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.	**REPLY 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:

JEFFREY R. LIEBENGUTH
Major, USMC
Appellate Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7394
Bar No. 34364

Index

Table of Authorities iii

Reply Argument:

I. PFC WATSON'S GUILTY PLEA TO FRAUDULENT ENLISTMENT IS IMPROVIDENT 1

Conclusion 4

Certificate of Filing, Service, and Compliance 5

Table of Authorities

United States Supreme Court
Planned Parenthood v. Casey, 505 U.S. 833 (1992) 2

United States Court of Appeals for the Armed Forces
United States v. Danley, 45 C.M.R. 260 (C.M.A. 1972) 1
United States v. Holbrook, 66 M.J. 31 (C.A.A.F. 2008) 1

Military Courts of Criminal Appeals
United States v. Loyd, 7 C.M.R. 453 (N.B.R. 1953) 1
United States v. Nazario, 56 M.J. 572
(A.F. Ct. Crim. App. 2001) 3
United States v. Stevens, 7 C.M.R. 838 (A.F.B.R. 1953) 1

Other
Marine Corps Order P1100.72C (18 Jun 2004) 3
William Winthrop, Military Law and Precedents Vols. 1 & 2
(2d ed., Washington Government Printing Office 1920)
(1886) 1

Reply Argument

I

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

The Government argues that *Loyd* and *Stevens*, which hold that a fraudulent enlistment conviction cannot be sustained unless it is established that, but for the misrepresentation, the accused would not have been permitted to enlist,[1] have been overruled *sub silentio* by the respective service appellate courts.[2] But even if that were true, it would hardly matter. This Court has the final say on the issue, and it has already decided that the rule is sound.

In *Danley*, this Court held that whether a misrepresentation during the enlistment process amounts to fraudulent enlistment "depends upon whether the concealed fact would have operated as a bar" to the enlistment[3]—a rule it favorably cited again just three years ago in *Holbrook*.[4] This rule can be traced back to Winthrop's 1886 *Military Law and Precedents*:

> A fraudulent enlistment is an enlistment procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment . . ., which has had the effect of causing the enlistment of a man not qualified to be a soldier, and who, but for such false representation . . . would have been rejected.[5]

---

[1] *United States v. Loyd*, 7 C.M.R. 453, 454 (N.B.R. 1953); *United States v. Stevens*, 7 C.M.R. 838, 841 (A.F.B.R. 1953).

[2] Gov't Answer of 12 Sep 2011 at 10, 12.

[3] *United States v. Danley*, 45 C.M.R. 260, 261 (C.M.A. 1972).

[4] *United States v. Holbrook*, 66 M.J. 31, 33 (C.A.A.F. 2008).

[5] William Winthrop, Military Law and Precedents Vols. 1 & 2, 734 (2d ed., Washington Government Printing Office 1920) (1886).

Thus, the deeper issue is whether this Court should now overturn the 125-year-old principle it adopted almost 40 years ago in *Danley*, and then recognized again just three years ago in *Holbrook*. The Supreme Court provides relevant guidance:

> [W]hen [a] [c]ourt reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, [it] may ask *whether the rule has proven to be intolerable simply in defying practical workability*; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . .; *whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine*; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[6]

Here, the *Danley* rule has not proven unworkable. It is a simple task for the government to access the Marine Corps Order on enlistments[7] to determine whether an enlistment would have been absolutely rejected had a serviceman been truthful.

Nor have "related principles of law so far developed" as to have left the *Danley* rule no more than a "remnant of abandoned doctrine." Indeed, the fraud principles that existed when Col Winthrop wrote his treatise in 1886 and when this Court decided *Danley* and *Holbrook*, still exist today.

Yet the Government urges this Court to overrule *Danley* and

---

[6] *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (citations omitted and emphasis added).

[7] Marine Corps Order P1100.72C (18 Jun 2004); *see* JA at 62-67.

adopt a new rule: that fraudulent enlistment occurs when an applicant "'provide[s] false information about a matter that would preclude [him] from entry'" *without a waiver*.[8] The Government wants this new rule because it fears that, in cases like this one, an applicant's enlistment misrepresentation would escape prosecutorial reach *altogether* if this Court continues to follow *Danley*.[9] But this fear is easily soothed. While Article 83 does not apply here under *Danley*, PFC Watson could have been properly charged under Article 134 as follows:

> **Charge**: Violation of the UCMJ, Article 134
>
> **Specification**: In that Private First Class Alexander M. Watson, U.S. Marine Corps, on active duty, did, at or near San Mateo, California, on or about 13 November 2007, misrepresent during the enlistment process that he had never been a patient in any institution primarily devoted to the treatment of mental, emotional, psychological, or personality disorders, and then did continue to conceal that misrepresentation once on active duty, conduct that, under the circumstances, was of a nature to bring discredit upon the armed forces.

Thus, all servicemen who misrepresent themselves during the enlistment process can be properly prosecuted under the UCMJ.

Regardless of the rule this Court adopts though, PFC Watson's plea is improvident because, as highlighted in his initial brief, he raised matters inconsistent with his guilty plea that were left unresolved by the military judge.[10] Yet the

---

[8] Gov't Answer at 13 (quoting *United States v. Nazario*, 56 M.J. 572, 579 (A.F. Ct. Crim. App. 2001)).

[9] Gov't Answer at 12-13.

[10] Appellant's Brief of 12 Aug 2011 at 6-10.

Government argues that the issue was waived.[11] In so doing, it essentially contends that, by pleading guilty, PFC Watson waived any claim that the plea itself was flawed. But under this reasoning, a guilty plea could never be improvident, which is surely wrong.

Conclusion

Because the rule found in *Danley* has not proven to be "unworkable" or become the "remnant of an abandoned doctrine," the principle of *stare decisis* dictates that it should not be discarded. But even if this Court abandons that rule and adopts the one urged by the Government, PFC Watson's plea is nonetheless improvident because the military judge left matters inconsistent with his plea unresolved.

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

JEFFREY R. LIEBENGUTH
Major, USMC
Appellate Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7394
Bar No. 34364

[11] Gov't Answer at 13-16.