IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Lazzaric T. CALDWELL Private (E-1) United States Marine Corps, Appellant	**APPELLANT'S BRIEF** Crim.App. Dkt. No. 201000557 USCA Dkt. No. 12-0353/MC

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

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Issue Presented

WHETHER, AS A MATTER OF LAW, A BONA FIDE SUICIDE ATTEMPT IS PUNISHABLE AS SELF-INJURY UNDER ARTICLE 134?

Statement of Statutory Jurisdiction

The lower court reviewed Appellant'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)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A military judge, acting as a special court-martial, convicted Private (Pvt) Caldwell, pursuant to his pleas, of:

> (1) "self-injury without intent to avoid service" (hereinafter "intentional self-injury"), in violation of Article 134, UCMJ;
>
> (2) larceny, in violation of Article 121, UCMJ; and
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> (3) two specifications of violating Article 92, UCMJ, for automobile-related orders violations.[1]

Contrary to his plea, the military judge also convicted Pvt Caldwell of one specification of possessing the marijuana substitute "spice," in violation of Article 92, UCMJ.[2] He acquitted Pvt Caldwell of two other specifications of violating

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[1] 10 U.S.C. §§ 892, 921, and 934.
[2] 10 U.S.C. § 892.

Article 92, UCMJ, for alleged use and distribution of "spice."[3] Pvt Caldwell was sentenced to confinement for 180 days, reduction in pay-grade to E-1, and a bad-conduct discharge.[4] The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.[5]

NMCCA Decision

On August 16, 2011, the lower court heard oral argument in this case. On November 15, 2011, in an unpublished opinion, the lower court issued a plurality decision, authored by Senior Judge Booker.[6] The opinion set aside the guilty findings for intentional self-injury and larceny.[7] The Court affirmed the remaining findings.[8] It then affirmed the sentence only with respect to the bad-conduct discharge.[9] Concurring in part, and dissenting in part, Judge Beal stated he would have affirmed all of the findings and the sentence.[10] In dissent, Senior Judge Maksym refused to affirm any of the findings or the sentence.

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[3] R. at 506-07.
[4] *Id.* at 566.
[5] Convening Authority's (CA's) Action, Sept. 30, 2010.
[6] *United States v. Caldwell*, No. 201000557, 2011 CCA LEXIS 181 (N-M. Ct. Crim. App. Nov. 15, 2011)(unpublished op.)(hereinafter "Caldwell I"). (Appendix 2).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Judge Beal inaccurately stated that he "join[ed] Senior Judge Booker in affirming the sentence as approved by the convening authority."

He explained that, in light of Pvt Caldwell's mental health history, he would have remanded the case for a Rule for Courts-Martial (R.C.M.) 706 inquiry.

On November 16, 2011, the lower court *sua sponte* ordered *en banc* reconsideration of the November 15, 2011, Panel 1 decision. On December 27, 2011, after Senior Judge Booker left the Court, the NMCCA issued a published, *en banc* opinion authored by Judge Beal that affirmed all of the findings and the sentence.[11] Judge Perlak, joined by Judge Payton-O'Brien, concurred in part and dissented in part, stating that they would not have affirmed the larceny conviction. Senior Judge Maksym dissented for the same reasons he stated in his previous dissent.

The *en banc* decision did not have the benefit of oral argument. The NMCCA did not order oral argument, nor was the appellant given the opportunity to present argument to the Court as the Court *sua sponte* reconsidered the panel decision.

On January 17, 2012, Pvt Caldwell requested the Judge Advocate General certify his first two assignments of error to this Court. The Judge Advocate General denied the request. On February 24, 2012, Pvt Caldwell filed a timely petition for grant of review with this Court, that was granted on July 11,

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[11] *United States v. Caldwell*, __ M.J. __, No. 201000557, slip op. at 3 (N-M. Ct. Crim. App. Dec 27, 2011) (hereinafter "*Caldwell II*").

2012.

