IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201000557
Lazzaric T. CALDWELL, Private (E-1) U.S. Marine Corps Appellant	)	USCA Dkt. No. 12-0353/MC

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?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellant's sentence included a punitive discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A military judge sitting as a special court-martial convicted Appellant, pursuant to his pleas, of one specification of violating a lawful general order by driving a vehicle when his operator's permit was revoked, one specification of failing to obey a lawful general order by failing to deregister his vehicle within ten days of the revocation of his operator's permit, one specification of larceny, and one specification of intentional self-injury, in violation of Articles 92, 121, and 134, of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 921, and 934 (2006). Additionally, the Military Judge convicted Appellant, contrary to his plea, of one specification

of violating a lawful general order by possessing spice, in violation of Article 92, UCMJ, 10 U.S.C. § 892.

The Military Judge sentenced Appellant to 180 days confinement and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed. The pretrial agreement stated that the Convening Authority would suspend all confinement in excess of time served as of trial if Appellant was acquitted of the specifications concerning spice. The agreement provided for suspension of all confinement in excess of 120 days if Appellant was convicted of any of the spice-related specifications. Because Appellant was convicted of possessing spice, in accordance with the pretrial agreement the Convening Authority suspended all confinement in excess of 120 days for six months after the announcement of sentence.

On November 15, 2011, the lower court issued an unpublished, plurality opinion that set aside Appellant's intentional self-injury and larceny specifications, and approved only so much of the sentence as extended to a bad-conduct discharge. *United States v. Caldwell*, No. 201000557, 2011 CCA LEXIS 181 (N-M. Ct. Crim. App. Nov. 15, 2011). Three Appellate Judges arrived at three different opinions as to how to resolve the case: Senior Judge Booker wrote the plurality opinion described above; Judge

Beal concurred, but wrote that he would have affirmed all findings and the sentence as approved; and Senior Judge Maksym dissented, writing that he would set aside all findings and the sentence, and authorize a rehearing. *Id*. The next day, the lower court *sua sponte* ordered reconsideration *en banc*. *United States v. Caldwell*, No. 201000557 (N-M. Ct. Crim. App. Nov. 16, 2011) (ordering reconsideration *en banc*).

On December 27, 2011, the Court issued a published, *en banc* decision. *United States v. Caldwell*, 70 M.J. 630 (N-M. Ct. Crim. App. 2011)(*en banc*). Judge Beal, writing for a 7-1 majority, affirmed the findings on the self-injury specification and the sentence as approved.[1] *Id*. Appellant filed a petition for grant of review with this Court, which this Court granted on July 11, 2012.

Statement of Facts

A. In the month prior to his intentional self-injury, Appellant engaged in several acts of misconduct.

On December 28, 2009, Appellant drove a vehicle despite his operator's permit having been revoked. (J.A. 86.) Additionally,

[1] The majority opinion affirmed all findings and the sentence as approved. Senior Judge Perlak, joined by Judge Payton-O'Brien, issued an opinion concurring that the self-injury specification and the sentence should be affirmed, but dissenting on the legal sufficiency of the larceny charge and specification. Senior Judge Maksym was the only vote dissenting from the majority opinion concerning the self-injury specification.

when his permit was revoked, Appellant was required to deregister his vehicle within ten days according to a lawful general order. (J.A. 86) Appellant failed to do so. (J.A. 86.) On January 4, 2010, with the help of a female Japanese friend, Appellant stole a belt from a store in Okinawa City, Okinawa, Japan. (J.A. 87-88.)

B. Appellant intentionally injured himself by cutting his wrist with a razor blade after being told he was going to the brig.

On January 22, 2010, Appellant was informed by Gunnery Sergeant Cordova that the commander might place him in pretrial confinement based on the previous incidents as well as some other alleged misconduct. (J.A. 55.) While he was in his barracks room waiting to find out if he was being sent to the brig, Appellant learned that a friend of his who had just left the military had died. (J.A. 55.)

