questioning it. This might occur where an accused knowingly admits facts that meet all the elements of an offense, but . . . states matters inconsistent with the plea that are not resolved by the military judge.[14]

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

[12] *Id.*

[13] *United States v. Garcia*, 44 M.J. 496, 497-98 (C.A.A.F. 1996) (citing *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994); *see also United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980); and RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

[14] *Inabinette*, 66 M.J. at 322.

So, should an accused raise a matter inconsistent with the plea at any time during the proceeding, "the military judge must either resolve the apparent inconsistency or reject the guilty plea."[15] Indeed, Article 45(a), UCMJ, directs military judges to be "vigilant" in rejecting inconsistent or improvident pleas.[16]

A. To plead providently to fraudulent enlistment an accused must admit that, but for his misrepresentation, his enlistment would have been rejected.

The Article 83, UCMJ, fraudulent-enlistment elements germane here are:

> (b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications for enlistment . . .; [and]
>
> (c) That the accused's enlistment . . . was obtained or procured by that knowingly false representation or deliberate concealment; . . . .[17]

Element (b) – the material-fact element – is not in issue here. Our focus is on element (c) and whether the providence inquiry established that PFC Watson believed and admitted that his enlistment was obtained because of his misrepresentation. That is, under *United States v. Loyd*[18] – a Navy Board of Review case – and *United States v. Stevens*,[19] – an Air Force Board of Review case – a fraudulent enlistment conviction cannot be sustained

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[15] *Garcia*, 44 M.J. at 498 (citing Art. 45(a) and R.C.M. 910(h)(2)); *see also Davenport*, 9 M.J. at 367.

[16] *United States v. Smith*, 44 M.J. 387, 392 (C.A.A.F. 1996) (internal quotations omitted).

[17] MCM, Part IV, ¶ 7b(1)(b) and (c) (emphasis added).

[18] *United States v. Loyd*, 7 C.M.R. 453 (N.B.R. 1953).

unless it is established that, but for the misrepresentation, the accused would not have been permitted to enlist.[20] As the *Loyd* court emphasized:

> The gist of the offense of fraudulent enlistment is the concealment of a fact knowingly and willfully, which, if known to the recruiting officer, would cause the rejection of the applicant.[21]

1. The evidence is inconsistent on whether PFC Watson believed and admitted that, but for his misrepresentation, his enlistment would have been rejected.

Paragraph (15) of the stipulation of fact first indicates that PFC Watson's enlistment was obtained as a result of his misrepresentation, only to then indicate that the enlistment *might* have been rejected had he told the truth. Further, paragraph (16) indicates that PFC Watson did not know if he would have been enlisted had he told the truth. These inconsistencies were left unresolved by the military judge. Indeed, instead of resolving them, his providence inquiry question: "do you believe that [your untruthful answer] *may* have impacted your ability to enlist in the United States Marine Corps?", cemented them.

Nonetheless, NMCCA affirmed the conviction, citing – without analysis – this Court's decision in *United States v. Holbrook*.[22] But *Holbrook* deals with the material-fact element (element b), as Holbrook argued that his plea was improvident because facts were

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[19] *United States v. Stevens*, 7 C.M.R. 838 (A.F.B.R. 1953).
[20] *Loyd*, 7 C.M.R. at 454; *Stevens*, 7 C.M.R. at 841.
[21] *Loyd*, 7 C.M.R. at 454 (citation and emphasis omitted).
[22] *Watson*, 2011 CCA LEXIS 61, at *8 (citing *United States v.*

not elicited establishing that he knew he lied about a material fact relevant to his enlistment qualifications.[23] This Court disagreed:

> The question whether a fact is "regarding qualifications" for "enlistment," and "material," is analyzed from the perspective of the service making the decision on the enlistment, not from the perspective of the untruthful applicant.[24]

Thus, this Court found that Holbrook's misrepresentation about pre-service drug use was a "material" misrepresentation.[25]

But the issue here is not materiality (element b); it is whether PFC Watson's enlistment would have been rejected had he been truthful (element c). So *Loyd* and *Stevens* control, not *Holbrook*. And although *Loyd* and *Stevens* are 1953 service court cases, their holdings remain valid, especially since this Court cited favorably to *Loyd's* holding – that a fraudulent-enlistment "conviction cannot be sustained unless the government shows that but for the fraudulent statement the accused would not have been permitted to enlist" – in its 2008 *Holbrook* opinion.[26]

Still, the Government will likely cite *United States v. Henry*,[27] an unpublished NMCCA case, and *United States v.*

Holbrook, 66 M.J. 31, 33 (C.A.A.F. 2008)).

