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 REPLY BRIEF** Crim.App. No. 201000557 USCA Dkt. No. 12-353/MC Filed on September 17, 2012

TO 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.

1. The Government Highlights Irrelevant Facts

The Government chose to organize its "Statement of Facts" into separate sections emphasizing: (1) that "Appellant engaged in several acts of misconduct" before his suicide attempt and "more misconduct" afterward, and (2) that his suicide attempt occurred following the command notifying him that it was placing him into pretrial confinement for a second time.[1] Although these facts are undisputed, the way the Government presents them is misleading.

As stated in Pvt Caldwell's brief, he was convicted of several minor offenses unrelated to his suicide attempt. But the fact that Pvt Caldwell pleaded guilty to driving "a vehicle despite his operator's permit having been revoked,"[2] and then not deregistering his vehicle within 10 days has nothing to do with this Court's specified issue: Whether as a matter of law a bona fide suicide attempt is punishable as self-injury under Article 134. Likewise, the fact that he was convicted of larceny for laughing as his Japanese friend shoplifted a belt from a store, and the fact that he was also convicted for possession of spice, have nothing to do with the specified issue, other than providing his command with an excuse to place him into pretrial

[1] Appellee's Br. at 3-7.

confinement, which surely exacerbated his diagnosed mental illnesses.

The Government also highlights the fact that Pvt Caldwell's suicide attempt occurred after he was notified he would be going back to the brig for further pretrial confinement.[3] This, in combination with several other recent triggers (mentioned in Appellant's brief) no doubt exacerbated his un-medicated, diagnosed mental illnesses to a breaking point, precipitating his suicide attempt. The Government's characterization is either a subtle attempt to dispute the authenticity of Pvt Caldwell's bona fide suicide attempt or an attempt to paint him as a bad Marine who deserves punishment. But it is undisputed — acknowledged by the military judge at trial, as well as the lower court — that Pvt Caldwell's suicide attempt was genuine, regardless of his unrelated misconduct.

2. A mischaracterization of Appellant's argument

The Government states that Appellant is seeking a "suicide exception" to Article 134.[4] That is not true and misstates Appellant's argument, which is much more nuanced than that.

Pvt Caldwell is not asking for an "exception" to existing law. He is simply asking this Court to examine his conviction to determine whether the elements of Article 134 — and in

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[2] Appellee's Br. at 3-4.
[3] *Id*. at 4.
[4] *Id*. at 8.

particular the specific elements of the Presidentially-listed "self-injury" offense —— are met.

The legal elements that must be pleaded and proved under clauses 1 and 2 of Article 134 are: (1) that the accused did or failed to do certain acts, and; (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].[5] 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."[6]

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 (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.[7]

There is no need for a "suicide exception" to the President's suggested self-injury offense under Article 134 because these elements simply are not met in bona fide suicide attempts, such as Pvt Caldwell's, which are induced by mental illness. That is Appellant's argument.

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[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 60b(1) and (2).
[6] *Id*., at 60c(2)(a).
[7] *Id*., at 103a(b). (Emphasis added).

3. A legal argument vs. a policy argument

The Government dismissively attempts to paint Pvt Caldwell's position as purely a policy argument. In doing so, it repeatedly (on 10 separate occasions) inserts the word "policy" when describing Appellant's arguments, including at every opportunity in its headers and sub-headers.

While there certainly may be overwhelming policy reasons that weigh against prosecuting bona fide suicide attempts in the military,[8] the Government again misstates Pvt Caldwell's arguments.

To be clear, Appellant's argument is that the elements of Article 134 were not and cannot be met when a diagnosed mentally-ill service member such as Pvt Caldwell is driven to make a bona fide suicide attempt as a result of his mental illness. Furthermore, Appellant's argument is that there was a substantial basis in law and fact to question Pvt Caldwell's pleas, and the military judge abused his discretion when he accepted the improvident plea.

Article 134 is a unique federal statute. And because one of the elements of Article 134 is whether the act or omission in question was of a tendency to discredit the service, there is

[8] See, e.g., 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. This was a cover story in time magazine. A quick Google search reveals many more articles about military suicide and veteran suicide rates, which are currently higher than they have ever

often a natural blurring of the lines between the legal underpinnings of the element and policy/public opinion. Therefore, a legal element of this offense is rooted in what the Government calls "policy" (i.e. prevailing opinions within the American public on whether bona fide suicide attempts by mentally-ill service members, particularly those suffering from PTSD, discredit the service). Surely, the "policies" mentioned in Appellant's brief, such as the policy expressed by the Judge Advocate General of the Navy (JAG) within the JAGMAN, are relevant to this question and instructive to this Court as to how it might approach the issue.