GySgt Cordova then informed him that he would be going into pretrial confinement. (J.A. 56.) Appellant called his parents and told his father that he did not feel like living anymore. (J.A. 56.) Appellant then used a razor blade to slit his wrist and sat on the floor of his barracks room. (J.A. 56.) Some time later, GySgt Cordova returned to the room, administered first aid, and ensured that Appellant received medical attention.

(J.A. 56.) Appellant testified at trial that this self-injury was a suicide attempt. (J.A. 59-60.)

Appellant was placed in pretrial confinement on January 22, 2010, and released on January 26, 2010. (J.A. 36.) Appellant then remained on pretrial restriction from January 26, 2010, until March 7, 2010. (J.A. 36.)

C. Subsequent to his intentional self-injury, Appellant did not attempt to injure himself again, but engaged in more misconduct.

At trial, Appellant was convicted against pleas of possessing the contraband substance "spice" in violation of a lawful general order on February 27, 2010. (J.A. 74.) This offense occurred during Appellant's period of pre-trial restriction. (J.A. 36.)

D. Appellant's providence inquiry concerning intentional self-injury.

During the providence inquiry into the intentional self-injury offense, Appellant told the Military Judge the circumstances of his injury. (J.A. 54-57.) Appellant mentioned that he had been depressed for the two or three months prior to the injury and that he did not have any more medication. (J.A. 56.) The Military Judge inquired into Appellant's statement about medication. (J.A. 56.) Appellant stated that he had been on medication months before this incident after having been diagnosed with delayed PTSD, a personality disorder, and

depression. (J.A. 56.) Appellant stated that he had started to have seizures and had been taken off of the medication to see what was causing the seizures. (J.A. 56.)

The Military Judge asked the Trial Defense Counsel whether he believed there were any Rules for Courts-Martial (R.C.M.) 706 issues with the Appellant. (J.A. 61.) Trial Defense Counsel replied, "No, sir." (J.A. 61.) Trial Defense Counsel explained he had known Appellant for quite some time and had spoken to him about the incident. (J.A. 61.) Trial Defense Counsel further represented that, although Appellant was in a depressed state at the time of the self-injury, Appellant knew what he was doing when he committed the offense and that he knew that it was wrong. (J.A. 61.)

Trial Defense Counsel also stated that Appellant was competent to stand trial and assist in his defense. (J.A. 61.) Appellant then added that he believed that he made a conscious decision to try and end his life because of the hardships he was facing and that he was not "temporarily insane" at the time of the offense. (J.A. 97-98.)

The Military Judge then explained the standard for a mental responsibility defense. (J.A. 63.) Appellant agreed with his Trial Defense Counsel that he knew that what he was doing was wrong but that he thought he would not have to face the

consequences because he would not survive the suicide attempt. (J.A. 63.) The Military Judge then confirmed that Appellant did not believe that being off of his medication gave him a reason to inflict the injury; Appellant agreed that it did not. (J.A. 66.) Appellant also agreed that the decision to injure himself was a freely made decision. (J.A. 66.) The Military Judge asked again if Appellant had a legal justification for the injury, and Appellant replied, "No, sir, I did not." (J.A. 66.)

The Military Judge continued his providence inquiry and asked Appellant about the terminal element of the Article 134 offense. (J.A. 64.) Appellant stated that his conduct was prejudicial to good order and discipline in the unit because it sent a message to others in the unit that the senior leadership would not be able to help them if they had not helped Appellant. (J.A. 65.) Appellant also believed his conduct to be service discrediting because it would cause the public to think poorly of the command. (J.A. 67-68.)

Before concluding his inquiry on this offense, the Military Judge noted the language in Appellant's stipulation of fact stating that Appellant had no lawful reason, excuse, or justification for inflicting his injury. (J.A. 69, 88.) The Military Judge asked Appellant again if it was true that there was nothing medically or mentally that made him lose his mind or

forced him to injure himself. (J.A. 69.) Appellant agreed that this was correct. (J.A. 69.)

