IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	**BRIEF ON BEHALF OF APPELLEE**
v.	)	Crim. App. Dkt. No. 20100479
Private First Class (E-3) **REGINALD D. HOLSEY,** United States Army, Appellant	)	USCA Dkt. No. 12-0597/AR

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Granted Issue:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE REJECTED APPELLANT'S PLEA BASED UPON A NECESSITY DEFENSE THAT IS NEITHER RECOGNIZED IN MILITARY COURTS NOR APPLICABLE IN APPELLANT'S CASE.

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, [hereinafter UCMJ].[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A military judge sitting as a special court-martial convicted appellant, contrary to his plea of desertion with the intent to remain away permanently, in violation of Article 85,

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[1] 10 U.S.C. § 866.
[2] 10 U.S.C. § 867(a)(3).

UCMJ, 10 U.S.C. § 885 (2006).[3] The military judge sentenced appellant to be reduced to the grade of E-1, to forfeit $964 pay per month for eleven months, to be confined for eleven months, and a bad-conduct discharge.[4] The convening authority approved the adjudged sentence.[5]

On April 30, 2012, the Army Court affirmed the findings and sentence in summary decision.[6] On September 13, 2012, this Honorable Court granted appellant's petition for review of the above assignment of error.

Statement of Facts

Appellant was charged with absenting his unit, the 551st Transportation Company, from 26 January 2007 to 11 August 2009.[7] Appellant left the day of his scheduled court-martial at Fort Eustis, Virginia on charges unrelated to the case now at issue and drove himself down to Miami, Florida where he remained for approximately two and a half years until being arrested by Miami-Dade Police and given a "provisional pass" to fly back to his unit to turn himself in.[8]

At trial, appellant attempted to plead guilty to the lesser included offense of being absent without leave, under Article

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[3] JA 48.
[4] JA 63.
[5] JA 71.
[6] JA 1.
[7] JA 6, 29-32, 92.
[8] JA 6, 41, 44, 92.

86, UCMJ, without a pretrial agreement or stipulation of fact.[9] As a result, the military judge conducted a providence inquiry with appellant to ensure he understood the meaning and effect of such a plea.[10]

During this inquiry, the military judge asked appellant why he initially absented himself in the following exchange:

> MJ: Why did you leave?
> DC: If I can have one moment, sir?
>
> MJ: Certainly, Captain Collver.
> [The defense counsel conferred with the accused.]
>
> MJ: PFC Holsey, why is it -- why did you leave?
> ACC: Because I wanted to, sir.
>
> MJ: Was your decision to leave a decision that you made freely?
> ACC: Yes, sir.
>
> MJ: No one from your unit forced you to leave?
> ACC: No, sir.
>
> MJ: Did anyone force you to leave?
> ACC: No, sir.
>
> MJ: Could you have been with your unit on that date if you had wanted to?
> ACC: Yes, sir.
>
> MJ: Did you realize at the time that you were going absent without leave?
> ACC: Yes, sir.
>
> MJ: Did you have permission from anyone in military authority to be absent from your unit?
> ACC: No, sir.[11]

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[9] No mention of a pretrial agreement is made and the military judge never asked the parties whether one existed. JA 8, 11.
[10] JA 10.
[11] JA 15-16.

Later on during the inquiry, the military judge discussed with appellant the circumstances of appellant's return to his unit:

> MJ: So you called your unit to say you were on your way back; is that right?
> ACC: Yes, sir.
>
> MJ: Did something prevent - and you did not come straight back; is that right?
> ACC: No, sir.
>
> MJ: Is there something that prevented you from returning?
> ACC: Yes, sir.
>
> MJ: And what was that?
> ACC: I had my kids at the time, sir, and I had nowhere to - of leaving them, sir - no family to leave them with or anything like that, sir.
>
> MJ: Did you make the decision, then, to remain with your children rather than return?
> ACC: Yes, sir.
>
> MJ: Do you understand that was a voluntary decision on your part?
> ACC: Yes, sir.
>
> MJ: That you could have opted to make other arrangements and return?
> ACC: I tried, sir, but I didn't - I don't have - I didn't have anyone to leave them with, sir.
>
> DC: One moment, sir.
> [The defense counsel conferred with the accused.][12]

While the record does not indicate how long appellant conferred with his trial defense counsel, without a response from defense, the military judge began to explain the defenses of both duress and necessity *sua sponte*:

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[12] JA 19-20.

> "Duress" means compulsion or coercion. It is when a third-party causes you to do something against your will by the use of either physical force or psychological coercion. Closely related to that is the defense of necessity, where the outside force is not a third-party but is simply the pressure of the circumstances.
> ....
> Now, for the defense of necessity, the pressure of the circumstances must have, one, caused you to believe that your actions were necessary, and two, your belief that your actions were necessary must have been reasonable, and there must have been no alternative that would have caused some lesser harm.[13]

At this point, the military judge asked appellant if he believed either defense applied in his case:

> MJ: Now, do you believe that either the defense of duress or necessity applies in your case?
> ACC: I believe necessity, sir.
>
> MJ: You do? Okay. In that case, government should be ready to proceed with its case. The court is going to be in a short recess, and we'll come back on the record and continue with the government's case.[14]

The military judge called a recess for approximately an hour and a half. After the recess, the military judge summarized the law in relation to the defenses of duress and necessity:

> Necessity is a defense of justification. It exculpates a nominally unlawful act to avoid a greater evil. Duress is a defense of excuse. It excuses a threatened or coerced actor. Duress and necessity are separate affirmative defenses, and the defense of necessity is not recognized in military law according to *United States v. Banks,* 37 M.J. 700 (A.C.M.R. 1993).

