IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

ROBERT E. ECKERT, JR.
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street
Washington Navy Yard, DC 20374
(202) 685-7433
fax (202) 685-7687
Bar no. 34522

KURT J. BRUBAKER
Colonel, U.S. Marine Corps
Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682,
fax (202) 685-7682
Bar no. 35424

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682,
fax (202) 685-7687
Bar no. 34114

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Issue Granted

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

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge and more than one year of confinement. The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b) (2006). Appellant filed a timely petition for grant of review with this Court. Accordingly, this Court has jurisdiction over the granted issues under Article 67(a)(3), UCMJ, 10 U.SC. § 867(a)(3) (2006).

Statement of the Case

A military judge sitting as a general court-martial, convicted Appellant, pursuant to his pleas, of one specification of fraudulent enlistment, one specification of unauthorized absence, one specification of communicating a threat, one specification of carrying a loaded firearm in a vehicle, one specification of possessing a deadly weapon with the intent to commit assault, one specification of communicating indecent language, and the knowing possession of child pornography, all in violation of Articles 83, 86, and 134 of the UCMJ, 10 U.S.C. §§ 883, 886, and 934 (2006).

The Military Judge sentenced Appellant to forty-two months confinement, reduction to pay grade E-1, total forfeiture of pay and allowances, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed. In accordance with a pretrial agreement, the Convening Authority suspended all confinement in excess of two years for twelve months.

Appellant submitted eight assignments of error to the lower court. After the lower court affirmed the findings and sentence as approved by the Convening Authority, Appellant filed a timely petition for a grant of review which this Court granted on two issues on July 19, 2011. This Court ordered briefing on only the issue noted above, whether Appellant's guilty plea to fraudulent enlistment was provident.

Statement of Facts

During the plea colloquy and in his written stipulation of fact, Appellant noted that at the age of thirteen, he attempted to take his own life and that as a result, he received inpatient treatment at a mental health facility. (J.A. 21, 22, 31, 35.) (J.A. 22.) During the plea colloquy, Appellant testified about his first trip to the Recruiting Station and how he filled out the written questionnaire that his recruiter provided:

> And I came over the question related to whether I had ever been previously confined in a facility that evaluates or treats mental health or psychiatric health and due to that nature of the question, I intentionally marked that I had never attended one of those facilities in hopes that it would help me better become eligible to join the Marine Corps; because, I assumed at the time that it would be a disqualifying factor or a factor that would severely hinder my chances of joining the Marines[.]

(J.A. 21.) Appellant agreed with the Military Judge that his recruiter's questions were undertaken as a part of his responsibility to obtain "information pertinent to individuals looking to enlist in the Marine Corps." (J.A. 22.) Appellant further admitted that at the time he lied to his recruiter, he remembered "being a patient in some type of institution" and that he intentionally tried to conceal or provide false information to the Recruiter. (J.A. 22, 23.) Appellant testified that he believed his recruiter relied on his misrepresentations and that had he told the truth, the recruiter would have "inquired additionally" into the matter. (J.A. 23.) Finally, the Military Judge asked Appellant: "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[?]" (J.A. 23.) Appellant replied: "I do, sir." (J.A. 23.)

Likewise, Appellant's Stipulation of Fact provided that he received inpatient treatment at a mental health facility after an attempted suicide. (J.A. 31.) Appellant admitted that "This

[the inpatient treatment at a mental health facility] is a material fact that the United States Marine Corps uses when determining whether to accept or decline an applicant." (J.A. 31.) The Stipulation also noted that Appellant "now believe[s] that this was a waivable disqualification, but [he] did not know that at the time." (J.A. 35.) Appellant believed that he "procured" his enlistment by concealing this information because it could have "potentially disqualified [him] from enlisting in the Marine Corps." (J.A. 36.) Appellant realized the true impact of his stay at a mental health facility based on his review, with his attorney, of the Military Personnel Procurement Manual, which "spells out what can be waived and what is not waivable." (J.A. 35.) Finally, the Stipulation noted that Appellant "did not know whether [he] would have been enlisted in the Marine Corps if he told the truth." (J.A. 36.)

Summary of Argument

Appellant fails to show a substantial basis in law or fact to question his guilty plea to fraudulent enlistment. Similar to the materiality element, the question of whether the misrepresentation must serve as a bar to enlistment should be examined from the perspective of the service, not Appellant. Here, absent a waiver, meaning absent an exception to the general practice, the service refuses to admit those who resided in a mental health facility. Thus, because the service's

standard practice is to refuse to admit those applicants, like Appellant, who resided in a mental health facility, Appellant's deliberate lie about that fact is what procured his enlistment. Because Appellant deliberately concealed a fact that would have affected his ability to enlist in the Marine Corps, his plea was provident.