Summary of the Argument

There is no basis in law for this Court to create a "suicide exception" to crimes prosecuted under the Uniform Code. Appellant conflates the *mens rea* requirement of intentional self-injury with the defense of lack of mental responsibility, and argues without legal foundation that Appellant's actions were not prejudicial to good order and discipline. This Court should not adopt Appellant's policy argument that the prosecution of intentional self-injury should be restricted, because such distinction is best left to the discretion of the political branches.

Argument

APPELLANT'S POLICY ARGUMENT WAS PROPERLY REJECTED BY THE LOWER COURT. THERE IS NO SUBSTANTIAL BASIS IN LAW OR FACT TO QUESTION APPELLANT'S GUILTY PLEA, AND NO BASIS IN CONSTITUTIONAL, STATUTORY, OR REGULATORY LAW FOR THIS COURT TO SET ASIDE APPELLANT'S CONVICTION.

A. Standard of Review.

When a guilty plea is attacked on appeal, the evidence should be viewed in the light most favorable to the Government. *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989) (Cox, J., concurring). The plea will stand unless the Court finds

that there is a substantial basis in law or fact to question it. *United States v. Mitchell*, 66 M.J. 176, 178 (C.A.A.F. 2008). Appellate courts should not "overturn a military judge's acceptance of a guilty plea based on a 'mere possibility' of a defense." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

B. There is no legal basis for Appellant's policy argument that bona fide suicide attempts should be excused from prosecution under Article 134, UCMJ.

This Court directly addressed Appellant's argument about the criminality of attempted suicide in *United States v. Ramsey*, 40 M.J. 71, 75 (C.M.A. 1994). In that case, this Court unanimously held:

> Appellant's attack against the criminality of attempted suicide under the UCMJ is a strawman. First, appellant was not charged with or convicted of attempted suicide. Second, the criminality under Article 134 of the UCMJ of what *was* the subject of his conviction was settled definitively in *United States v. Taylor*, 17 C.M.A. 595, 596-97 (C.M.A. 1968). Appellant's attempted suicide was not the substantive crime he faced; rather, his attempt to kill himself was the *basis* for his crime of self-inflicting an injury to the prejudice of good order and discipline. If attempted suicide for the purpose to avoid military duty may be a sufficient basis for a charge of malingering, *see United States v. Johnson*, 26 M.J. 415 (C.M.A. 1988), then attempted suicide without such purpose surely may be a sufficient basis for a charge of intentional self-infliction of injury to the prejudice of good order and discipline.

Id. (Emphasis in original.)

Ramsey and *Taylor* are dispositive and control the outcome of this case. Here as in *Ramsey* and *Taylor*, Appellant was not charged with "attempting suicide," but rather with an act that was prejudicial to good order and discipline. (J.A. 36.) Appellant admitted to all elements of this offense. He told the Military Judge that he had intentionally cut his wrists with a razor blade, and admitted that this act caused himself injury. (J.A. 56.) He further told the Military Judge that his self-injury had prejudiced good order and discipline in his unit because it sent a message to other Marines that the senior leadership would not help them. (J.A. 56.) Appellant also admitted that his conduct was service discrediting because members of the public who heard about his suicide attempt would tend to have a poor opinion of the unit and its leadership. (J.A. 67-68.) Appellant's providence inquiry satisfied all elements of the offense to which Appellant pled guilty.

Appellant argues that *Ramsey* and *Taylor* should be jettisoned in favor of a rule that suicide attempts can never be prosecuted as intentional self-injury. (Appellant's Br. at 29-30.) In essence, Appellant argues that times have changed since Vietnam and Desert Storm, and the concept of suicidal intent is better understood now than when *Ramsey* and *Taylor* were decided. (Appellant's Br. at 14, 33-34.)