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[13] JA 20-21.
[14] JA 21.

> However, at least two cases indicate that the common law defense of necessity, which may be broader than the defense of duress, may apply to the military, *United States v. Rockwood,* 52 M.J. 98 (C.A.A.F. 1999) and *United States v. Olinger,* 50 M.J. 365 (1999).
>
> Necessity has arguably been recognized and applied de *facto* to the defenses of AWOL and escape from confinement but always under the name of duress.
>
> There are several cases that discuss such a situation: *United States v. Guzman,* 3 M.J. 740 (N.C.M.R. 1977) and *United States v. Wilson,* 30 C.M.R. 630, and that's a 1960 Navy Board of Review case. Those are just a couple of cases that address it.
>
> That being the state of the law, which discusses both duress and necessity, the Court will not accept your plea as provident, and the Court's prepared to hear from the government on the findings portion of the case at this time.[15]

At no point did the military judge further inquire into whether appellant's reason for originally absented himself from his unit on or about 26 January 2007 was due to not having adequate caretaking arrangements for his minor dependents.[16]

As soon as the very beginning of opening argument, trial defense counsel emphasized that appellant "does not contest the fact that he was absent from his unit ... [that he] attempted to plead guilty ... [h]e wants to plead guilty to that ... [h]e wants to take responsibility for what he did ...."[17] Defense focused their efforts on arguing that the government had not met its burden in regards to the elements of intent to remain away

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[15] JA 22-23.
[16] JA 13-23.
[17] JA 24.

permanently and that appellant's absence was terminated by apprehension.[18] While trial defense counsel chose not to raise any duress or necessity issues, the fact-finder questioned appellant after he took the stand under oath about how many children he had living with him in Miami and who else was in the home during that timeframe.[19] At the conclusion of the findings portion of the trial, the military judge found appellant guilty of desertion terminated by apprehension.[20]

During pre-sentencing, appellant made an unsworn statement which highlighted his concern about his children's caretaking and welfare.[21] Appellant's unsworn statement also unmistakably showed that while he believed that he "went AWOL," he still denied being apprehended or deserting his unit despite the fact-finder's prior verdict.[22] Appellant tied his decision to not return to his unit based on his fiancé leaving him to care for the children by himself, but it was never established if this event occurred before or after January 26, 2007.[23] However, appellant states: "I only had two things in this world, and that was the military and my kids, and I chose my kids."[24]

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[18] JA 26-27.
[19] JA 46.
[20] JA 48.
[21] JA 53-56.
[22] JA 48, 53, 56.
[23] JA 53.
[24] JA 53.

Summary of Argument

The government agrees that the defense of necessity is not directly recognized in military law and that the military judge abused his discretion in rejecting the plea. Even if such a defense does exist, the military judge failed to conduct an adequate factual inquiry to determine if the defense existed at the time appellant absented himself from his unit, as the offense of absence without authority is an instantaneous offense. Had the military judge further developed the pertinent facts to constitute a necessity defense, appellant would have been able to make an informed decision regarding that defense. Despite the military judge's error, appellant was not prejudiced as the error did not have substantial influence on the findings. The government was forced to establish all the elements of the offense while the defense was also able to present appellant's willingness to admit guilt as a source of mitigation.

Standard of Review

This Court reviews a military judge's acceptance or rejection of a guilty plea for abuse of discretion.[25] However, questions of law are reviewed de novo.[26] Appellate courts

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[25] "A military judge abuses his discretion if he accepts a guilty plea without an adequate factual basis to support the plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)).

[26] *Id.* at 321.

evaluate whether the record shows "'a substantial basis' in law and fact for questioning the guilty plea."[27] For a non-constitutional error, the government must prove that "the error itself" did not have "substantial influence" on the findings.[28]

Law

"The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."[29] "If at any time during the court-martial proceeding – whether during presentencing evidence or trial on the merits – the accused sets up a matter inconsistent with the plea, the military judge must either resolve the apparent inconsistency by reopening the providence inquiry or reject the guilty plea."[30] "A necessary corollary to this requirement is that the accused set up something that is truly inconsistent with his plea" before it is deemed improvident.[31] "[I]n a guilty plea case, inconsistencies and apparent defenses must be resolved by the

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[27] *Id.* at 322 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).
[28] *United States v. Pablo*, 53 M.J. 356, 359 (C.A.A.F. 2000) (quoting *Kotteakos v. United States*, 328 U.S. 750 (1946)).
[29] Rule for Courts-Martial [hereinafter R.C.M.] 910(e).
[30] *See United States v. Heitkamp*, 65 M.J. 861, 863 (Army Ct. Crim. App. 2007) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)) (internal quotation marks omitted); *See also* Art. 45, UCMJ.
[31] *United States* v. *Logan*, 47 C.M.R. 1, 2 (C.M.A. 1973).