Argument

> A WAIVER BY THE MARINE CORPS, BY DEFINITION, MEANS THAT APPELLANT DID NOT MEET THE QUALIFICATIONS FOR ENLISTMENT. THE CRIME OF FRAUDULENT ENLISTMENT MERELY REQUIRES AN APPLICANT LYING OR DELIBERATELY CONCEALING A FACT THAT WOULD CAUSE THE SERVICE TO REJECT THAT APPLICANT. HERE, APPELLANT LIED ABOUT HIS COMMITMENT TO A MENTAL HEALTH FACILITY, A FACT THAT WOULD RESULT IN HIS REJECTION, UNLESS THE SERVICE WAIVES THEIR QUALIFICATIONS. THUS, THE PLEA IS PROVIDENT.

A. Standard of Review.

"The standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion." *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008). 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.* "Review of the statutory elements required to establish an offense is a question of law" reviewed *de novo*. *United States v. Holbrook*, 66 M.J. 31, 32 (C.A.A.F. 2008).

B. The crime of fraudulent enlistment is examined from the perspective of the service, not the accused. Beyond his knowledge that he lied, Appellant's knowledge as to whether his concealment would be considered as material or disqualifying is irrelevant. Thus, the pertinent question here is whether Appellant concealed information from the recruiter that would have been used to reach the decision as to whether he would be enlisted into the military.

Fraudulent enlistment has four elements: (a) enlistment into an armed force; (b) concealment of a material fact regarding qualifications for enlistment; (c) the enlistment must be procured by the deliberate concealment; and (d) the accused must receive pay or allowances. Manual for Courts-Martial, Part IV, ¶ 7.b. (1-4) (2008 ed.). Although the primary question presented by this case concerns the third element, case law that addresses the materiality element (element b) is relevant to construing the statute at issue.

When an applicant provides "false information about a matter that would preclude him from entry without the service waiving the disqualification," they violate Article 83, UCMJ. *United States v. Nazario*, 56 M.J. 572, 579 (A.F. Ct. Crim. App. 2001) *rev'd on other grounds* 58 M.J. 19 (C.A.A.F. 2002); *see also United States v. Stevens*, No. S30170, 2004 CCA LEXIS 168, *12-13 (A.F. Ct. Crim. App. Jul. 20, 2004) (holding the Government must prove "drug use that was disqualifying," absent a waiver). The Navy-Marine Corps Court of Criminal Appeals has adopted an identical position: "The facts concealed do not have

to be an absolute bar to enlistment." *United States v. Henry*, No. 200200009, 2003 CCA LEXIS 203, *7 (N-M. Ct. Crim. App. Aug. 26, 2003) (citing *Nazario*, 56 M.J. at 579).[1]

1. Appellant need only understand that he is lying, he need not realize that his lie will definitively prevent his enlistment.

This Court considered a very similar issue to that in this case, and like the service courts, examined this offense from the perspective of the military recruiter, not the accused. *Holbrook*, 66 M.J. at 33. No requirement exists beyond the accused's knowledge that he answered the recruiter's questions untruthfully "regarding his qualifications" for enlistment. *Id*. "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." *Id*. (citations omitted). This Court went further in noting that "no authority" supports appellant's argument, that liability turns upon the applicant's knowledge that the service knew "the truth might preclude his enlistment." *Id*.

Although Appellant argues that this Court's *Holbrook* decision has no bearing on this case (Appellant's Br. at 6-7), there are three additional factors in that decision that

[1] The lower court incorrectly cited the *Nazario* language as an opinion of this Court. (J.A. 70.) In fact, that quotation is from the Air Force Court's *Nazario* opinion.

directly apply to this case. In the quote above, this Court utilized the phrasing "might preclude his enlistment," not whether the fact would bar his enlistment under all circumstances. *Id*. Next, this Court firmly rejected the notion that an accused must possess "thorough knowledge" about the service's enlistment standards in order to violate Article 83. *Id*. This of course, is the holding in *Holbrook* that an accused must simply lie about something relevant to the service's decision whether to enlist the applicant. Finally, this Court approves of the explanation of the offense in the Manual. *Id*.