Statement of Facts

"It was a suicide attempt"[12]

On January 22, 2010, alone in his barracks room at Camp Schwab, Okinawa, Lazzaric T. Caldwell, a 23-year-old Marine Corps private, slit both his wrists with a razor blade in an effort to take his own life.[13]

Pvt Caldwell suffered from diagnosed delayed post-traumatic stress disorder (PTSD).[14] He also had been diagnosed with depression and personality disorder and had been prescribed the antidepressant Zoloft, as well as several other medications, to treat these conditions.[15] After experiencing a series of seizures consistent with epilepsy, Pvt Caldwell stopped taking his medications — around January 7-8, 2010 — believing them to be the cause of the seizures.[16] Soon afterward, he was struck by back-to-back pieces of devastating news: (1) One of his Marine Corps friends unexpectedly died almost immediately upon returning home from Okinawa;[17] and (2) his command notified him

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[12] R. at 95-96.
[13] R. at 88, 92.
[14] R. at 94; Defense Ex. L at 1.
[15] R. at 92, 94-95.
[16] R. at 95; Defense Ex. L at 3.
[17] R. at 91-92. Corporal Wright, a friend of Pvt Caldwell's in Okinawa, had just returned to the United States and unexpectedly passed away soon after arriving home. According to his

it was placing him in pretrial confinement—for the second time that tour[18]—over the alleged theft of a belt.[19] Pvt Caldwell had also experienced several other recent traumatic events, including being stabbed by his fiancé, who then broke up with him, and the deaths of his grandmother and great-grandmother.[20]

On January 22, 2010, one of the staff non-commissioned officers (SNCO) in Pvt Caldwell's unit informed him that he was going back to the brig.[21] The SNCO then left Pvt Caldwell, who was sobbing uncontrollably, alone in his barracks room.[22]

"I just didn't feel like I wanted to live anymore, and I feel like I couldn't have put up with things anymore," Pvt

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testimony, Pvt Caldwell learned of this from talking to Corporal Wright's wife just before the suicide attempt took place.

[18] The command had earlier placed Pvt Caldwell in pretrial confinement for 61 days prior to taking him to summary court-martial, a length of time in pretrial confinement that exceeded the maximum jurisdictional amount of confinement that he could have been sentenced to in that forum. See Art. 20, UCMJ. This incident, and disputes over the fairness of the summary court-martial, colored relations between Pvt Caldwell and his chain of command throughout the period dealt with in *this* case and resulted in 4th Marine Regiment effectively "shunning" Pvt Caldwell for the rest of his time in the unit. Pvt Caldwell describes that he was told by his superiors "just to check in from time to time," and he went from shop to shop and watched TV all day. "It made me feel like I had no purpose in the unit," he said. (See R. at 549-51; Defense Ex. J; Prosecution Ex. 26; Shinn Aff., Jan. 6, 2011, at 1-4.)

[19] R. at 91-92.

[20] R. at 98.

[21] R. at 92.

[22] R. at 92, 95-96.

Caldwell said during his providence inquiry.[23] "I didn't have any of the medication or anything anymore . . . and then I took the razor blade and I slit my wrist[s]."[24] When pressed by the military judge, Pvt Caldwell described it as "not the smartest idea, but it was a suicide attempt."[25]

When the SNCO later entered his barracks room, he found Pvt Caldwell bleeding on the floor and administered first aid by wrapping socks around his wrists.[26] He then called in corpsmen, who responded with their medical kits.[27] After providing acute care to stabilize his injuries, they removed Pvt Caldwell to the base hospital, where he spent one day under psychiatric observation before being placed into the brig.[28]

Rather than help Pvt Caldwell get mental health treatment for the previously-diagnosed mental illnesses and the suicide attempt, he was put in the brig, largely ignored by his command,[29] and prosecuted for intentional self-injury under Article 134, UCMJ.[30] Pvt Caldwell pleaded guilty without the

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[23] R. at 92.
[24] R. at 92.
[25] R. at 95.
[26] R. at 92-93, 96.
[27] R. at 93.
[28] R. at 103.
[29] See Appellant's Aff., Jan. 11, 2011, at 2-4.
[30] Charge sheet.

benefit of an R.C.M. 706 inquiry.[31]

The intentional self-injury specification he was convicted of by exceptions and substitutions, read as follows:

> In that Private Lazzaric T. Caldwell, U.S. Marine Corps, on active duty, did, at Okinawa, Japan, on or about 22 January 2010, intentionally injure himself by cutting his wrists with a razor blade after being informed by First Sergeant Kenneth C. Lovell III that he was being taken to the brig at Camp Hansen, Okinawa, Japan.[32]

Summary of Argument

A bona fide suicide attempt, particularly one associated with mental illness, should not be treated as a crime under the "self-injury" clause of Article 134, nor under any other statute within the UCMJ. Intentional self-injury without intent to avoid service cannot, as a matter of law, be used to prosecute a bona fide suicide attempt induced by depression, PTSD or other mental illness because in such cases neither element of the crime can be met.[33] But even if this Court believes there are

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[31] i.e., a competency board pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.)