military judge or the guilty pleas must be rejected."[32] In determining whether "the providence inquiry provides facts inconsistent with the guilty plea," this court takes appellant's "version of the facts 'at face value.'"[33] A military judge may not arbitrarily reject a guilty plea.[34] Under the substantial basis test, if the question of a defense is reasonably raised, it is "incumbent upon the military judge to make a more searching inquiry to determine [appellant]'s position on the apparent inconsistency with his plea of guilty."[35] "In deciding a providence issue, the sole question is whether appellant made a statement ... which was in conflict with his guilty plea."[36]

Argument

1. The military judge abused his discretion in rejecting the plea regardless of whether the necessity defense applied.

The government agrees with appellant that the defense of necessity has not been directly recognized in military law.[37] Although the defense of necessity has never been explicitly rejected, neither this honorable court, nor the Army Court of

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[32] *United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004)(citing *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)).
[33] *Heitkamp*, 65 M.J. at 863 (citing *United States v. Gilchrist*, 61 M.J. 785, 791 (Army Ct. Crim. App. 2005)) (quoting *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976)).
[34] *See United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987).
[35] *Heitkamp*, 65 M.J. at 863 (quoting *United States v. Timmins*, 45 C.M.R. 249, 253 (C.M.A. 1972)).
[36] *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983).
[37] Appellant's Brief 9.

Criminal Appeals, have actually ever adopted the common law defense of necessity for a variety of sound reasons.[38]

This court previously stated that the definition of duress is interpreted in accordance with the "prevailing civilian law that the threat emanate from the unlawful act of another person," and other service courts have so similarly held.[39] As for expanding the duress defense to also include necessity, the Army Court has gone so far to say "rejecting the necessity defense goes to the core of discipline within a military organization."[40] The Supreme Court has held "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'"[41] The armed forces cannot afford to allow service members the

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[38] *See United States v. Olinger*, 50 M.J. 365, 366 (C.A.A.F. 1999); *United States v. Sanchez*, 40 M.J. 508, 511 (A.C.M.R. 1994) (stating that "[t]he defense of necessity ... is not recognized as a defense in military law.") (citing *United States v. Banks*, 37 M.J. 700, 702 (Army Ct. Crim. App. 1993)). *See also United States v. Rankins*, 34 M.J. 326, 330 n.2 (C.M.A. 1992) (Judge Crawford noting that "[i]n light of the difficulties to be encountered in applying the necessity defense, particularly in the absence of any legislative or executive guidance, [she] would decline to adopt the necessity defense by judicial fiat.") *But cf. United States v. Rockwood*, 58 M.J. 98, 113-14 (C.A.A.F. 1999) (finding no error where a military judge crafted a "blend[ed]" duress instruction with elements of necessity to "fit the circumstances" of the case).

[39] *United States v. Washington*, 57 M.J. 394, 398 (C.A.A.F. 2002). *See also United States v. Collins*, 37 M.J. 1072, 1073 (N.M.C.M.R. 1993); *United States v. Mitchell*, 34 M.J. 970, 973 (A.C.M.R. 1992).

[40] *Olinger*, 50 M.J. at 367 (quoting *Banks*, 37 M.J. at 702).

[41] *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986).

discretion to act in their own best interest at the expense of their unit, as appellant did in this case.[42] Consequently, the defense of duress should not be expanded upon to include natural or physical forces or pressures of circumstance due to the unique institutional demands of the military.[43]

Even if a narrow form of necessity, blended with the defense of duress, potentially could exist in military law, the military judge failed to conduct an adequate factual inquiry to see if such a defense existed at the time appellant actually absented himself from his unit. As a result, the limited facts raised by appellant provide insufficient basis for this court to consider whether the law of duress should be extended to include necessity at this time.[44]

Given that the offense of absence without authority is an instantaneous offense "complete at the moment an accused absents himself or herself without authority," the facts as presented to the military judge during the providence inquiry did not support a necessity defense had it actually existed.[45] The record shows that, so far as the military judge was aware at the time of the

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[42] *See Banks*, 37 M.J. at 702 ("In no other segment of our society is it more important to have a single enforceable set of standards").
[43] *See Washington*, 57 M.J. at 397.
[44] *See generally Olinger*, 50 M.J. at 367 (describing why "[a]ppellant's vague speculation ... provide[d] an insufficient basis for considering whether the law should be interpreted or extended ....")
[45] MCM, pt. IV, ¶ 10c(8) (2008).

providence inquiry, the only potential factual basis for appellant's necessity defense was the reason he gave of why he chose not to *return* to his unit nearly two and a half years *after* the offense was already completed.[46] As the offense was already completed, any such explanation by appellant would be, at best, evidence for mitigation and extenuation of why he stayed absent for such a long period of time.[47] If the military judge felt that such a statement presented more than the "mere possibility of conflict between a guilty plea and the accused," the military judge was required to take the additional step of inquiring whether this was also appellant's original reason for initially absenting himself despite the answer he previously gave: "[b]ecause [he] wanted to."[48] Instead the military judge immediately rejected the plea and notified the government that it "should be ready to proceed with its case."[49]

