IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	FINAL BRIEF ON BEHALF OF APPELLANT
Private First Class (E-3), George D. MacDonald United States Army, Appellant	)	CCA Dkt. No. 20091118 USCAAF Dkt. No. 14-0001/AR

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

ISSUES PRESENTED

I.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN DETERMINING THAT THE MILITARY JUDGE'S ERROR IN QUASHING A SUBPOENA ISSUED TO PFIZER, INC., TO PRODUCE RELEVANT AND NECESSARY DOCUMENTS REGARDING CLINICAL TRIALS, ADVERSE EVENT REPORTS, AND POST-MARKET SURVEILLANCE OF THE DRUG VARENICLINE WAS HARMLESS BEYOND A REASONABLE DOUBT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE REQUESTED INSTRUCTION ON INVOLUNTARY INTOXICATION, AND ERRED IN FAILING TO INSTRUCT THE MEMBERS ON THE EFFECT OF INTOXICATION ON APPELLANT'S ABILITY TO FORM SPECIFIC INTENT AND PREMEDITATION.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012)[hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

Appellant was tried at Fort Benning, Georgia on 13 & 24 November, 2008, 11 December 2008, 27 March 2009, 1 & 24 June 2009, 27 July 2009, 1 October 2009, 18 November 2009, 4 December 2009 and 7-12 December 2009 before a general court-martial convened by Commander, Headquarters, United States Army Maneuver Center of Excellence and Fort Benning. Appellant was charged with one specification of resisting apprehension under Article 95, UCMJ (2006) (Charge I); one specification of murder under Article 118, UCMJ (2006) (Charge II); and two specifications of assault under Article 128, UCMJ (2006) (Charge III).

Appellant elected trial by members, pleaded not guilty to all charges and specifications, and was found guilty of all charges and specifications. He was sentenced to a reprimand, reduction to E-1, total forfeitures, a dishonorable discharge, and confinement for life without eligibility for parole. The convening authority approved the adjudged sentence.

Under Article 66(c), UCMJ, the Army Court determined that the findings and sentence were correct in law and fact on 3 July 2013. This Court granted review of this case on 21 February 2014.

STATEMENT OF THE FACTS

Appellant entered the United States Army on 12 June 2007.[1] In spite of his undiagnosed psychiatric conditions, appellant, an Eagle Scout,[2] enjoyed a certain amount of success in his life and his short Army career. On 28 September 2007, appellant completed Infantry Training.[3] On 19 October 2007, appellant completed the Airborne Course; he was the Enlisted Honor Graduate.[4] Appellant had been recommended by the Admissions Committee for an appointment to the United States Military Academy Preparatory School (USMAPS) at Fort Monmouth, New Jersey, and was selected for the USMAPS class of 2009.[5]

While awaiting transfer to Fort Monmouth, appellant was assigned to the supply room at Delta Company, 2/19, at Fort Benning. The people he worked with in the supply room, including SGT Markesha Moore, SPC Theria Rahming, and Mr. Bobby Hunter, all described him as a good soldier and a peaceful person.[6] Others also testified to appellant's character for non-violence. Ms. Michelle Langerman, a civilian, testified that she had known appellant since he was a child, and in her opinion

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[1] JA at 16.
[2] JA at 739.
[3] JA at 740.
[4] JA at 741, 742.
[5] JA at 736, 737.
[6] JA at 187, 196, 200.

appellant is a peaceful person.[7] Mr. Evan Carlucci, appellant's friend from childhood, testified that he had known appellant since he was six or seven years old, and testified that appellant is not a violent person.[8] Mr. Robert O'Donnell, appellant's former scout leader, testified that, in his opinion, appellant "is a peaceful person" who "actively seeks to avoid violence."[9]

While appellant was awaiting transfer to USMAPS, concerns about neuropsychiatric effects of Chantix increased. On 20 November 2007, about a year and a half after Chantix was first approved by the Food and Drug Administration (FDA), the FDA issued an "Early Communication About an Ongoing Safety Review of Varenicline."[10] The Early Communication described certain behaviors, including "suicidal thoughts," "aggressive and erratic behavior," and "drowsiness" reported in cases involving Chantix, but noted that it had not concluded that there was a causal relationship. With respect to the "suicidal thoughts" cases, the FDA stated that "[a] preliminary assessment reveals that many of the cases reflect new-onset of depressed mood, suicidal ideation, and changes in emotion and behavior within days to weeks of initiating Chantix treatment," and concluded

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[7] JA at 217.
[8] JA at 219.
[9] JA at 224.
[10] JA at 705.

that "[t]he role of Chantix in these cases is not clear because smoking cessation, with or without treatment, is associated with nicotine withdrawal symptoms and has also been associated with the exacerbation of underlying psychiatric illness." The FDA went on to say, however, that "not all patients described in these cases had pre-existing psychiatric illness and not all had discontinued smoking."[11]

On 2 February 2008 the FDA issued an "Alert" to "highlight important revisions to the WARNINGS and PRECAUTIONS sections of the full prescribing information for Chantix regarding serious neuropsychiatric symptoms."[12] The symptoms included "changes in behavior, agitation, depressed mood, suicidal ideation, and attempted and completed suicide."[13] The FDA warned that "it appears increasingly likely that there is an association between Chantix and serious neuropsychiatric symptoms," and noted that it "requested that Pfizer, the manufacturer of Chantix, elevate the prominence of this safety information to the WARNINGS and PRECAUTIONS sections of the Chantix prescribing information."[14]