[32] Charge sheet. "Razor blade" was substituted for the word "knife."

[33] The crime of intentional self-injury contains two elements: (1) that the accused intentionally inflicted injury upon himself or herself, and (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 103a(b).

circumstances where these elements can be met, this case does not fall among them because the providence inquiry fails to establish that Pvt Caldwell, in his suicidal state, could form the requisite intent to "intentionally" injure himself, or that his actions actually prejudiced good order and discipline or were of a nature to bring discredit upon the armed forces.

Argument

AS A MATTER OF LAW, A BONA FIDE SUICIDE ATTEMPT IS NOT PUNISHABLE AS SELF-INJURY UNDER ARTICLE 134.

"It is an odd charge because . . . it's basically criminalizing an attempted suicide."[34]

- Lieutenant Colonel D. M. Jones, Military Judge -

Standard of Review

Whether attempted suicide can be prosecuted via intentional self-injury under Article 134, is a question of law. Questions of law are reviewed *de novo*.[35]

Discussion

This case raises a threshold question: Can intentional self-injury, an enumerated example of a crime under Article 134, be used as a vehicle within the military to prosecute bona fide suicide attempts?

This Court should find that it cannot and should not for

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[34] R. at 99.

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

two reasons: (1) The *mens rea* element of intentional self-injury cannot be met by a genuine suicide attempt; and (2) the prejudicial/service-discrediting element (clauses 1 and 2) also cannot be met under such circumstances.

But even if this Court believes that there are circumstances in which such attempted suicides can be prosecuted under this statute, this case does not fall within them.

Lower court error

The lower court erred in three critical aspects of its analysis:

> (1) In its effort to justify an antiquated policy, it stretched the concept of "prejudicial to good order and discipline" far beyond what common sense and the law currently allow;
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> (2) it failed to undertake any analysis of *mens rea*, and
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> (3) it misinterpreted this Court's case-law in analyzing whether *United States v. Ramsey*[36] and *United States v. Taylor*[37] are "dispositive" on the matter of whether "prosecution of genuine suicide attempts should be prohibited under military law."

Law

Article 134, UCMJ, criminalizes "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." The legal elements that must be pleaded and

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[36] *United States v. Ramsey*, 40 M.J. 71, 75 (C.M.A. 1994).
[37] *United States v. Taylor*, 38 C.M.R. 393, 395 (C.M.A. 1968).

proved under clauses 1 and 2 of this statute, therefore, are:

> (1) that the accused did or failed to do certain acts, and;
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> (2) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces [clause 1] or was of a nature to bring discredit upon the armed forces [clause 2].[38]

Clause 1 refers "only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense."[39]

According to the President, "self-injury without intent to miss service" (intentional self-injury) contains two elements:

> (1) that the accused *intentionally* inflicted injury upon himself or herself, and
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> (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[40]

The offense dates back at least to Article of War 96 of the 1949 U.S. Army MANUAL FOR COURTS-MARTIAL, which stated that, "Any willfully and wrongfully self-inflicted injury which results in temporary or permanent impairment of the ability of a person to perform military duty may be punishable under Article 96 as a disorder to the prejudice of good order and military

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[38] MCM, Part IV, ¶ 60b(1) and (2).
[39] *Id.* at 60c(2)(a).
[40] *Id.* at 103a(b). (emphasis added).

discipline."[41]

It appears to have been envisioned, at that time, not as a way to prosecute attempted suicides, but as a lesser-included-offense (LIO) of malingering, which is punishable under Article 115. Military appellate courts have most often dealt with it as such.[42] It differs from malingering because the government does not have to prove the often-difficult element of intent to avoid duty or service as long as it can show that the self-injury meets the requirements of clauses 1 or 2.[43] The presidential explanation does articulate that, while the result of the injury is not relevant (i.e., it does not matter what impact it has on the accused's ability to perform his duties), the "circumstances and extent of injury . . . are relevant to a determination that the accused's conduct was prejudicial to good order and discipline, or service-discrediting."[44]

At common law, suicide was considered a felony, and

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[41] MCM, U.S. ARMY (1949 ed.), ¶ 183a.