Had the military judge further developed the necessary facts to constitute a potential defense of necessity, appellant would have been in a position to make an informed decision

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[46] It is abundantly evident that the military judge only questioned appellant on his return to his unit using the word "return" three times. There is no mention or even inference of leaving, departing or similar language. JA 19-20.
[47] See generally *United States v. Estes*, 62 M.J. 544, 553 (Army Ct. Crim. App 2005) ("The duration of the absence is not an essential element of the offense but constitutes a matter in aggravation for purposes of determining the authorized maximum punishment.") (quoting MCM, at pt. IV, ¶¶ 10c(4), 10c(8)).
[48] *See Logan*, 47 C.M.R. at 3. JA 15-16.
[49] JA 21.

regarding that defense. If a military judge believes there might be a substantial basis in law and fact to question a plea, it is "incumbent upon the military judge to make a more searching inquiry to determine [appellant]'s position on the apparent inconsistency with his plea of guilty."[50] The record simply does not support that the military judge made any such inquiry as it pertains to the original reason of why appellant left his unit.[51] As the necessary inquiry or additional factual development was not made, the military judge abused his discretion when he arbitrarily rejected appellant's plea based on a mere possibility of a defense that was not even factually raised by appellant's statements during the providence inquiry.[52]

Moreover, partly due to this failure, the limited facts raised by appellant do not provide sufficient basis for this court to appropriately consider whether the common law defense of necessity should be combined with the military defense of duress.[53] Appellant's trial defense counsel did not attempt to argue the defense of necessity on the merits, and only during the military judge's questioning of appellant under oath and appellant's unsworn statement during pre-sentencing did any

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[50] *Heitkamp*, 65 M.J. at 863 (quoting *Timmins*, 45 C.M.R. at 253).
[51] JA 15-21.
[52] *See generally Penister*, 25 M.J. at 148 (stating that "if the military judge rejects a provident guilty plea because of a misapplication or misunderstanding of the law, this can hardly be deemed 'failure by the accused.'")
[53] *See Olinger*, 50 M.J. at 367.

additional details surface.[54] Yet, even the additional details provided in appellant's unsworn statement are vague and only could provide, at best, a "mere possibility" of a defense.[55] As such, the inadequate, vague facts raised by appellant in the record provide insufficient basis for this court to consider whether the military defense of duress should be extended into a form of necessity at this time.

2. Appellant suffered no prejudice as the military judge's error did not have substantial influence on the findings.

Despite the military judge's abuse of discretion in rejecting appellant's guilty plea, appellant was not prejudiced by this error as it was harmless. In fact, appellant arguably benefitted from the military judge's error as not only was the government forced to establish all the elements of the offense, but the defense was also able to simultaneously present appellant's willingness to admit guilt as a source of mitigation. Either way, so far as the sentencing landscape is concerned, defense was left in no worse position as appellant had no plea bargain or pre-trial agreement in place at the time he attempted to plead guilty and the maximum punishment remained unchanged.

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[54] The military judge questioned how many children appellant had living in Miami, their ages and who else was in the home at the time. JA 46. Appellant in his unsworn statement raised the issue that his fiancé disappeared, but the record is unclear at what point she actually left. JA 53.

[55] *See Olinger*, 50 M.J. at 367; *Logan*, 47 C.M.R. at 3.

The rejection of a plea of guilty by a military judge is not a constitutional error as there is no constitutional right to plead guilty.[56] For non-constitutional errors, the government must prove that "the error itself" was harmless by showing that it did not have "substantial influence" on the findings.[57] Here, the error was harmless because 1) the government was forced to prove all elements of their case, 2) appellant was able to present willingness to admit guilt to the fact-finder, and 3) the maximum sentence exposure remained the same for the single charge given the level of court-martial.

When the military judge rejected appellant's guilty plea, the government was forced to establish all the elements of the offense thereby testing both the law and facts of the case in the "crucible of the adversarial process."[58] Furthermore, the government was likely caught off guard as they were given only an hour and a half[59] to prepare their case to prove all elements of the charge instead of only two elements of the intent to

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[56] *See generally Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (finding that "there is no constitutional right to plea bargain" and that "[i]t is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.")

[57] *Pablo*, 53 M.J. at 359 (citations omitted).

[58] *Pinero*, 60 M.J. at 33. JA 21, 25.