On 18 April 2008, appellant visited the Martin Army Community Hospital at Fort Benning. His "Chief Complaint" was "Smoking," and "Desires assistance with smoking cessation,"

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[11] JA at 705.
[12] JA at 707.
[13] JA at 707.
[14] JA at 707 (capitalization and underline in original).

having "smoked up to 1/2 pack daily for past 3 years off and on."[15] Appellant was prescribed "VARENICLINE (CHANTIX) STARTER PACK– PO TAB - A 12 WK COURSE OF THERAPY RECOMMENDED."[16] Appellant took the medication.[17]

On 16 May 2008, in response to escalating concerns about Varenicline's safety, the FDA issued a "public health advisory to alert patients, caregivers, and healthcare professionals to important changes to Chantix prescribing information."[18] According to the Public Health Advisory, the manufacturer of Chantix, at the request of the FDA, updated the prescribing information "to include warnings about the possibility of severe changes in mood and behavior in patients taking Chantix."[19] The Public Health Advisory advised that "Chantix may cause worsening of a current psychiatric illness even if it is currently under control and may cause an old psychiatric illness to reoccur." It said that symptoms of Chantix "may include anxiety, nervousness, tension, depressed mood, unusual behaviors and thinking about or attempting suicide," and "In most cases, neuropsychiatric symptoms developed during Chantix treatment,

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[15] JA at 700.
[16] JA at 700.
[17] JA at 697.
[18] JA at 709.
[19] JA at 709.

but in others, symptoms developed following withdrawal of varenicline therapy."[20]

On the same day that the FDA issued this Public Health Advisory, Private Rick Bulmer was assigned to basic training, First Platoon, Echo Company, 1st Battalion, 50th Infantry Regiment, 198th Infantry Brigade, Fort Benning, Georgia.[21] PVT Bulmer had undergone surgery prior to arriving at Fort Benning, and was allowed frequent rests and excusal from strenuous activity as a result.[22] On 18 May 2008, at around 1830, PVT Bulmer was present for Drill and Ceremony training, but because of his injury he was unable to participate. Because of the heat, PVT Bulmer's Drill Sergeant, SSG Joshua Tackett, instructed him to observe the training from the shade of trees close to the barracks. SSG Tackett observed PVT Bulmer in an open area underneath the building near a lister bag but did not know where PVT Bulmer went after that.[23]

PVT Bulmer apparently went back to his rack in Echo Company, 1st Platoon's bay. Specialist Justin Harrison was in the 3rd Platoon bay, which is immediately above the 1st Platoon bay. He heard screaming, and at first did not think anything of it; it was basic training and he "thought it was somebody

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[20] JA at 709.
[21] JA at 696.
[22] JA at 696.
[23] JA at 696.

getting smoked downstairs."[24] When he realized something was going on, he looked out the window and heard someone below shout, "Oh, my God, he's having a heart attack," and he proceeded downstairs.[25] He heard screams, "Oh, my God, Jesus no, please stop."[26] Specialist Harrison saw what looked like punching. He testified, "I didn't realize it was a knife at first and he was just kneeling down over Private Bulmer just going away."[27] He yelled "hey," and appellant turned around and came at him.[28] Specialist Harrison agreed that "Private Bulmer's under the bunk and Private Macdonald is out of control stabbing him."[29] Specialist Harrison testified that in his 19 May statement to CID he had said that appellant was "acting completely crazy," "[l]ike he was possessed."[30] He agreed that he had reported appellant acting "[l]ike he was on something."[31] He recalled testifying at the Article 32, UCMJ hearing that appellant "just looked like he was; he looked pretty just clear eyed, like he was transparent," and "[i]t looked like you could see right through him."[32]

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[24] JA at 107.
[25] JA at 108.
[26] JA at 108.
[27] JA at 108.
[28] JA at 109.
[29] JA at 117.
[30] JA at 120-121.
[31] JA at 121.
[32] JA at 122.

Tragically, Private Bulmer died as a result of stab wounds inflicted by appellant.

Immediately after the attack appellant ran out of the bay, returned to his own room and took a shower.[33] He put the bloody clothes, shoes and knife in a backpack and departed the barracks.[34] Appellant was apprehended and taken to Martin Army Community Hospital for treatment for injuries sustained during his apprehension[35], and later taken to CID for questioning. He was interviewed by Special Agent David Maier in the early morning hours of 19 May 2008,[36] and provided Special Agent Maier with a sworn statement.[37] Special Agent Maier gave appellant a notepad to write down what they had discussed, and left the room for him to do that alone.[38] Appellant wrote page one of the statement, then Special Agent Maier returned, took the notepad back, wrote out questions, and gave the notepad to appellant to provide written answers to the things they had discussed verbally.[39]

Appellant was cooperative throughout the interview.[40] He described an "internal struggle," and said "he was telling

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[33] JA at 689.
[34] JA at 689.
[35] JA at 139.
[36] JA at 128.
[37] JA at 137, 689.
[38] JA at 138.
[39] JA at 138.
[40] JA at 142.