[42] See TJAGSA Practice Note, *Confusion about Malingering and Attempted Suicide*, THE ARMY LAWYER, June 1992, at 38 (hereinafter *"Confusion about Malingering and Attempted Suicide"*); See also, *United States v. Ramsey*, 35 M.J. 733 (A.C.M.R. 1992); *Taylor*, 38 C.M.R. at 393. Modern case law, of course, makes it impossible today to convict someone of intentional self-injury as an LIO of malingering.

[43] See Article of War 96, MCM, U.S. ARMY (1949 ed.), ¶ 183a; *Confusion about Malingering and Attempted Suicide*, at 38; see also *Ramsey*, 35 M.J. at 733; *Taylor*, 38 C.M.R. at 393; MCM, U.S. ARMY (1949 ed.), ¶ 40b.

[44] MCM, Part IV, ¶ 103a(c)(1).

attempted suicide was considered a misdemeanor.[45] By the time the UCMJ was promulgated in 1950, however, most states already considered such common law interpretations of suicide to be obsolete, and they no longer treated suicide and attempted suicide as criminal offenses.[46] Today, the few states that continue to criminalize suicide recognize lack of mental capacity as a defense and tend to use such laws for ancillary purposes, such as barring administrator's wrongful death actions or targeting those who assist suicide, rather than prosecuting those who attempt suicide.[47]

Article 115 and Article 134 do not reference suicide specifically. But military appellate courts have addressed the issue on occasion, albeit not since 1992.

In 1955, the Air Force Board of Review ruled in *United*

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[45] *State v. Willis*, 121 S.E.2d 854, 855-57 (N.C. 1961) (citing CHITTY'S BLACKSTONE, 19th London Ed., Book IV, pp. 189, 190 and 10 HALSBURY'S LAWS OF ENGLAND, 3d Ed., s. 1396, p. 728.).

[46] Robert I. Simon, M.D., ET AL., *On Sound and Unsound Mind: The Role of Suicide in Tort and Insurance Litigation*, J. AM. ACAD. PSYCHIATRY LAW 33:2 (2005) at 176. See also *State v. Willis*, 121 S.E.2d at 855-56, a 1961 case in which the N.C. Supreme Court noted that Alabama, Massachusetts, New Jersey and South Carolina continued to criminalize suicide as of that date.

[47] See e.g., *Wackwitz v. Roy*, 418 S.E.2d 861, (Va. 1992), where the Virginia Supreme Court, noting that suicide remains on the books as a crime in Virginia, decided whether the nonresident administrator of a decedent's estate (his widow) could bring a wrongful death suit against a psychiatrist and hospital that allowed him to be discharged shortly before he committed suicide.

States v. Walker that suicide and suicide attempts were not crimes under the UCMJ.[48] In that case, the accused was charged with and convicted of "attempted suicide" under Article 134 after consuming approximately 100 sleeping pills following his assault on a fellow service member and going AWOL.[49] The court stated:

> It has been repeatedly held by both the Federal and State courts that although suicide was and is an offense at common law it cannot be punished in the United States. . . . Further, we believe punishment for the offense of suicide to be prohibited by the "cruel and unusual punishment" provisions of both the Constitution of the United States and the Uniform Code of Military Justice.[50]

In *United States v. Johnson*, a 1988 Court of Military Appeals case, the Court noted in dicta that a "suicide attempt" made for the purpose of avoiding duty — as opposed to for self-destruction — could be prosecuted via Article 115 (malingering).[51] Staff Sergeant Johnson admitted during his providence inquiry, however, that his "motive for attempting suicide . . . [was] . . . to avoid prosecution and its consequences."[52] In other words, he did not exhibit serious

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[48] *United States v. Walker*, 20 C.M.R. 931 (A.F.C.M.R. 1955).
[49] *Id.* at 933.
[50] *Id.* at 935.
[51] *United States v. Johnson*, 26 M.J. 415, 417 (C.M.A. 1988).
[52] *Id.* at 417. This colloquy between Staff Sergeant Johnson and the military judge is what triggered the Court's musings that Congress would have wanted to punish serious attempted suicides

suicidal intent, making his self-injury what today would be described as a "suicidal gesture," not a bona fide suicide attempt.