[59] Neither party objected to the military judge's "short recess." JA 21.

remain away and termination by apprehension.[60] On the merits, the government ended up going forward without being able to call any other soldiers who served in appellant's unit during his absence; instead the government was forced to rely on documentary evidence for substantive proof.[61] Defense, on the other hand, free from carrying the burden of proof in the case, could have chosen to explore the necessity defense issue or they could have rightfully chosen to stick to their original trial strategy. Appellant chose the latter. Still, the military judge's questions of appellant during appellant's sworn testimony on the merits, shows that the military judge was considering facts relevant to a potential necessity defense in regards to appellant's dependent minor children living with him in Miami.[62]

While the military judge's error made the government's job substantially more difficult, the error did not hamper defense's goal of presenting appellant's willingness to admit guilt to the lesser-included offense as a source of mitigation. For example, in the very first lines of opening argument, trial defense counsel emphasized that appellant "does not contest the fact

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[60] JA 21. Appellant highlights this point by characterizing government's case as "a slipshod contested trial on desertion, particularly the elements appellant's guilty plea would have addressed." Appellant's Brief 5, n.1.
[61] JA 25-33. *See also* Appellant's Brief 5, n.1.
[62] JA 46.

that he was absent from his unit ... [that he] attempted to plead guilty ... [h]e wants to plead guilty to that ... [h]e wants to take responsibility for what he did ...."[63] Trial defense counsel made the strategic decision to argue that government had not met its burden in regards to the elements of intent to remain away permanently and that appellant's absence was terminated by apprehension, while at the same time presenting appellant as a remorseful soldier willing to accept responsibility for being absent without authority.[64] Defense's strategy continued into the pre-sentencing hearing during appellant's unsworn statement where appellant explained his broken family situation: namely, his fiancé's abrupt departure leaving him with his dependent children to care for and his remorse for being absent without leave.[65] In essence, the military judge's error gave appellant "the best of both worlds," by forcing the government to prove his guilt while permitting appellant to receive due consideration for admitting the gravamen of the offense from the outset of trial.

In his brief, appellant cites to various authorities for reasons why "there may be substantial advantages from a plea of guilty," however appellant neglects to explain how the military judge's rejection of his plea actually "stripp[ed]" him of any

[63] JA 24.
[64] JA 26-27.
[65] JA 53-56.

of these supposed advantages.[66] The best insight into appellant's flawed argument is the statement that "appellant's guilty plea would have provided the military judge with *tangible evidence* of the appellant's remorse and maturity."[67] Given all the previously discussed arguments and evidence presented by appellant throughout the court-martial, appellant seems to argue that as a result of the military judge not accepting appellant's plea as provident, that this rejection somehow forced appellant to only present less persuasive evidence. Even assuming *arguendo* that an accepted guilty plea is somehow "tangible evidence" of remorse and maturity, appellant does not enlighten this court on how this "tangible evidence" is apparently better than the remorse and maturity evidence presented by appellant during the contested case. Appellant's argument that the hour and a half recess did not give "the slightest opportunity to discuss the implications [of the rejected guilty plea] or tailor their case accordingly" necessarily fails, as trial defense counsel did not object to proceeding with the contested case.[68] As there was no objection to the military judge's decision for the government to proceed with their case after a short recess, such an objection made now at the eleventh hour on appeal should

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[66] Appellant's Brief 20.
[67] Appellant's Brief 20.
[68] Appellant's Brief 21.

be considered forfeited or waived.[69] Despite what appellant now avers, the record shows that he 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 on short notice.

Finally, the error was also harmless because the maximum sentence exposure for appellant remained the same for the single specification of the charge. Given that there was no plea bargain between government and defense, 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 the lesser-included charge.[70] Contrasting this case to other military cases where this court and others held that the appellant should be entitled to "the benefit of his bargain," in this case there is no evidence in the record of any bargain to be had.[71] As a result, even from a sentencing standpoint, appellant suffered no "measurable prejudice" in

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[69] *See generally United States v. Sweeney,* 70 M.J 296, 303-04 (C.A.A.F. 2011) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)) (discussing waiver and forfeiture).

[70] Desertion, terminated by apprehension, maximum punishment: dishonorable discharge, 3 years confinement, total forfeitures. Absence without leave, more than 30 days, maximum punishment: dishonorable discharge, 1 year confinement, total forfeitures. MCM, app. 12-1, (2008). A special court-martial empowered to adjudge a bad-conduct discharge maximum punishment: bad-conduct discharge, 1 year confinement, two-thirds forfeitures. MCM, pt. II, ¶ 201f(2)(B) (2008).

[71] *See Penister*, 25 M.J. at 152-53. *See e.g. United States v. Clayton*, 25 M.J. 888, 890-91 (A.C.M.R. 1988).

regards to potential maximum punishment exposure resulting from the military judge's rejection of his guilty plea.[72]

Conclusion

The defense of necessity is not directly recognized in military law. Even assuming *arguendo* that such a defense exists, the military judge abused his discretion in failing to conduct an adequate factual inquiry to determine if the defense existed at the time appellant absented himself from his unit as such an offense is an instantaneous one that begins the moment the accused absents himself from his unit without authority. Despite the military judge's error, appellant was not prejudiced as the error did not have substantial influence on the findings. The government was forced to establish all the elements of the offense beyond a reasonable doubt, while the defense was also able to present appellant's willingness to admit guilt as a source of mitigation. Lastly, the military judge's rejection of appellant's plea did not alter the potential maximum punishment, as there was no pre-trial agreement in this case.

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[72] *See generally United States v. Diaz*, 2009 WL 690614, *4 (N-M. Ct. Crim. App. 2009) (unpub.) *affirmed by United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2009) (finding that, "even assuming *arguendo* that the military judge erred by not permitting the appellant to [plead guilty]" the appellant "suffered no measurable prejudice").