himself no," and said "wasn't me talking, wasn't me."[41] Prior to the stabbing he was telling himself "no."[42] Appellant said to Special Agent Maier, "I was someone else; something was wrong."[43] He wrote, "I want to go to a hospital for my head to be fixed."[44] When Special Agent Maier asked appellant why he stabbed that man, appellant replied in writing "Insanity, temp." Appellant's explanation for this was "because this is not who I am; I went crazy for a while; I should have seen the signs, was hurting; I snapped; I'm so sorry."[45] When asked to describe the signs, appellant wrote, "the new and strange thoughts that person telling me [unintelligible] and dangerous things that aren't me. Was recent, the 'stretched thin' feeling after so long time of abuse in basic training environment."[46] Appellant stated,

> I fought myself with the idea, yes I did intend to kill him. When I saw him in the bay I didn't think it was wrong, I felt something strange, I snapped and didn't like it, I was stretched and it made me crazy and I don't like it. I'm a good person and if you knew me you wouldn't dream that I'd ever do anything like this I never thought like this before. I like to love. I was not angry at him, nor was I angry while the event took place. I guess I thought I was supposed to kill this man.[47]

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[41] JA at 144, 689.
[42] JA at 145.
[43] JA at 145.
[44] JA at 145.
[45] JA at 146, 689.
[46] JA at 689.
[47] JA at 689 (underlined text in original).

Special Agent Maier asked appellant what he was thinking when he stabbed Private Bulmer, and appellant replied that he was thinking, "I wish I didn't have to do this, I hate to do this, but also a silent nothing."[48]

Dr. Glenmullen, a psychiatrist accepted as an expert in the field of forensic psychiatry with specialized knowledge, training and expertise regarding the impact of medication on the human brain[49] testified for the defense.[50] Dr. Glenmullen received his medical degree from Harvard Medical School[51] and has been a clinical instructor in psychiatry at Harvard Medical School for over twenty years.[52]

Using Defense Exhibit DDD as a demonstrative aid, Dr. Glenmullen testified that the cells in the human brain communicate with each other through neurotransmitters, which are chemicals that one cell uses to communicate with another cell. "Biogenic amines" are "three closely related chemical signals, three of these neurotransmitters; dopamine; serotonin; and norepinephrine in the brain."[53] These biogenic amines are important because "they have profound effects on mood and

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[48] JA at 689.
[49] JA at 389. Dr. Glenmullen testified that he has a "very specialized expertise in medication side-effects, psychiatric medications." JA at 384.
[50] JA at 388. Despite receiving "many, many" requests to testify in criminal cases, Dr. Glenmullen has only testified in four.
[51] JA at 381.
[52] JA at 383.
[53] JA at 392.

behavior." Of the three, the most stimulating is dopamine, which

> is excitatory and you can get a range of excitatory responses depending on how much the signal is, anything from feeling a little more alert, a little more focused, to feeling very restless and agitated and maybe having trouble sleeping, to starting to feel very anxious, very irritable, hostile, and even psychotic if you push it too far.[54]

When the cells transmit dopamine, it is contained in "little packets" consisting of the matter making up the cell membranes, so they merge with the cell membrane and release the chemicals. The chemicals cross a space called a "synapse" and enter "receptors" on the receiving cell "that they fit into like a lock and key." According to Dr. Glenmullen, dopamine fits into dopamine receptors, serotonin would fit into serotonin receptors, and so on.[55] The "receptors are sitting on the receiving cell and once dopamine attaches to them the little arrows that say 'signal' essentially then a communication is going to go down that cell into the next, into the next, into the next to create some kind of reaction in the brain."[56]

The level of dopamine in the brain affects a person's behavior, and probably has one of the most profound effects on human emotion and behavior. According to Dr. Glenmullen, "if you take a drug that releases a small amount [of dopamine] and

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[54] JA at 393.
[55] JA at 394.
[56] JA at 395.

releases it in areas that are not too dangerous in the brain, you may just feel more alert, more focused."[57] Dr. Glenmullen likened dopamine to "a strong version of caffeine," and said,

> if you turn it up and up and up and you can feel more agitated, irritable, anxious, sleepless; keep turning it up and up you can get manic; keep turning it up and up you can get psychotic. It's this whole range depending on the individual's sensitivity, how much dopamine is being released, and where in the brain dopamine is being released and whether or not it's just a particular dangerous area of the brain.[58]

Dr. Glenmullen testified that, from a forensic diagnosis perspective, to be under the influence of a drug means that a drug is affecting a person. It could be a positive effect, such as a person being under the influence of an antidepressant and feeling better. A person could also be under the influence of a drug to which the person is having a bad reaction and feel worse. A person could also have a "paradoxical reaction," meaning the person could be under the influence of a drug in a way that alters their behavior beyond their control.[59]

During the early 1990's when certain antidepressants, particularly Prozac, were first released, there were reports that medications that affect the biogenic amines were making some people suicidal and perhaps even violent. Violence to one's self and violence towards others is, according to Dr.

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[57] JA at 395.
[58] JA at 395-396.
[59] JA at 397.

Glenmullen, are two sides of the same coin -- some have one, some have none, and some have both. Over time as data was collected and the FDA studied the issue, first "alerts" about these drugs surfaced in 2003, first warnings came in 2004, and a series of warnings since.