The Court of Military Appeals also addressed the prospect of suicide, as it related to self-injury prosecutions, in *United States v. Taylor*[53] and *United States v. Ramsey*[54]. Both of these cases will be examined extensively later in this brief, as both were cited in the lower court's opinion. But it is worth noting here that *Ramsey* and *Taylor* were decided long before current views on suicide, and terminology about suicide, prevailed. Although the phrase "suicide attempt" was used in both, the Vietnam and Gulf War-era courts deciding those cases did not appear to believe that Specialist Ramsey or Seaman Recruit Taylor demonstrated serious suicidal intent.[55]

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via Article 115 if the accused "not only wanted to avoid duty but also wanted to end his life." *Id.* at 417-18. This dual-purpose scenario, however, implies a calculated act of ultimate protest on the part of an accused that does not occur in an attempted suicide associated with depression/mental illness (e.g., Buddhist monks protesting the Vietnam War by attempting suicide/Tibetan monks similarly protesting Chinese governmental actions are calculated in their approach to suicide in a way similar to that envisioned by the *Johnson* court. Someone suffering from acute depression, such as - to use a few famous examples - Curt Cobain, Ernest Hemingway or Sylvia Plath, is not).

[53] *Taylor*, 38 C.M.R. at 393.

[54] *Ramsey*, 40 M.J. at 71.

[55] *Taylor*, 38 C.M.R. at 393; *Ramsey*, 40 M.J. at 71.

Analysis

Here, the military judge and the lower court both recognized that Pvt Caldwell made a genuine suicide attempt and that Pvt Caldwell suffered from a variety of mental illnesses, including PTSD. Yet the military judge found Pvt Caldwell guilty of intentional self-injury under clauses 1 and 2. And the lower court affirmed his findings. The lower court did not analyze this case under clause 2; only under clause 1.

a. Stretching Clause 1 Beyond Its Limits

The lower court held that because Pvt Caldwell, in his suicidal state, "needlessly exposed GySgt C to his bodily fluids and he caused corpsmen to respond with their medical kits, presumably expending medical supplies in the process," he had prejudiced good order and discipline.[56] Furthermore, the court said, because he had tried to kill himself, Pvt Caldwell was hospitalized overnight for "acute medical care" and psychiatric treatment rather than going straight into confinement, as ordered by his commanding officer.[57] This too, it said, constituted prejudice to good order and discipline, as did the fact that Pvt Caldwell's fellow Marines were "shocked" and "didn't know how to react toward it," and things became "really

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[56] *Caldwell II*, slip op. at 4.
[57] *Caldwell II*, slip op. at 4.

weird" afterward.[58]

By the lower court's logic, and without citing any case law to support its position, the scope of "prejudice to good order and discipline" has expanded to include circumstances in which no actual prejudice to the good order and discipline of the unit must be shown. In the Navy and Marine Corps, all that the Government must demonstrate now to meet the requirements of clause 1 is that people in the unit felt uneasy or "weird," or that supplies were used, as the result of an accused's action or failure to act.

The logical consequence of this opinion is that any action by a Sailor or Marine that requires a medical response may now be prejudicial to good order and discipline, even when the responders demonstrate perfect order and discipline in doing what they are trained to do, as they did here.

Under the logic of the lower court's opinion, for example, a service member who requires medical treatment because he had a motorcycle accident has prejudiced good order and discipline and can be prosecuted under a novel Article 134 specification.[59] This would meet the first element because driving a motorcycle

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[58] R. at 99-100.

[59] While not an intentional self-injury, under the lower court's expanded definition of Clause 1 this could now theoretically result in a conviction under Clause 1 of Article 134.

is an act that the accused did, and requiring medical to treat and expend supplies for treatment meets the requirements of clause 1, according to the lower court's opinion in this case.