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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DANIEL H. KARNA
Captain, Judge Advocate
Attorney for Appellee
November 26, 2012

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing BRIEF ON BEHALF OF APPELLEE, *United States v. Holsey*, Crim. App. Dkt. No. 20100479, Dkt. No. 12-0579/AR was filed electronically with the Court on the 26th day of November, 2012 and contemporaneously served electronically on military appellate defense counsel, Captain J. Fred Ingram.

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ATTACHMENT

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
E.E. GEISER, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MATTHEW M. DIAZ
LIEUTENANT COMMANDER (O-4), JAGC, U.S. NAVY

NMCCA 200700970
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 May 2007.
Military Judge: CAPT Daniel O'Toole, JAGC, USN.
Convening Authority: Commander, Navy-Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR T. Riker, JAGC, USN.
For Appellant: Maj R.D. Belliss, USMC; Capt Kyle Kilian, USMC; LT Kathleen Kadlec, JAGC, USN; Ms. Kathleen J. Purcell; Mr. Robin B. Johansen.
For Appellee: LT Elliot Oxman, JAGC, USN; LT Derek D. Butler, JAGC, USN.

19 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with officer members convicted the appellant, contrary to his pleas, of violating a lawful general regulation, conduct unbecoming an officer, wrongfully communicating classified information, and the unauthorized removal of classified information, in violation of Articles 92, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 933, and 934. The approved sentence included confinement for six months and a dismissal.

The appellant raises four assignments of error. First, he asserts that the military judge erred when he arbitrarily rejected the appellant's guilty plea to Charge II and its sole specification. Second, the appellant avers that the military judge abused his discretion when he excluded evidence of the appellant's specific intent, state of mind, and the circumstances surrounding the appellant's actions. Third, the appellant argues that the cumulative effect of the two errors enumerated above deprived the appellant of a fair trial. Finally, the appellant asserts that a sentence including six months confinement and a dismissal is unjustifiably severe.

We have examined the record of trial and the pleadings of the parties. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.[1]

Background

Between 6 July 2004 and 15 January 2005, the appellant was assigned as Deputy Staff Judge Advocate of Joint Task Force GTMO, Guantanamo Bay, Cuba. Among his duties was responsibility to act as liaison between his command and staff attorneys from the Department of Defense and the Department of Justice in connection with *habeas corpus* litigation involving Guantanamo detainees. Believing that the U.S. Government's repeated refusal to disclose the names of unrepresented detainees held in Guantanamo violated the spirit if not the letter of a recent United States Supreme Court decision,[2] the appellant took it upon himself to download classified identifying information relating to unrepresented detainees from a secure database in his office.[3] Specifically, the appellant downloaded and printed a document containing the names, nationality, and alpha-numeric coded data that potentially reflected classified source and method information regarding each individual detainee. The alpha-numeric information reflected on the print-out was properly classified SECRET, but was not marked as such.

Thirteen days later, having cut the classified printout into smaller pieces, the appellant placed the cut pieces of paper into an unsigned Valentine's Day card and mailed the classified data to an attorney working at the Center for Constitutional Rights (CCR) who had previously requested the names and nationalities of unrepresented Guantanamo detainees. The CCR attorney immediately contacted the federal judge handling the detainee litigation,

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[1] The appellant's 25 July 2008 Motion for Oral Argument is denied.

[2] *Rasul v. Bush*, 542 U.S. 466 (2004)(upholding the right of Guantanamo detainees to file *habeas corpus* petitions in U.S. federal court).

[3] The data was downloaded from the appellant's classified SIPRNET computer which is authorized to contain classified material up to and including SECRET material.

disclosed receipt of the material, and arranged to turn the material over to the court for review. The appellant departed Guantanamo the same day he mailed the Valentine's Day card.

Attempted Guilty Plea

At trial, the appellant originally pled not guilty to all charges but, prior to trial, moved to amend his plea to the specification under Charge II (conduct unbecoming an officer) to guilty by exceptions and substitutions. The appellant's modified plea excepted the words "classified documents" and substituted therefore the words "government information not for release."[4] The defense team generally articulated the facts and circumstances the appellant believed constituted the offense in their written motion and in two discussions between counsel and the military judge in the record of trial. Appellate Exhibit LXVIII; Record at 417-21, 488-513.

The military judge declined to accept the plea noting that the plea as proffered was "irregular in that it did not state an LIO (lesser included offense), but it changed the nature of the charge." Record at 873. Additionally, the military judge stated that he was not confident the specification, as excepted and substituted, even stated an offense. The military judge observed that, while the conduct charged under Article 133, UCMJ, "does not have to be a crime, the conduct must so seriously offend against the law as to expose the officer to disgrace and to bring disrepute upon the military profession which he represents." *Id.* at 516. In essence, the military judge ruled that, within the context of the appellant's factual proffer, the amended specification did not rise to a level above "slight infractions or breaches." *Id.*

Rule for Courts-Martial 910(a)(1)[5] authorizes an accused to plead guilty to a specification with exceptions and substitutions. R.C.M. 910(b), however, permits a military judge to reject such a plea if the exceptions and substitutions render it "irregular." The discussion under this rule defines an irregular plea to include "pleas such as guilty without criminality...." A military judge's decision to reject a proffered plea as "irregular" is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

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[4] The original specification under Charge II read, in pertinent part, as follows:

> IN THAT LIEUTENANT COMMANDER MATTHEW M. DIAZ, JAGC, U.S. NAVY...DID, AT OR NEAR GUANTANAMO BAY, CUBA,...WRONGFULLY AND DISHONORABLY TRANSMIT CLASSIFIED DOCUMENTS TO AN UNAUTHORIZED INDIVIDUAL.