Certain prescription drugs are associated with suicide, including all antidepressants, some antipsychotics, all mood stabilizers, and Chantix is the most recent.[60] An antidepressant is a drug used to treat depression, usually affecting one or more of the biogenic amines. An antipsychotic is a drug used to treat psychosis; they block dopamine, which has been found to be helpful for people who are psychotic. Mood stabilizers are used for bipolar disorder. There are warnings associated with all of these drugs.[61] What the warnings have in common "is that to different degrees they all do differ from the different classes, the warning about people becoming suicidal on the drug and/or aggressive. It's only been with Chantix that the warning is explicit about homicidality."[62]

Chantix is a new drug marketed by Pfizer to help people with smoking cessation or nicotine withdrawal. Chantix was first approved by the FDA on 10 May 2006.[63] A typical course of

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[60] JA at 398-399.
[61] JA at 399.
[62] JA at 400.
[63] JA at 244.

treatment lasts 12 weeks. The smoker chooses a "quit date," and begins taking Chantix seven days prior to the quit date and continues to smoke.[64] For the first three days, he or she takes a .5 mg tablet once a day; between days 4 and 7 they take a .5 mg tablet twice a day; and from day 8 until the end of treatment, they take a 1 mg tablet twice a day.[65] The warning for Chantix is stronger than with any of the warnings for antidepressants, antipsychotic and mood stabilizer drugs.[66] While some of the other warnings mention irritability, hostility and perhaps go so far as to use the word "aggression," Chantix is the first one where homicidality is explicitly spelled out in the FDA warnings.[67]

Slide 5 of Def. Ex. DDD explains the dangers associated with Chantix. Those include changes in mood, including depression and mania; psychosis, hallucinations; paranoia; delusions, homicidal thoughts; agitation; anxiety; panic; suicidal thoughts; suicide attempt; and completed suicide. The list of dangers comes from the newest FDA warnings on Chantix. In July 2009 the FDA announced it was requiring "black box" warnings for Chantix. A black box warning is the highest level

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[64] JA at 711.
[65] JA at 711.
[66] JA at 401.
[67] JA at 401.

possible that the FDA can issue, short of removing the drug from the market.[68]

Dr. Glenmullen testified that Chantix affects dopamine in the brain, and causes an increase in dopamine. He testified about the "dopamine hypothesis of schizophrenia," which is "the belief that schizophrenics have excess levels of dopamine and that is what makes them psychotic."[69] Schizophrenics who are psychotic have excess dopamine, so drugs that block dopamine - antipsychotics - are used to treat schizophrenics. Those drugs work in the basal ganglia to block dopamine in psychotics. Since drugs that block dopamine treat psychosis, it is believed that excess dopamine causes psychosis, and drugs that increase dopamine can cause psychosis.[70] According to Dr. Glenmullen, the dopamine hypothesis of schizophrenia is well established in psychiatry. Dr. Glenmullen cautioned against oversimplification, but said that while there is a lot about the human brain that is unknown, there is a lot of evidence to support the belief that there are interactions among the neurotransmitters.[71]

Nicotine causes the release of dopamine. The release of dopamine from nicotine is apparently not in a dangerous part of

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[68] JA at 402-403.
[69] JA at 404.
[70] JA at 404-405.
[71] JA at 406.

the brain because people who smoke do not ordinarily do dangerous things.[72] When the person stops smoking, the release of dopamine stops and part of that is responsible for the cravings people have in smoking cessation. Nicotine patches, gum and lozenges are used to replace the nicotine and some of that dopamine release. Chantix is also prescribed, and for most normal people who have a normal reaction to it, an intermediate level of dopamine is released, between what a cigarette would do and no cigarette.[73] The belief is that it helps people not to have cravings. Sensitive people or people who have a paradoxical reaction to Chantix could get much larger dopamine release in some parts of their brain or dopamine release in some dangerous part of their brain.[74] A "paradoxical reaction" is a bad or severe reaction that is not the reaction that would be expected for most people who take the drug.[75]

Dr. Glenmullen testified that Chantix binds to the same receptors as nicotine, as confirmed by test tube studies of laboratory animals. "But what we don't know is all of the other things that Chantix may be doing - other dopamine receptors, other chemical receptors, interactions among chemicals."[76] And while the Pfizer studies indicate that Chantix releases a lower

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[72] JA at 411.
[73] JA at 411.
[74] JA at 412.
[75] JA at 412.
[76] JA at 486.

level of dopamine than nicotine, "[w]e don't know what else it is doing and where in the brain to account for these side-effects that we now clearly have."[77] When Chantix binds to these receptors it blocks nicotine from binding to those receptors, but:

> whereas the nicotine is a kind of pulse, the Chantix binds, it sticks on it, so at least for the ones that Pfizer studied in the test tubes, it's kind of a more sustained lower level. Whether or not it's the fact that it's sustained that ultimately makes it so dangerous for some people we don't know or whether it's a totally different receptor somewhere else in the brain.[78]

Dr. Glenmullen said that because of the limited number of binding sites, the combination of smoking and Chantix releases less dopamine than released by smoking alone, but only for those receptors. He testified, "We have no idea what the rest of Chantix is doing in the brain."[79]

Dr. Glenmullen worked with Mr. Thomas Moore, another defense expert, in examining Chantix cases that had been reported to the FDA.[80] When Chantix was first approved, the "Patient Information" accompanying each prescription described "the most common side effects" as nausea, changes in dreaming, constipation, gas, and vomiting.[81] For people with a normal

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[77] JA at 487.
[78] JA at 487.
[79] JA at 488.
[80] JA at 414.
[81] JA at 711.