As in *Ramsey*, Appellant's argument is a "strawman," based not in law but policy. Congress exercises the Constitutional power, and duty, to make rules for the government and regulation of the armed forces. U.S. Const. Art. I, § 8. If Congress wished to restrict prosecution of suicide attempts under Article 134, UCMJ, it could do so. Similarly, the President could restrict such prosecutions pursuant to his delegated rule-making authority under Article 36, UCMJ. Neither Congress nor the President have made any such rules restricting convening authorities' discretion to prosecute service members for intentional self-injury under Article 134, UCMJ. Indeed, the President declined to restrict the prosecution of intentional self-injury even while substantially revising Parts III and IV of the Manual for Courts-Martial in December 2011. Exec. Order No. 13,593, 3 C.F.R. 13593 (2011). For these reasons, this Court should not substitute its judgment for that of the political branches on this policy question, no matter how much society's "current views on suicide" have changed. (Appellant's Br. at 14.)

C. Appellant's attempted suicide was an intentional act that fulfilled the *mens rea* requirement of intentional self-injury.

1. Appellant possessed the *mens rea* required to commit the offense.

Contrary to Appellant's argument, Appellant possessed the necessary *mens rea* for the offense because he *intended* to injure himself: *Mens rea* is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." *Black's Law Dictionary* 1006 (8th ed. 2004.) The offense of self-injury contains the *mens rea* requirement that the accused's injury must have been inflicted intentionally upon himself. Manual for Courts-Martial, United States (2008 ed.), Part IV, ¶ 103.a. There is no controversy here that Appellant's action, cutting his wrists with a razor blade, was intentional; Appellant admitted as much at trial. (J.A. 59-60.) The injury was not an accident, the result of simple negligence, or a mere failure to contain external forces acting upon him. Therefore the *mens rea* requirement is met.

2. Appellant pled guilty and gave up the right to present the affirmative defense that he lacked mental responsibility for his actions.

Appellant's argument conflates *mens rea* with the principle of mental responsibility. Lack of mental responsibility is an affirmative defense in any trial by court-martial under the Code. Article 50a, UCMJ, 10 U.S.C. § 850a (2006). When raising this

defense, the accused has the burden to prove lack of mental responsibility by clear and convincing evidence. Article 50a(b), UCMJ, 10 U.S.C. § 850a (2006). Until such burden is met, "[t]he accused is presumed to have been mentally responsible at the time of the alleged offense." R.C.M. 916(k)(3).

In order to show that he lacked mental responsibility for his intentional self-injury, Appellant would have been required to show by clear and convincing evidence that "at the time of the commission of the acts constituting the offense . . . as a result of a severe mental disease or defect, [he] was unable to appreciate the nature and quality or the wrongfulness of his or her acts." R.C.M. 916(k)(1). By pleading guilty, however, Appellant here gave up his right to a contested trial of the facts, including his ability to present evidence supporting this affirmative defense. (J.A. 47.) The Military Judge explained this to Appellant on the Record prior to accepting his pleas, and Appellant stated that he understood. (J.A. 46-48.) Appellant averred that he had discussed these rights with his Trial Defense Counsel and agreed to give them up and plead guilty. (J.A. 48.)

Further, the Military Judge went to great lengths during the providence inquiry to ascertain that Appellant was in fact mentally responsible for his actions. Appellant stated that he

did know that what he was doing was wrong when he cut his wrists. (J.A. 63.) He made a conscious decision based upon the hardships he was facing at the time. (J.A. 62.) Appellant repeatedly averred to the Military Judge that he was able to appreciate the nature, quality, and wrongfulness of his acts. (J.A. 59-61.) The Military Judge even inquired of Appellant's Trial Defense Counsel whether an R.C.M. 706 hearing was advisable; Trial Defense Counsel averred none was necessary, and confirmed that Appellant "knew what he was doing . . . and he knew that what he was doing was wrong." (J.A. 61.)

3. The Navy Manual of the Judge Advocate General presumption concerning suicide pertains to administrative investigations and does not restrict commanders' authority to prosecute intentional self-injury under Article 134, UCMJ.