The Manual's explanation of Article 83 is very broad and, though not binding authority, demonstrates that, at least in the President's interpretation of the statute, the drafters of the Article did not intend to limit the Article's application to those facts that would absolutely bar an applicant from serving in the military. Manual, Part IV, ¶ 7.c.(1). The phrasing reads: "any of the qualifications proscribed by law, regulation, or orders for the specific enlistment." *Id*. A material matter is "any information used by the recruiting officer in reaching a decision as to enlistment . . . in any particular case." *Id*.

2. This Court should reject Appellant's argument that a provident plea to fraudulent enlistment must include a statement from the accused that had he told the truth on the fact at issue, it would have served as an absolute bar to enlistment.

The granted issue presents two questions: (1) must the concealed fact serve as an absolute bar that will prevent the accused from enlistment in all circumstances; and, (2) does Appellant's failure to understand and admit during the plea colloquy, that at the time of his lie, the fact he is concealing will prevent him from enlisting in all circumstances?

In support of his legal argument that only an absolute bar to enlistment in all circumstances violates Article 83, Appellant relies on two service court cases that were overruled and a 1972 Court of Military Appeals case that is distinguishable. (Appellant's Br. at 8-10.) This Court framed the issue in a case where it reviewed the sufficiency of the evidence in a fraudulent enlistment as "whether the concealed fact would have operated as a bar to" enlistment. *United States v. Danley*, 21 C.M.A. 486, 487 (C.M.A 1972). In that case, this Court held that the regulation at issue "permits many exceptions, one of which precisely fits the purpose for which this accused sought to reenlist." *Id.* at 488. There, this Court held that appellant's concealment of a prior reenlistment, contrary to the government's argument, did not disqualify him

for reenlistment. *Id*. at 488-89. Thus, the issue in that case had nothing to do with whether a disqualification that could be waived gives rise to an Article 83 offense, it was whether the fact the appellant concealed certain information disqualified him at all. Because the fact at issue was not a disqualifier under the Army regulation discussed in the case, the enlistment was not fraudulent.

Those are not the facts here, where the Marine Corps Order Appellant cites notes that any "psychological or psychiatric hospitalization or counseling" is expressly listed as a "commonly occurring condition[that] do[es] not meet established physical standards and *may be permanently disqualifying*." (J.A. 63 (emphasis supplied).) In *Danley*, the appellant fell under an exception "which precisely fit[] the purpose for which [he] sought to reenlist." Here, Appellant deliberately lied about his stay in a mental health facility, a fact that does not meet the Marine Corps' established physical standard, thus it rendered him unqualified for enlistment, absent a waiver of the Marine Corps' standard criteria.

Appellant also cites *United States v. Loyd*, 7 C.M.R. 453, 454 (N.B.R. 1953), a Naval Board of Review case, for the proposition that the concealed fact must cause the rejection of the applicant. (Appellant's Br. at 6.) But *Loyd* does not assist Appellant. First, *Loyd* was overruled *sub silentio* when

the lower court adopted the *Nazario* rule in *Henry* holding that "the facts concealed do not have to be an absolute bar to enlistment." *Henry*, 2003 CCA LEXIS 203, at *7; (J.A. 70.) Second, in *Loyd* the court noted that the prosecution failed to prove both "willful concealment" and "legal disadvantage." 7 C.M.R. at 454. The recruiter in *Loyd* told the applicant to lie on his forms and state that he had no prior military service (he had an honorable discharge from the Army) because a truthful response would delay his entry into the Navy (he was supposed to ship that evening). *Id*. There, the fact at issue, prior honorable military service, was not a disqualifying factor at all and thus, has no relevance to the issue in this case.

Likewise, the other Board of Review case that Appellant relies upon is both overruled and distinguishable. The issue was whether the instructions provided the jury on the issue of Appellant's mental state during his alleged fraudulent enlistment were adequate. *United States v. Stevens*, 7 C.M.R. 838, 841 (A.F.B.R. 1953). The court noted that an element of the offense required the accused's "intent to conceal at the time when he allegedly entered into the enlistment." *Id*. At trial, the appellant argued that his intoxication vitiated his ability to form the requisite intent. *Id*. at 842. On appeal, the court held that the claim, though incredible, "reasonably raised the issue of his mental capacity to know that his

representations were false." *Id*. Thus in *Stevens*, the issue concerned the adequacy of the jury instructions on the appellant's intent and did not construe the third element at issue in this case. Finally, again, even were this Court to adopt Appellant's interpretation of *Stevens*, the Air Force court overruled the case *sub silentio* in *Nazario*. 56 M.J. at 579.