reaction to it, Chantix causes "an intermediate level of dopamine release, between what a cigarette would do and no cigarette."[82] People who have "paradoxical reactions" to Chantix "could get much larger dopamine release in some parts of their brain or just dopamine release in some dangerous part of their brain."[83] And, according to Mr. Moore, "[s]erious psychiatric side-effects were reported in the clinical trials of Chantix prior to its approval, but they were small in number and so therefore, difficult to interpret."[84]

According to Dr. Glenmullen, there is a very strong association between Chantix and aggression and violence, as compared to nicotine. There were 100 times the annual reports of aggression and violence with Chantix than there were with nicotine.[85] Dr. Glenmullen testified that in evaluating Chantix as a cause of violence and aggression, it is important to consider nine criteria, including the strength of association; consistency of data; specificity of data; the temporal relationship between the taking of the drug and the side effect; the dose response; the biological plausibility; coherence; experiment; and analogy. He explained each of those terms with respect to causation, and concluded that "we have all nine

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[82] JA at 711.
[83] JA at 412.
[84] JA at 244.
[85] JA at 415.

criteria for causality strongly met for Chantix."[86] Dr. Glenmullen testified that in his opinion Chantix can cause people to become aggressive or violent.[87]

Dr. Glenmullen conducted a forensic interview with appellant, the purpose of which was to determine whether appellant knew the wrongfulness of what he was doing at the time of the incident.[88] Dr. Glenmullen formed a diagnosis of appellant prior to his using Chantix, including three diagnoses of untreated psychiatric conditions. In Dr. Glenmullen's opinion, appellant had "a schizoid personality disorder, which was kind of his reaction to his childhood;" dysthymia, which is "a history of long term mild depression," which he had for more than two years; and a "psychosis . . . not otherwise specified" that included "auditory hallucinations."[89] These conditions all pre-dated appellant's prescription of Chantix.[90] These conditions were still present in the month between the date he started taking Chantix and the date of the incident.[91]

Before Dr. Glenmullen examined appellant he read documents about the incident, including appellant's confession, witness statements, and laboratory testing. He conducted an interview

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[86] JA at 421, 743.
[87] JA at 421.
[88] JA at 389-390.
[89] JA at 435-436.
[90] JA at 436.
[91] JA at 437.

with appellant, and interviewed him for a total of about ten hours. As Dr. Glenmullen interviewed appellant he observed his behavior and facial expressions, and his emotional reactions to things. He built in "trick questions" designed to prevent the subject from sensing that the question was from "some kind of list."[92] According to Dr. Glenmullen, if the story has changed significantly from the original story told after the incident, he would be bothered by it, but if everything he hears is consistent with what he read in the earlier documentation, that is stronger, in his estimation.[93] Dr. Glenmullen discussed appellant's childhood and family situation, and his school environment. Dr. Glenmullen also interviewed nine additional people, six of whom were adults appellant knew when he was growing up, including his Sunday School teacher, Scout Master, members of appellant's family, and the mother of one of his friends. He also interviewed three people who were appellant's own age, including his twin brother, his ex-girlfriend, Ms. Haley Safronoff, and one of appellant's friends growing up. The reason he interviewed so many people was to see whether the information appellant had given him matched with what other people would say.[94]

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[92] JA at 421-422.
[93] JA at 422-423.
[94] JA at 427-428.

Dr. Glenmullen's interview with Ms. Safronoff was important to his diagnosis because it is "common for someone who is having homicidal ideations to mention it to someone close to them." Dr. Glenmullen testified,

> To me it was like corroborating evidence. In other words, I'm not just relying on Mr. Macdonald's report at the time of the incident, in his confession, and everything since that he was having these thoughts for about five days, maybe a week. There is some contemporaneous evidence that this was the case from that statement.[95]

Dr. Glenmullen also interviewed appellant's Scout leader who reported that he had had a conversation with appellant in May in which he noticed a distinct change in appellant, and that appellant "seemed very disconnected, very alienated, just not anywhere near as engaged as usual." To Dr. Glenmullen, "that was a very important piece of evidence."[96] Dr. Glenmullen clarified that this conversation took place "in the second half of the month on Chantix, the last two and a half weeks sometime."[97]

Dr. Glenmullen considered appellant's psychiatric history in four time periods, including "his life up until he takes Chantix; he's on Chantix for 1 month and the run up to the incident; there's the day of the incident, which is the third

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[95] JA at 527.
[96] JA at 528.
[97] JA at 529.

time period; and then there's everything since."[98] The three conditions - schizoid personality disorder, dysthymia, and psychosis - were present before appellant ever went on Chantix. Dr. Glenmullen described appellant's place on the schizophrenia spectrum, stating,

> the schizoid personality disorder would put him in this schizophrenic spectrum at the least severe end of the spectrum. He wouldn't be on the very far left because of the auditory hallucinations. The auditory hallucinations indicate that he was already starting to move to the right. He's not yet at schizophreniform disorder, but you could kind of put an X on that first arrow, maybe kind of in the middle of it. He's moved towards something more serious, but typically as people move towards something more serious it's very slow. It takes years. It typically starts in teenage years and it can take like a decade to develop into something much more serious. He's kind of at the early part of that.[99]

Appellant had some of the side effects of Chantix during the time he was taking it. According to Dr. Glenmullen,

> [h]e became depressed. He became paranoid. He became much more - he had much more thought that people were picking on him on the base. He much more thought that people were out to get him. He much more thought that people were talking about him. Decidedly paranoid; he developed homicidal thoughts in the last week of the four weeks on Chantix and he became anxious and agitated and he was also suicidal. There were two particular events, no suicide attempt, but two particular events.