The Government's eagerness to dismiss "policy" arguments is ironic because it, too, relies heavily on policy arguments in its brief, as did the lower court in its published, *en banc* opinion.[9]

4. The "Guilty Mind" of a bona fide suicidal person

Government: "Appellant's argument conflates *mens rea* with the principle of mental responsibility. . . . The injury was not . . . a mere failure to contain external forces acting upon him."[10]

Response: The Government argues that *mens rea* is not at issue here; this is purely about an affirmative defense. Yet what caused Appellant's injury is precisely what the Government

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been.

[9] See Appellant's Br. at 26-27.

[10] Appellee's Br. at 12.

describes as a *mens rea* issue: The failure to contain external forces – in this case the un-medicated, diagnosed depression and PTSD – that were directly affecting Pvt Caldwell's thoughts and actions at the time of his suicide attempt. Appellant is not conflating concepts.

Mens rea, a component of all but strict liability offenses, is a Latin phrase which literally translates to "guilty mind." In other words, it is a unique mental component, distinguishable from the *actus reus* (e.g. the actual act of self-injury). "Self-injury" under Article 134 requires specific intent. But that intent is not present in situations like Pvt Caldwell's. It is self-evident under any modern understanding of bona fide suicide that people afflicted with mental illnesses to the extent that they have lost the basic human desire to live are no longer acting rationally or distinguishing right from wrong. They do not appreciate the morality or immorality of their suicide attempt. Indeed, the JAGMAN explicitly recognizes this understanding.

5. The Military Judge's Failure

Even if a bona fide suicide attempt is punishable under Article 134 as a matter of law, there is a substantial basis in law and fact to question this plea, because the *defense* of lack of mental responsibility was raised by the military judge but never adequately addressed.

The Government claims that "the Military Judge went to great lengths during the providence inquiry to ascertain that Appellant was in fact mentally responsible for his actions."

The providence inquiry reveals otherwise.[11]

As then-Senior Judge Maksym noted in dissent, detailed defense counsel should request, and a military judge should order, *even in the absence of such a request*, a hearing pursuant to R.C.M. 706 if it appears "that there is reason to believe the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial . . . ."[12] The assignment of responsibility for conducting an inquiry into the mental capacity or responsibility of an accused to a "sanity board" of health care professionals is, in fact, a long-standing feature of military law.[13]

Here, the military judge acknowledged that there was a reason to believe Pvt Caldwell lacked mental responsibility for the offenses charged and lacked capacity to stand trial. His concern was expressed when he asked trial defense counsel whether he thought an R.C.M. 706 board was warranted. Merely asking trial defense counsel about it, however, does not resolve the issue.

Given what the military judge had just learned about Pvt

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[11] See J.A. 56-64.

[12] *United States v. Caldwell*, 70 M.J. 630, 638 (N-M. Ct. Crim. App. 2011)("Caldwell II") (S.J. Maksym dissent)(citing R.C.M. 706(a)). Emphasis added.

[13] *United States v. English*, 47 M.J. 215, 219 (C.A.A.F. 2002) (citing MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1917 ed.) ¶ 219("medical

Caldwell, trial defense counsel's response that, based on conversations and interactions with Pvt Caldwell, he didn't think Pvt Caldwell had any mental issues that should stop the proceedings, should not have satisfied a military judge in this case.[14] Rather, this only highlights the fallacy of the military judge's choice to rely solely on trial defense counsel's assertion.

This colloquy does not rebut the strong inference of lack of mental responsibility that was raised when Pvt Caldwell described: (1) his slitting of his wrists; (2) his serious suicidal intent; (3) his history of depression, PTSD and mental illness; (4) his prescribed medications, and (5) his failure to take them immediately prior to the suicide attempt. Indeed, these factors convinced the military judge that they were, in fact, prosecuting a bona fide suicide attempt.