The appellant originally also excepted the word "dishonorably" but later determined to leave the word in the specification. Record at 488.

[5] RULE FOR COURTS-MARTIAL 910(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

The appellant argues that the military judge's decision to reject his plea without giving him the opportunity to at least try to provide a factual basis during a providence inquiry was arbitrary as it was driven by a misunderstanding of the law. Specifically, the appellant asserts that the military judge, in effect, determined without reference to the specific facts of the case, that a plea to a wrongful and dishonorable release of "government information not for release" could not so seriously offend against the law as to expose the officer to disgrace and to bring disrepute upon the military profession. Record at 516. The appellant argues that he was prejudiced by the military judge's error insofar as he was unable to obtain the benefit with the members of having pled guilty. Appellant's Brief and Assignment of Errors of 19 May 2008 at 27.

We agree with the appellant that the wrongful release of "government information not for release" could, under the right circumstances, constitute an act reflecting sufficient dishonor and lack of integrity to constitute an offense under Article 133, UCMJ. An officer who, for example, provided a base phone directory to terrorists with knowledge that they would use the information in the directory to target attacks on particular military personnel would, at the very least, be guilty of conduct unbecoming an officer. At issue is whether the facts and circumstances proffered by the appellant in connection with his motion to amend his plea were sufficient for the military judge to make a reasoned determination whether the proffered plea constituted such dishonorable conduct.

Appellate Exhibit LXVIII specifically articulates the facts and circumstances underlying the appellant's plea. The appellant specifically asserted that:

> Due to the requirements of his duties, LCDR Diaz was granted access to classified information and government information not for release pertaining to the detainees and JTF's mission and operations. LCDR Diaz' duties during this time period included serving as liaison for the JTF to attorneys who were pursuing habeas corpus litigation in U.S. federal district courts on behalf of the detainees. In December 2004 and January 2005, he was aware that the U.S. Supreme Court ruled on 28 June 2004 that Guantanamo detainees could pursue habeas corpus relief in U.S. federal district court, and he knew that the U.S. District Court for the District of Columbia had ruled in October 2004 that the detainees were entitled to assistance of counsel in pursuing this habeas corpus litigation. In December 2004 and January 2005, there were detainees in Guantanamo Bay who had not petitioned for habeas relief and who were not represented by counsel. LCDR Diaz was aware that attorneys who were pursuing habeas corpus relief for those detainees had requested the names of the detainees. On 14 January 2005, LCDR Diaz knew that it

was the Department of the Navy's and Department of Defense's intent to refuse to provide the names of the detainees to the attorneys pursuing habeas on behalf of detainees, specifically to Ms. Barbara Olshansky, an attorney employed by the Center for Constitutional Rights (CCR). Therefore, LCDR Diaz knew that the names of the detainees were U.S. Government information and that the aforementioned federal departments considered that this was government information not for release.

On 2 January 2005, LCDR Diaz, while still serving with JTF-GTMO, printed out a list from the Joint Detention Information Management System (JDIMS), an electronic database to which he had access. That list included the names of the detainees currently being held by JTF-GTMO. The JDIMS database contained government information not for release. On 2 January 2005, LCDR Diaz knew that the list he printed out contained government information not for release, specifically, the names of the detainees.

On 14 January 2005, LCDR Diaz transmitted this list containing government information not for release to Ms. Barbara Olshansky by placing this list in an envelope and mailing it from the U.S. Postal Service mail facility at Guantanamo Bay. The envelope was addressed to Ms. Olshansky at her office at the CCR in New York City, New York. Ms. Olshansky was not authorized to receive, or be in possession of this information. Lieutenant Commander Diaz knew that it was the Department of the Navy and Department of Defense's decision to refuse to provide the names of the detainees to Ms. Olshansky.

Under the circumstances, LCDR Diaz' conduct as described above, was unbecoming an officer and a gentleman. By mailing this list to Ms. Olshansky, LCDR Diaz conducted himself, in his official capacity as a U.S. Naval officer, in a disgraceful manner.

It appears from the appellant's written motion that he was willing to plead guilty only to providing the *names* of detainees to CCR, but not to providing the nationalities and the alpha-numeric coded data. During motion practice, however, the defense implied that they would plead guilty to providing all the information reflected on the printout mailed to CCR, but that they intended to litigate and argue that none of the information provided was properly classified. Record at 490.