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[98] JA at 437.
[99] JA at 437-438.

Appellant's side effects changed on the day of the incident. He had become psychotic. He was delusional, and his delusion was that he was supposed to do what he did.[100]

Dr. Sonal Pancholi, a forensic psychologist, evaluated appellant and testified as an expert in forensic psychology. Dr. Pancholi conducted an in-depth interview with appellant, and spoke with numerous sources, including friends and family. She reviewed the available medical and legal records, including witness statements and the confession, and conducted psychological testing. She reviewed his medical record to "have a thorough understanding of his medical background to identify if there were any . . . medical issues present that would explain his behavior" and to see if there were "any abnormalities say in his brain functioning that would suggest that he may engage in the behavior that he did."[101]

Dr. Pancholi conducted psychological testing and administered three measures, including the MMPI-2 and MCMI-3 and the SIRS. The MCMI-3 and MMPI-2 are objective measures of emotional and personality functioning. They are administered to identify or help in the diagnostic process of individuals who are exhibiting problematic behavior, either emotional or interpersonally. The SIRS is a measure of feigning or

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[100] JA at 439-440.
[101] JA at 540.

malingering of psychiatric symptoms.[102] The MCMI and the MMPI both involve standardized scoring based on norms that have been generated for both measures, and the individual's scores are then compared to the norms available for those two measures.[103] The MMPI-2, the MCMI-3 and the SIRS are all generally accepted in the psychological community in the assessment of mental health.[104] Dr. Pancholi concluded from the SIRS that appellant was not malingering and that "he was being forthright and honest."[105] The MCMI-3 revealed that the elevations on appellant's profile were "consistent with Schizoid Personality Disorder, Dysthymania and there was a sub-clinical elevation for thought disorder." By "sub-clinical" Dr. Pancholi meant "it was approaching clinical significance."[106]

In addition to the objective testing, Dr. Pancholi conducted a clinical interview, which was

> designed to not only glean a history of the individual's background to assess their developmental functioning and how it is that their personality and emotional functioning came to be, but also their mental state at the time of the offense, you know to elicit what was some of their underlying thoughts, what was their thinking process. Questions are included in the interview, to again, sort of trick questions, so that if for instance I'm asking about specific symptoms I may throw in there symptoms that are not real symptoms - not real psychiatric symptoms,

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[102] JA at 541.
[103] JA at 541.
[104] JA at 542.
[105] JA at 542.
[106] JA at 542.

> and if I'm getting endorsements of "yes" on everything then that's going to make me suspicious that okay here is an individual who may not be completely forthright with me.[107]

Dr. Pancholi also spoke with "collateral sources," including appellant's troop leaders; his girlfriend; one of the headmasters of the prep school appellant attended; two corrections officers at the county jail in which appellant was confined; appellant's step-father; a friend of appellant's from childhood, and appellant's brother. After conducting the clinical interview and speaking with those collateral sources and reviewing the case file, Dr. Pancholi diagnosed appellant with the same conditions Dr. Glenmullen did – Psychotic disorder not otherwise specified, schizoid personality disorder and dysthymania, which is a low grade chronic depression.[108]

On 1 July 2009, a little over a year after appellant killed PVT Bulmer, the FDA required new "boxed warnings" for Chantix. A "boxed warning," or a "black box warning," is "the next step above" a "warning section" in the hierarchy of FDA warnings, and describes "a very serious risk of this drug, serious enough that it is important for every prescribing physician to know about this risk and consider it before prescribing this drug," and which "contains that safety information."[109] A boxed warning is

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[107] JA at 545.
[108] JA at 545.
[109] JA at 248.

the last step before a determination is made that the benefits do not outweigh its risk and it must be withdrawn from the market.[110] The boxed warning for Chantix states,

> Serious neuropsychiatric events, including, but not limited to depression, suicidal ideation, suicide attempt and completed suicide have been reported in patients taking CHANTIX. Some reported cases may have been complicated by the symptoms of nicotine withdrawal in patients who stopped smoking. Depressed mood may be a symptom of nicotine withdrawal. Depression, rarely including suicidal ideation, has been reported in smokers undergoing a smoking cessation attempt without medication. However, some of these symptoms have occurred in patients taking CHANTIX who continued to smoke.
>
> All patients being treated with CHANTIX should be observed for neuropsychiatric symptoms including changes in behavior, hostility, agitation, depressed mood, and suicide-related events, including ideation, behavior, and attempted suicide. These symptoms, as well as worsening of pre-existing psychiatric illness and completed suicide have been reported in some patients attempting to quit smoking while taking CHANTIX in the post-marketing experience. When symptoms were reported, most were during CHANTIX treatment, but some were following discontinuation of CHANTIX therapy.
>
> These events have occurred in patients with and without pre-existing psychiatric disease. Patients with serious psychiatric illness such as schizophrenia, bipolar disorder and major depressive disorder did not participate in the pre-marketing studies of CHANTIX and the safety and efficacy of CHANTIX in such patients has not been established.
>
> Advise patients and caregivers that the patient should stop taking CHANTIX and contact a healthcare provider immediately if agitation, hostility, depressed mood, or changes in behavior or thinking that are not typical for the patient are observed, or if the

[110] JA at 249.