The Manual of the Judge Advocate General (JAGMAN) is promulgated in order to "provide[] a single, concise source of authoritative information on matters of Naval administration under the cognizance of the [Judge Advocate General]." Judge Advocate General Instruction (JAGINST) 5219.1G, Dec. 21, 2008. Nothing in the JAGMAN purports to restrict a Convening Authority's discretion to prosecute acts prejudicial to good order and discipline under the Uniform Code. The policy decisions reflected in the JAGMAN are therefore irrelevant to this Court's consideration of the specified issue here.

Appellant cites to a presumptive inference regarding administrative investigations of suicides and suicide attempts. (Appellant's Br. at 26, *quoting* JAGMAN § 218(c), JAGINST 5810.7F, encl. (1) at 2-36, June 28, 2012.) This presumption is contained within Chapter II of the JAGMAN, which is clearly titled "Administrative Investigations," and "sets forth principles governing the convening, conduct, review, and storage of administrative investigations conducted in or by the Department of the Navy (DON) under the authority of this Manual." JAGMAN § 201, JAGINST 5810.7F, encl. (1) at 2-5, June 28, 2012. The section to which Appellant cites pertains specifically to "line of duty/misconduct investigations." *Id*. at 2-32. The presumptive inference to which Appellant refers therefore has no bearing on the prosecution of offenses at courts-martial, or upon courts' consideration of the lack of mental responsibility affirmative defense.

For these reasons, this Court should refuse to substitute the administrative presumptions in the JAGMAN for the statutory and regulatory rules that govern lack of mental responsibility in trials by courts-martial.

D. Appellant's self-injury was prejudicial to good order and discipline and service discrediting conduct.

Appellant also argues that a suicide attempt made by a person with possible mental health issues can never be

prejudicial to good order or discipline or service discrediting. (Appellant's Br. at 15-19.) However, Appellant offered sufficient bases for his self-injury to satisfy both aspects of the second element. He stated that he saw the effect on the unit first hand following his suicide attempt. (R. 99-100.) Further, he recognized that his actions could create a negative perception about the senior leadership in his unit that might deter other members of the unit from looking to the leadership for assistance. (R. 101.) Appellant also knew that his suicide attempt could cause people outside of the military to think less of his service and his unit, as he had thought less of other units upon hearing of suicides by other service members. (R. 103.)

Additionally, the lower court noted that Appellant's actions were prejudicial to good order and discipline because they "caused a disorder in the barracks" and "needlessly exposed GySgt C to [Appellant's] bodily fluids and he caused corpsmen to respond with their medical kits, presumably expending medical supplies in the process." (J.A. 19.) The lower court also noted that Appellant "did not go into pretrial confinement as ordered by his commanding officer; instead, he was transported to the hospital where he received acute medical care followed by

treatment in the psychiatric ward for one day." (J.A. 19.) This disorder was the antithesis of good order and discipline.

Appellant contends that such application of Article 134, UCMJ, "[s]tretch[es c]lause 1 [b]eyond [i]ts [l]imits," because all of the service members who responded to Appellant's injuries were merely performing their normal duties as duty officer and medical personnel. (Appellant's Br. at 15-16.) 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. (*Id*.) The implications of Appellant's proposed rule are extreme: presumably, a response by military police officers, or civilian emergency personnel, or any service member rendering aid would never be sufficient to establish prejudice to good order and discipline. Appellant cites no authority for this proposition, and this Court should reject it.

In summary, Appellant asks this Court to make a policy decision and carve out an exception to intentional self-injury offenses when injury at issue involves a suicide attempt. But there is no basis in law for this Court to create a "suicide exception" to crimes prosecuted under the Uniform Code. That policy distinction is best left to the discretion of the political branches.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court on September 7, 2012. I also certify that this brief was electronically served on Appellate Defense Counsel, Capt Michael Berry, USMC, on September 7, 2012.

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