We find that the military judge accurately understood the breadth and scope of Article 133, UCMJ. He did not act in an arbitrary manner or otherwise abuse his discretion. We agree with him that the essence of the Government's charge and specification was that the appellant knowingly provided

classified information to CCR and that the appellant's proffered plea substituting "government information not for release" was qualitatively distinct from the charged offense. Further, we find that the factual proffer in the appellant's motion coupled with the two extended discussions on the record gave the military judge a reasonable sense of what the appellant intended to say during providence obviating the need to go through the motions of a formal providence inquiry.

Even assuming *arguendo* that the military judge erred by not permitting the appellant to at least attempt to providently plead guilty to conduct unbecoming an officer, he suffered no measurable prejudice. We observe that the defense focus at trial was to specifically dispute the classified nature of the material provided to CCR. At no time either during cross-examination or during the defense merits case did the defense argue or otherwise imply that the appellant had not, in fact, copied and forwarded the database material as alleged by the Government. We further note that following findings the military judge consolidated Charge II and the specification thereunder with Specification 2 of Charge III (communication of classified material) ensuring that the appellant faced no additional punishment for the Article 133, UCMJ, charge. Record at 1755. While arguably an instruction during sentencing regarding rehabilitative potential would have been of some benefit to the appellant, we find any such benefit to be minimal at best given the facts and circumstances of this case.[6]

Exclusion of Motive Evidence

The appellant next argues that the military judge violated the appellant's statutory and constitutional rights when he "excluded evidence of the appellant's specific intent, state of mind and the circumstances surrounding his actions."[7] Appellant's Brief at 37. Specifically, the military judge granted a Government *motion in limine* to exclude, inter alia, any defense evidence relating to:

> 1) whether or not the release of the information was consistent with the sworn oath of a commissioned officer;
>
> 2) the ethical obligations of a judge advocate or a practicing attorney;
>
> 3) the United States Supreme Court decision in *Rasul v. Bush*; and

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[6] *See* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, at instruction 8-3-35 (15 Sept 2002).

[7] The military judge granted the Government *motion in limine* at Appellate Exhibit XXXVII by incorporating his findings of fact in Appellate Exhibit L (Ruling on Defense Motion to Compel Witness Production).

4) the legality or the illegality of United States Government policies on detainee *habeas corpus* petitions.

Appellate Exhibit XXXVII; Record at 338-47, 386-87.

The defense argues that it sought to present this evidence of the appellant's state of mind as relevant to the specific intent element of Specification 2 of Charge III (communicating classified information in violation of 18 U.S.C. § 793)[8] and the dishonor element of the specification under Charge II (conduct unbecoming an officer).

We review the military judge's evidentiary decision for an abuse of discretion. *United States v. Osburn*, 31 M.J. 182, 187 (C.M.A. 1990). An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making findings of fact. *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002).

After taking evidence, the military judge made findings of fact that were consistent with the record. We adopt them as our own. The military judge correctly observes that criminal intent and motive are "separate and distinct" issues that may or may not have a logical or causal connection. "Intent" in this context reflects "a mental resolution or determination to do [an act]."[9] By contrast, "motive" is a "desire that leads one to act."[10] While there are cases in which motive or purpose could arguably be relevant to a specific intent such as fact patterns involving possible insanity, duress, or justification; the instant case does not include any of these issues.[11]

As noted by the military judge, the essence of the defense's logic is that a laudable motive makes it less likely that the appellant intended to harm the U.S. Government or advantage a foreign power. We disagree. The appellant's intent was to copy classified material and provide it to an unauthorized person. He did so with the understanding that such classified material *could* be used to the detriment of the United States or to advantage a foreign power. Whether he thought CCR *would*, in fact, use the material for such purposes is irrelevant to his intent. Further, whether he provided the material to CCR for laudable reasons or otherwise is also irrelevant for purposes of findings.

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[8] 18 U.S.C. § 793 requires a specific intent that the disclosure of information relating to the national defense be done with reason to believe such disclosure could cause injury to the United States or be used to the advantage of a foreign nation.

[9] BLACK'S LAW DICTIONARY – 825 (8th ed. 2004).

[10] *Id.* at 1039.

[11] The military judge rejected a defense motion to mount a justification defense noting that neither the *Rasul* case, the oath taken by a commissioned officer, nor the ethical obligations of a judge advocate or attorney mandated the appellant's conduct. Record at 327-58.

The appellant's argument that taking action for arguably pure and good motives excuses his knowing violation of the law is nonsensical and dangerous. The Government, quoting an opinion by Justice Stevens when he was serving in the 7th Circuit, succinctly summarized the flaw in the appellant's logic. Justice Stevens observed that "[o]ne who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making.... [a]n unselfish motive affords no assurance that a crime will produce the result its perpetrator intends."[12]

Sentence Severity

The appellant argues that six months confinement and a dismissal is inappropriately severe for offenses involving the knowing provision of classified material to an unauthorized person. We have considered the record of trial to include the appellant's prior military record. We have also considered the negative impact of the appellant's acts. The appellant's actions not only degraded the military chain of command, brought into question civilian control of the military, and negatively impacted public trust in the fidelity of our military personnel but, more fundamentally, the appellant's conduct strikes directly at core democratic processes. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

The appellant's remaining assignment of error is without merit. The findings and approved sentence are affirmed.

Senior Judge COUCH and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

[12] *United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971).