> patient develops suicidal ideation or suicidal behavior. In many post-marketing cases, resolution of symptoms after discontinuation of CHANTIX was reported, although in some cases the symptoms resolve.
>
> The risks of CHANTIX should be weighed against the benefits of its use. CHANTIX has been demonstrated to increase the likelihood of abstinence from smoking for as long as one year compared to treatment with placebo. The health benefits of quitting smoking are immediate and substantial.
>
> (See WARNINGS/Neuropsychiatric Symptoms and Suicidality, PRECAUTIONS/Information for Patients, and ADVERSE REACTIONS/Post-Marketing Experience)[111]

The "PRECAUTIONS" section of the Medication Guide states, under the heading "Information for Patients,"

> Patients should be informed that quitting smoking, with or without CHANTIX, may be associated with nicotine withdrawal symptoms (including depression or agitation) or exacerbation of pre-existing psychiatric illness. Furthermore, some patients have experienced changes in mood (including depression and mania), psychosis, hallucinations, paranoia, delusions, homicidal ideation, aggression, anxiety, and panic, as well as suicidal ideation and suicide when attempting to quit smoking while taking CHANTIX. If patients develop agitation, hostility, depressed mood, or changes in behavior or thinking that are not typical for them, or if patients develop suicidal ideation or behavior, they should be urged to discontinue CHANTIX and report these symptoms to their healthcare provider immediately.[112]

The "WARNINGS" section of the Medication Guide states, under the heading "Neuropsychiatric Symptoms and Suicidality,"

> Serious neuropsychiatric symptoms have been reported in patients being treated with CHANTIX (See Boxed Warning, PRECAUTIONS/Information for patients, and

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[111] JA at 716.
[112] JA at 716.

ADVERSE REACTIONS/Post-Marketing Experience). These post-marketing reports have included changes in mood (including depression and mania), psychosis, hallucinations, paranoia, delusions, homicidal ideation, hostility, agitation, anxiety, and panic, as well as suicidal ideation, suicide attempt, and completed suicide. Some reported cases may have been complicated by the symptoms of nicotine withdrawal in patients who stopped smoking. Depressed mood may be a symptom of nicotine withdrawal. Depression, rarely including suicidal ideation, has been reported in smokers undergoing a smoking cessation attempt without medication. However, some of these symptoms have occurred in patients taking CHANTIX who continued to smoke. When symptoms were reported, most were during CHANTIX treatment, but some were following discontinuation of CHANTIX therapy.

These events have occurred in patients with and without pre-existing psychiatric disease; some patients have experienced worsening of their psychiatric illnesses. All patients being treated with CHANTIX should be observed for neuropsychiatric symptoms or worsening of pre-existing psychiatric illness. Patients with serious psychiatric illness such as schizophrenia, bipolar disorder, and major depressive disorder did not participate in the pre-marketing studies of CHANTIX and the safety and efficacy of CHANTIX in such patients has not been established.

Advise patients and caregivers that the patient should stop taking CHANTIX and contact a health care provider immediately if agitation, depressed mood, changes in behavior or thinking that are not typical for the patient are observed, or if the patient develops suicidal ideation or suicidal behavior. In many post-marketing cases, resolution of symptoms after discontinuation of CHANTIX was reported, although in some cases the symptoms persisted, therefore, ongoing monitoring and supportive care should be provided until symptoms resolve.

The risks of CHANTIX should be weighed against the benefits of its use. CHANTIX has been demonstrated to increase the likelihood of abstinence from smoking for as long as one year compared to treatment with

> placebo. The health benefits of quitting smoking are immediate and substantial. [113]

The "ADVERSE REACTIONS" section of the Medication Guide, under the heading "Post-Marketing Experience," states,

> The following adverse events have been reported during post-approval use of CHANTIX. Because these events are reported voluntarily from a population of uncertain size, it is not possible to reliably estimate their frequency or establish a causal relationship to drug exposure.
>
> There have been reports of depression, mania, psychosis, hallucinations, paranoia, delusions, homicidal ideation, aggression, hostility, anxiety, and panic, as well as suicidal ideation, suicide attempt, and completed suicide in patients attempting to quit smoking while taking CHANTIX (See Boxed Warning, WARNINGS/Neuropsychiatric Symptoms and Suicidality, PRECAUTIONS/Information for Patients). Smoking cessation with or without treatment is associated with nicotine withdrawal symptoms and the exacerbation of underlying psychiatric illness. Not all patients had known pre-existing psychiatric illness and not all had discontinued smoking.[114]

The remaining facts necessary for the resolution of the issues in this case can be found in the argument below.

SUMMARY OF THE ARGUMENT

After taking the smoking cessation drug Chantix, appellant stabbed a complete stranger to death for no apparent reason. Homicidal ideations have been associated with Chantix. The defense at trial was that appellant was involuntarily intoxicated as a result of taking the drug, and as a result of

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[113] JA at 716.
[114] JA at 716.

that involuntary intoxication he lacked mental responsibility, and was unable to premeditate or form the specific intent. The defense sought to discover certain documents related to clinical studies and post-market surveillance of the drug from the manufacturer, Pfizer. The military judge quashed the subpoena, apparently believing that the evidence was not relevant. The military judge did not review the evidence in camera before quashing the subpoena. The Army Court concluded that the military judge erred in quashing the subpoena because the evidence was relevant to appellant's defense, but concluded that the error was harmless beyond a reasonable doubt because nothing in the records would have impacted the findings. The error was not harmless beyond a reasonable doubt; the evidence was relevant, and the only way to know with any certainty whether it would have impacted the findings is to review it, which neither the trial court nor the Army Court did.