The legal gymnastics required to affirm Pvt Caldwell's conviction have, in effect, caused the NMCCA to interpret clause 1 of Article 134 in such an extreme way that it has become a strict liability offense. And this fits into the general tenor of the lower court's opinion, which makes no analysis of *mens rea*, even though it acknowledges this was a genuine suicide attempt. Its analysis on this front begins and ends with the fact that the accused, rather than someone else, was the source of the injuries.

Surely, neither Congress nor the President intended Article 134 to be used as a strict liability statute to prosecute mentally-ill people who make genuine suicide attempts, particularly when there are strong indications that their mental illness played a role.

Moreover, less than a month after deciding *Caldwell II*, in *United States v. Stratton*, the lower court came out with a view of what constitutes prejudice to good order and discipline that is much different than its view in *Caldwell II*.[60] *Stratton*

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[60] *United States v. Stratton*, No. 201000637 2012 CCA LEXIS 16, *15 (N-M. Ct. Crim. App. Jan. 26, 2011)(unpublished

concerned a consensual sodomy conviction that the lower court analyzed in the context of *United States v. Marcum*.[61] In finding that the military judge erred by ruling that the third *Marcum* factor[62] had been met, the lower court stated — in sharp contrast to this case — that "using the mere fact that the allegation was reported and required investigation [including calling out emergency medical technicians], as is always the case when a crime is reported," should not "be held against the appellant as independent substantiation of impact on the command."[63]

b. Bona Fide Suicide Attempts Do Not Violate Clause 1

This Court should find that a bona fide suicide attempt, particularly one induced by mental illness, is not punishable under Clause 1. Clause 1 refers "only to acts *directly* prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense."[64] To be punishable under Clause 1, conduct must be *directly* and *palpably*

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op.)(Appendix 4).
[61] *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).
[62] The third *Marcum* factor is whether there are "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." *Id.* at 207.
[63] *Stratton*, slip op. at 8.
[64] MCM, Part IV, ¶ 60c(2)(a) [emphasis added].

prejudicial to good order and discipline.[65] There is no bright-line rule establishing the evidence necessary to establish proof that certain conduct was prejudicial to good order and discipline. Generally speaking, the Government must demonstrate the direct impact of the conduct at issue on good order and discipline. And this Court has held that prejudicial effect may not be inferred from the underlying conduct as a *per se* rule.[66] For example, the discussion of adultery in the Manual for Courts-Martial explains that "adulterous conduct that is directly prejudicial includes conduct that has an *obvious*, and *measurably divisive effect* on unit discipline, morale, or cohesion . . . ."[67] By logical extension, a bona fide suicide attempt must also have an obvious and measurably divisive effect on unit discipline, morale, or cohesion.

A bona fide suicide attempt can certainly have indirect impacts, such as the impact on the morale of the unit, or people not knowing how to react to it, such as Pvt Caldwell described in his providence inquiry. But aside from the fact that it will never be clear how much of the unit's psychological and morale response stems from the suicide attempt itself rather than a

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[65] *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964).
[66] *See United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991) (off-base cross-dressing not prejudicial to good order and discipline *per se*).
[67] MANUAL FOR COURTS-MARTIAL Part IV-114, ¶62c(2) [emphasis added].

command's failure to help the suicidal person, this is an indirect, remote reaction.

To use a different example, not showing up for work may cause a unit to be short-handed and unable to accomplish its mission, which is a more direct prejudice. But in the case of a genuinely suicidal person, such prejudice has occurred long before the suicide attempt itself. Therefore, the self-inflicted injury is not the cause of any prejudice. By the time someone has become so sick as to have lost the basic human desire to live, that person cannot reasonably have been expected to perform his or her job properly, even if he or she has not yet attempted suicide. This is particularly true here, where Pvt Caldwell's command relieved him of all job-related responsibilities long before his suicide attempt. And here, as often is the case, Pvt Caldwell's desire to commit suicide was not precipitated by his own misconduct, but by his mental infirmity. Thus, a bona fide suicide attempt associated with or induced by mental illness such as depression or PTSD cannot violate Clause 1 of Article 134,[68] and it did not violate Clause

[68] Almost every bona fide suicide attempt falls into this category. The only foreseeable exception to this presumption would be a situation in which a service member was attempting a murder-suicide for calculated, rational reasons. The example that most readily comes to mind would be a service member who, for political reasons, attempts a suicide bombing. But such an

1 in Pvt Caldwell's case.

c. Bona Fide Suicide Attempts Do Not Violate Clause 2

According to the President, clause 2 makes punishable conduct that "has a tendency to bring the service into disrepute or which tends to lower it in the public esteem."[69] Clause 2, by its nature, requires an analysis of how the public might view genuine suicide attempts by Sailors and Marines suffering from PTSD or other mental illnesses. But public perception colors military suicide as a mental-health issue, not a criminal act.