[23] *Holbrook*, 66 M.J. at 32.

[24] *Id.* at 33.

[25] *Id.*

[26] *Id.*

[27] *United States v. Henry*, 2003 CCA LEXIS 203 (N.M. Ct. Crim. App. Aug. 26, 2003) (unpublished) (this case mistakenly cites to *United States v. Nazario*, 56 M.J. 172 (C.A.A.F. 1996), instead of *United States v. Nazario*, 56 M.J. 572 (A.F. Ct. Crim. App. 2001).

Nazario,[28] an AFCCA case upon which *Henry* relies, and argue that the plea was provident because PFC Watson's prior mental-health would have prevented his enlistment *without a waiver*. To be sure, had PFC Watson been truthful he would have needed a waiver to enlist.[29] But under the *Loyd* and *Stevens* rule – the rule favorably endorsed by this Court in *Holbrook* – the purpose of Article 83 is to punish those whose enlistment would have been barred altogether had they been truthful, not those who sidestepped a waiver.

Nonetheless, in *Nazario* the AFCCA "reject[ed] the appellant's contention that the false representation must have concerned a matter that would absolutely bar . . . service."[30] In so doing, it ran afoul of *Loyd* and *Stevens*, and ignored this Court's similar reasoning in *United States v. Danley*.[31]

In *Danley*, the appellant initially enlisted in the Army for three years.[32] One year later he reenlisted for another three years and was paid a reenlistment bonus.[33] The next year, he again reenlisted for a four-year term and received another reenlistment bonus based on being a first-time reenlistee, which he was obviously not.[34] The trial court convicted Danley of

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[28] *United States v. Nazario*, 56 M.J. 572 (A.F. Ct. Crim. App. 2001), *rev'd on other grounds*, 58 M.J. 19 (C.A.A.F. 2002).
[29] *See* JA at 63 (Marine Corps Order P1100.72C, 3-84 (Ch-3, 18 Jun 2004)); *see also* JA at 62, 64-67.
[30] *Nazario*, 56 M.J. at 579.
[31] *Untied States v. Danley*, 45 C.M.R. 260 (C.M.A. 1972).
[32] *Id.* at 261.
[33] *Id.*
[34] *Id.*

fraudulent enlistment.[35] Thus, the issue before this Court was whether Danley's last reenlistment was fraudulent.[36] As in *Loyd* and *Stevens*, this Court reasoned that the answer to that question "depends upon whether the concealed fact would have operated as a bar" to the enlistment.[37] But in deciding *Nazario*, the AFCCA leaped over the *Danley* reasoning and clung to the fact that there this Court "did not define the term 'bar.'"[38] Surely this term's meaning is not in doubt. Black's Law Dictionary defines it as: "to prevent."[39] But the *Nazario* Court would have it defined as *to prevent without a waiver*. This Court should not adopt such a convenient definition here.

Still, even if this Court abandons the *Loyd*, *Stevens*, and *Danley* reasoning, and rules that fraudulent enlistment occurs when an accused makes a misrepresentation that, if known, would have required a waiver for enlistment, PFC Watson's plea is still improvident. In his stipulation of fact PFC Watson indicates, "I now believe that [my mental-health treatment] was a waivable disqualification . . . ."[40] Yet he goes on to say, "this was important information that *could have potentially* disqualified me from enlisting in the Marine Corps . . . ."[41] This is an obvious inconsistency that was left unresolved by the military judge.

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[35] *Danley*, 45 C.M.R. at 261.
[36] *Id.*
[37] *Id.*
[38] *Nazario*, 56 M.J. at 578.
[39] BLACK' S LAW DICTIONARY 143 (7th ed. 1999).
[40] JA at 35.
[41] JA at 36 (emphasis added).

Thus, even under the *Henry* and *Nazario* scheme, the plea is improvident.

Conclusion

This Court should not abandon the teachings of *Loyd*, *Stevens*, and *Danley* for the *Henry* and *Nazario* scheme. But even if it were to do so, the Government could not prevail here. Regardless of the rule the Court adopts, PFC Watson's plea is improvident because the military judge left inconsistencies with his plea unresolved.

This Court should therefore set aside PFC Watson's fraudulent-enlistment conviction.

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Certificate of Filing and Service

I certify that the original and seven copies of the foregoing brief and the joint appendix were hand-delivered to the Court, and that a copy of each was hand-delivered to opposing Appellate Government Counsel and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on August 12, 2011.

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