Regardless of how well defense counsel felt he knew his client, neither he nor Pvt Caldwell are psychiatrists. Defense counsel had no more authority to speak about Pvt Caldwell's mental capacity at the time of the incident than any layperson. Therefore, his statement should have carried minimal weight, if any at all, given the serious mental issues raised during the providence inquiry. Instead, it was substituted for an R.C.M. 706 inquiry because, as the military judge noted: "This court is not a court that immediately upon hearing anything to do with

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board")).

some sort of mental problem stops the proceedings . . . and indicates everyone has to have a 706 hearing. I don't believe that's required, and I don't believe it's necessary."[15]

But the military judge did not just "hear anything" dealing with mental health problems; he heard substantive testimony from Pvt Caldwell that he, in fact, had been diagnosed with such problems and was off his medications when he genuinely tried to commit suicide.

Tragically, the significance of these statements was missed at trial. As Senior Judge Maksym noted in dissent (and as members of the public looking in on this process would likely agree), Pvt Caldwell's statements during his providence inquiry that "he was fooling people into thinking his problems were not that significant can only cause one to wonder whether counsel – and the military judge – were just two of the people [fooled]."[16]

The military judge had a duty to address this issue fully when he realized that he was dealing with a genuine suicide attempt by someone whom he knew was suffering from diagnosed PTSD and depression. The fact that the military judge acknowledged the issue and then failed to resolve it properly represents a significant basis in law and fact to question this plea and gives this Court ample basis to reject it. Indeed, as S.J, Maksym

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[14] R. at 97-98.
[15] R. at 98-99.
[16] *Caldwell II*, 70 M.J. at 638 (S.J. Maksym dissent).

noted, it gives this Court ample basis to question all of his pleas that day.

6. *Ramsey* and *Taylor*

Government: "*Ramsey* and *Taylor* are dispositive and control the outcome of this case."

Response: They are not and do not. As discussed in Appellant's brief, the facts of those cases were much different than the facts of this case. Neither *Ramsey* nor *Taylor* dealt with bona fide suicide attempts as we understand that term today. The former dealt with a suicidal gesture, and one with every indication of being motivated by the desire to avoid service in Gulf War I. And the latter dealt with a self-injury that could not even be classified today as a suicidal gesture. Neither is on-point with Pvt Caldwell's case. Therefore, despite the quaint dicta of those cases regarding "suicide attempts," this Court should resist the Government's attempts to paint those cases as controlling of anything here. Rather, it should look at this as an opportunity to inject modern jurisprudence into its military case-law in this area.

7. Terminal elements

The Government goes further than the lower court, urging this Court to affirm Pvt Caldwell's convictions under *both* clauses of Article 134. And to justify this, it relies on Pvt Caldwell's statements during his providence inquiry, in which he

expressed why *he* believed his suicide attempt met those elements, as well as the lower court's opinion. Despite his desire to plead guilty, Pvt Caldwell's justifications did not, however, demonstrate at all how his actions were prejudicial or service-discrediting. They demonstrated, ironically, how his chain of command met the terminal elements of a 134 offense.

Finally, the Government wants this Court to believe that the lower court's arguments, unsupported by case law, that acts or omissions which require medical treatment and the expenditure of medical supplies is sufficient to demonstrate prejudice to good order and discipline. Like the lower court, it cannot cite to any legal justification for its argument that "under Appellant's flawed logic, the expenditure of medical resources and reaction of emergency personnel is not sufficient to demonstrate prejudice to good order and discipline."[17] After making this argument, which seems to be wholly rooted in policy, it attacks Pvt Caldwell for citing no authority for his position that the lower court has taken Article 134 well beyond where Congress intended.

Yet consider the implications of the Government's argument. Assume a servicemember neglects to tie his shoe (an omission), and falls down the stairs of his barracks. Medical is called to treat him, expending supplies in the process, because he has injured his neck. Under the logic of the lower court and of the Government, this now meets the elements of Article 134. Surely, this Court does not believe Congress intended for any injury

caused by an act or omission of a servicemember that required medical treatment to be prosecutable. Yet the lower court has taken the Navy and Marine Corps down that path, and the Government seeks to defend it. This Court should not let Article 134 be stretched to that point.

Conclusion

This Court should set aside Pvt Caldwell's "self-injury" conviction, as it does not meet any of the elements required for conviction, and there was a substantial basis in law and fact to question the plea.

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[17] Appellee's Br. at 17.

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