The President, Congress, and the national news media are a proxy for the public. All have, over the past few years, significantly increased their focus on the problem of suicide within the military, particularly when it is related to PTSD. In the last week of July 2012, for example, TIME MAGAZINE's cover story was entitled: "*One a Day: Every day, one U.S. soldier commits suicide. Why the military can't defeat its most insidious enemy.*"[70] This extra attention has come at a time

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example is far afield from the facts of this case and almost every other bona fide military suicide attempt. Such an example is also one of the few foreseeable exceptions to the *mens rea* piece of this argument.

[69] MCM, Part IV, ¶ 60c(3).

[70] Mark Thompson and Nancy Gibbs, *One a Day: Every day, one U.S. soldier commits suicide. Why the military can't defeat its most insidious enemy*, TIME MAGAZINE, July 23, 2012, at 22-31 (hereinafter "*One a Day*").

when, stretched by two wars, the military has seen PTSD and suicide numbers trend steadily upward.[71]

In fact, since 2001, the number of suicide deaths in the U.S. military is truly alarming—2,676 U.S. service members have died by suicide. This number is significantly higher than the 1,950 service members who have died in the Afghanistan conflict, and it approaches the 4,486 who have died in the Iraq conflict over a similar time period.[72] In 2011, suicides accounted for 20 percent of deaths in the military, ranking second only to combat as the leading cause of death for service members.[73] While the Army has borne the brunt of this, all the services have experienced a rise in suicides, with the Marine Corps total projected to rise to 45 in 2012 and the Navy total projected to rise to 62.[74] Through June 3, 2012, there has already been an 18-percent increase in military suicides compared with the same period in 2011.[75] As an enlisted male under age 25 who had

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[71] See, e.g., John Roberts, *Marine Corps Steps Up Suicide Prevention Efforts to Halt Deadly Trend*, FOX NEWS, Mar. 30, 2011, http://www.foxnews.com/us/2011/03/30/marine-corps-steps-suicide-prevention-efforts-halt-deadly-trend/ (last visited Aug. 1, 2012); see also Brian Everstine, *Rise in Suicides Leads to 1-Day Standdown*, THE AIR FORCE TIMES, Jan. 30, 2012, http://www.airforcetimes.com/news/2012/01/air-force-suicides-rise-lead-to-standdown-013012w/ (last visited Aug. 1, 2012).
[72] *One a Day* at 26-27.
[73] *Id.*
[74] *Id.* at 26-27.
[75] *Id.* at 31.

received behavioral health services and been prescribed antidepressants prior to his suicide attempt, Pvt Caldwell fits squarely within many of the leading demographic indicators for suicide.[76]

Working within this climate, the President and Congress have both expressed a strong interest in erasing the stigma of suicide. In 2010, President Obama observed National Survivors of Suicide Day by writing:

> My administration is also dedicated to preventing suicide among America's service members and veterans. We have worked to increase funding for mental health screening and treatment for these heroes, and we remain committed to meeting the needs of all our women and men returning home from Iraq and Afghanistan.[77]

A recent House Resolution—aimed at overturning a policy prohibiting presidential letters of condolence from going to families of members of the Armed Forces who have died by suicide pointed to record-high suicide rates in the military over the past few years and stated, "Suicide in the Armed Forces is a growing problem which cannot be ignored."[78] The resolution, co-

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[76] *One a Day* at 26-27.

[77] Barack Obama, *Presidential Message in Support of National Survivors of Suicide Day and Suicide Prevention Efforts Nationwide*, Nov. 19, 2010, http://www.afsp.org/files/Misc_/obamaletter.pdf (last visited Aug. 1, 2012).

[78] H.R. Res. 1229, 111th Cong. (2010) (available at the Library of Congress website <http://thomas.loc.gov/cgi-bin/query/z?c111:H.RES.1229:>) (last visited Aug. 1, 2012).