Under the Marine Corps Order that addresses recruiting, Appellant's concealed fact, his psychiatric hospitalization, means that he does not meet established physical standards. Accordingly, he is not qualified to enlist in the Marine Corps: unless of course, the service waives those standards. Black's defines "waive" as: "to give up (a right or claim) voluntarily. "To waive a right one must do it knowingly——with knowledge of the relevant facts." Black's Law Dictionary 1276 (7th ed. 2000).

The crime of fraudulent enlistment, per the explanation of the offense, is designed for this precise situation: a member who conceals a fact that would prevent his entry into the service. Under Appellant's interpretation of the offense, only when an applicant lies about the conditions listed as permanently disqualifying would there be an offense under Article 83. (*See* J.A. 64-65.) This would work an absurd result in that an applicant could, instead of seeking a waiver for a disqualifying condition, lie about it and not be liable, but if

he lied about his schizophrenia, then he would violate Article 83. (J.A. 63-65.)

This result would contravene the intent behind Article 83, which is to ensure that applicants to the military do not conceal facts material to their enlistment. Case law does not support requiring the concealment of facts that serve as absolute bars to military service. Secondly, as in *Holbrook*, this Court should examine this case from the perspective of the service, the entity that determined a person with Appellant's condition does not meet their established physical standards, and that determined that, absent a waiver of those standards, such a person would be denied enlistment.

This Court should reject Appellant's invitation for an "absolute bar" rule. The Government respectfully invites this Court to adopt the Air Force Court's holding in *Nazario*, that an applicant violates Article 83 when they "provide false information about a matter that would preclude [them] from entry without the service waiving the disqualification." 56 M.J. at 579.

C. Appellant's guilty plea forecloses his argument on appeal that the information regarding his commitment to a mental health facility would not have impacted the decision to admit him into the Marine Corps.

A plea of guilty waives any argument on appeal contesting the "factual issue of guilt on the offense to which the plea was

made." Rule for Courts-Martial 910(j); *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011). Appellant could have pled not guilty and argued that his stay at a mental health facility did not require a waiver or is a matter in which waivers are summarily granted. Cf. *United States v. Ferguson*, 68 M.J. 431, 435 (C.A.A.F. 2010) ("Appellant could have pled not guilty . . ., and challenged the prosecution's theory of the specification. . ."; but by pleading guilty, appellant "relinquished his right to contest the prosecution's theory on appeal.").

Instead, having pled guilty and explicitly admitted to lying about not having been in a mental institution and procuring an enlistment by providing false information that he explicitly believed his recruiter relied on, Appellant waived any objection on appeal as to the factual matter of whether his particular stay in a mental health facility was a disqualifying factor. Although Appellant now characterizes his trial statements as equivocation as to whether his mental health treatment would have disqualified him (Appellant's Br. at 9), his statements explicitly admitted that his hospitalization was a disqualifying factor. He admitted during the plea colloquy that when he filled out the forms at his Recruiting office, had he answered truthfully, "[he] assumed that it would be a disqualifying factor or a factor that would severely hinder his

chances of joining the Marines." (J.A. 21.) Thus, his arguments must be rejected.

The substantial basis in fact that Appellant now asserts for questioning the plea is the seeming disconnect between the plea colloquy and stipulation of fact. (Appellant's Br. at 9.) Again, this misconstrues the focus of the offense. The stipulation reads "could have potentially disqualified me" from service. This makes perfect sense given that: (1) Appellant, when he sat in the recruiter's office, was in no position to know definitively whether the fact would permanently bar him from service; and, (2) the service is the determiner of whether it will waive the normal qualifications. If the stipulation read, "I knew at the time I filled out the paperwork that the fact I concealed would prove an absolute bar to military service," the offense would require a level of knowledge in each applicant that they will never possess.

Appellant's particular stay in a mental health facility was a waivable disqualification. (J.A. 63.) Thus, there is no disconnect between his statements during the plea colloquy about his intent at the time of the lie, and his then understanding about the Marine Corps' standards for enlistment and the Stipulation of Fact, written with the benefit of knowledge acquired through his counsel. Because Appellant fails to show a

substantial basis in law or fact for questioning the plea, this Court should affirm the Military Judge's acceptance of the plea.

Conclusion

The Government requests that this Court affirm the findings and sentence as approved by the lower court.

/S/

ROBERT E. ECKERT, JR.
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE,
Bldg. 58, Suite B01
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687
Bar no. 34522

/S/

KURT J. BRUBAKER
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 35424

/S/

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on September 12, 2011.

/S/

ROBERT E. ECKERT, JR.
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687
Bar no. 34522