IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) APPELLANT'S REPLY TO BRIEF) ON BEHALF OF APPELLEE
v.	) Crim. App. Dkt. No. 20100479
	) USCA Dkt. No. 12-0597/AR
Private First Class (E-3) **Reginald D. Holsey,** United States Army Appellant	)

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

Argument

The military judge's abuse of discretion prejudiced appellant because the improper rejection of appellant's attempted guilty plea denied him a valuable source of mitigation.

1. In its argument that the military judge's abuse of discretion did not prejudice appellant, the Government devotes considerable effort to the notion that appellant actually *benefitted* from the error, because it "made the government's job substantially more difficult" and "gave the appellant 'the best of both worlds' by forcing the government to prove his guilt . . . ." (Gov. Br. at 19). Perhaps theoretically, this could have benefitted the appellant—realistically it did not.[1] Thus, the government's insistence that this should still somehow be

[1] Obviously if the government had been unable to secure a guilty finding at the contested trial this would have been to appellant's benefit. However appellant was convicted of the charge.

considered as a windfall to the appellant—thereby minimizing the prejudice it caused—is misplaced at best, if not an entirely irrelevant distraction.

2. In its claim that appellant suffered no prejudice from having to proceed immediately to a contested trial, the government claims appellant had "ample opportunity to present evidence of repentance and remorse while the government was forced to prove their case through the *crucible of the adversarial process*" at the contested trial. (Gov. Br. at 20).[2] While the idea appellant was able to "repent" at his contested trial may be true, it overlooks that, with ample time to prepare for a contested trial, particularly in light of the military judge's embrace of "necessity," appellant could have raised this defense during the findings, and still "repented" during sentencing if convicted. The opportunity to repent is not an acceptable substitute for adequate preparation and offering of a substantive defense to a contested charge.

3. The government also claims that appellant suffered no prejudice because "the maximum punishment the special court-martial was empowered to adjudge was less than or equal to the severity of maximum punishment for both the greater charge and

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[2] The "crucible of the adversarial process" in appellant's case—with regard to the elements of his rejected plea—amounted to the government's introduction of three DA form 4187's to establish that appellant was absent without leave and appellant's testimony (which did not contest his absence).

the lesser included charge." (Gov. Br. at 20). This argument misses the mark, as plainly there is no legal support for the idea that just because an accused received less than the maximum sentence, he is thereby foreclosed from any other sentence relief based on errors the military judge commits.

4. The government claims because appellant did not have a pre-trial agreement, there was "no bargain to be had" and therefore appellant suffered "no measurable prejudice," despite the military judge's abuse of discretion. The government cites only one case, *United States v. Diaz*—an unpublished Navy court opinion—for this broad proposition. NMCCA 200700970, 2009 WL 690614 (N-M. Ct. Crim. App. Feb 9, 2009). However, even a cursory review of *Diaz* reveals that it is so factually and legally distinct from appellant's case that it offers little, if any, support to the government's position.

First, in *Diaz*, the Navy court actually held that the military judge did *not err* in rejecting Diaz's guilty plea, and therefore the discussion of prejudice amounted to little more than an academic exercise on an issue not squarely before the court. *Id.* at *4. Contrary to appellant's case, *Diaz* involved *four* specifications, only one of which the accused attempted to plead guilty to in the form of a lesser included offense. *Id.* at *1. Additionally, in reasoning that there would not have been prejudice even if error did occur, the NMCCA specifically

highlighted that the offense the accused attempted to plead guilty to was consolidated with another charge at sentencing, "ensuring [accused] faced no additional punishment" for that charge. *Id.* at *4.

Here, the military judge erroneously rejected a guilty plea to a lesser included offense of the *only* charge that appellant was actually convicted of—unlike one of many that Diaz was convicted of, and sentenced for. Thus, the military judge's error in appellant's case was disproportionate, and posed the risk of far greater prejudice to appellant than that which the accused in *Diaz* faced. More importantly, the appellant here was sentenced for only the single offense that also encompassed the offense he attempted to plead guilty to, as opposed to *Diaz*, in which the military judge eliminated any risk of prejudice by consolidating the charge the accused attempted to plead guilty to before sentencing.

Conclusion

The appellant was prejudiced when the military judge erroneously rejected his guilty plea, impairing his ability to present a valuable and meaningful source of mitigation. Appellant respectfully requests that this court set aside his conviction and order a rehearing.

WHEREFORE, appellant respectfully requests this Court grant the requested relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Holsey*, Crim.App.Dkt.No. 20100479, USCA Dkt. No. 12-0597/AR, was electronically filed with both the Court and Government Appellate Division on December 6, 2012.

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