Appellant requested an instruction on involuntary intoxication and the military judge refused to give it. The Army Court concluded that the military judge erred in refusing to give the instruction, but held that the error was harmless beyond a reasonable doubt. The error was not harmless beyond a reasonable doubt because the members did not know that they could consider appellant's involuntary intoxication either as a complete defense to the charge, or as negating the elements of

premeditation and intent, and may have acquitted appellant outright or convicted him of a lesser included offense.

ASSIGNMENT OF ERROR

I.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN DETERMINING THAT THE MILITARY JUDGE'S ERROR IN QUASHING A SUBPOENA ISSUED TO PFIZER, INC., TO PRODUCE RELEVANT AND NECESSARY DOCUMENTS REGARDING CLINICAL TRIALS, ADVERSE EVENT REPORTS, AND POST-MARKET SURVEILLANCE OF THE DRUG VARENICLINE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

The military judge's decision to quash a subpoena is reviewed for an abuse of discretion.[115] Whether constitutional error is harmless beyond a reasonable doubt is a question of law reviewed de novo.[116]

Argument

Appellant's defense counsel filed a request for discovery with trial counsel on 19 March 2009. The defense requested, among other things, clinical trials, adverse event reports describing "adverse reactions to the drug Varenicline that have, within their description or characterization, actual violence towards self or others or thoughts of violence towards self or

[115] *United States v. Wuterich*, 67 M.J. 63, 77 (C.A.A.F. 2008).
[116] *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013).

others, to include but not limited to suicidal or aggressive thoughts," and post-market surveillance of the drug. In the defense's view, this evidence was required to "explore 'lack of mental responsibility' and 'partial mental responsibility," because a "review of the CID case file documents reveals that PFC Macdonald was taking Varenicline (a.k.a. Chantix), a prescription smoking-cessation medication prior to the charged offenses," and noted an escalation in the risks associated with the drug.[117]

On 24 March 2009 trial counsel issued a subpoena to Pfizer Incorporated to provide the items requested by the defense.[118] On 22 June 2009, defense counsel filed a Motion for Appropriate relief, asking the military judge to order Pfizer Incorporated to produce the documents specified in the discovery request, noting that "is specifically linked to the potential side affects [sic] and possible dangers associated with Varenicline (a.k.a. "Chantix") and are directly related to any possible defense of lack of mental responsibility or diminished capacity."[119]

On 1 June 2009 during an Article 39(a), UCMJ, session the defense noted that there were still outstanding issues with respect to whether Pfizer would comply with the subpoena, and

[117] JA at 767.
[118] JA at 770.
[119] JA at 763.

the defense would file a motion to compel if need be, but the defense was not seeking intervention from the military judge although that might change.[120]

On 23 June 2009 Pfizer's legal counsel sent a letter to trial counsel objecting to the subpoena as "overbroad, oppressive, and unreasonable," inasmuch as it would "required the review and production of literally millions of pages of documents, at enormous expense to Pfizer, which is not a party to this case."[121]

At a hearing on 24 June 2009 defense counsel noted that it was apparent that Pfizer was not going to comply with the subpoena, and the military judge asked the defense what he wanted the military judge to do. Defense counsel responded, "I want you to order them to produce it."[122] In the defense's view, this was discoverable material.[123] The defense argued, "the data the defense is aware of shows that this drug was never tested on anybody with any kind of psychological or mental disorders, that should be in the clinical trial data. So the information is relevant."[124]

After a great deal of discussion, the military judge found that while there was some evidence that appellant was prescribed

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[120] JA at 26-38.
[121] JA at 800.
[122] JA at 45.
[123] JA at 47.
[124] JA at 49.

Chantix, and there was some evidence that he was using it at the time he committed the offense, two toxicology reports indicated that it was not in his system on the date of the offense.[125] The military judge further concluded that appellant had been evaluated pursuant to Rule for Courts-Martial (R.C.M.) 706, but "nothing [was] presented before the court that there is any mental responsibility issues, full or partial."[126] The military judge denied the defense's motion to compel because there was "no showing of an adverse impact on this particular accused or how it relates to any type of mental responsibility defense, state of mind defense, or any other matter involved in this case."[127]

At this point in the trial, appellant's blood and urine had been tested by the Armed Forces Institute of Pathology (AFIP) and the tests revealed no presence of varenicline in either. But from the defense perspective it was unknown whether those results were valid because the stability studies required to adequately perform the tests had been withheld by Pfizer. Pfizer ultimately provided the stability studies, and the defense sought an independent testing of appellant's blood and urine using the analytical standards provided by Pfizer in response to subparagraph echo of the subpoena. On 29 June 2009

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[125] JA at 66.
[126] JA at 66.
[127] JA at 67.

Dr. Edward Barbieri, a member of NMS Labs and a defense expert, prepared a written report stating that testing of appellant's urine and blood samples that had been provided to him by the AFIP, indicated that varenicline was indeed present in the urine sample but not the blood sample.[128] On 1 July 2009 the FDA required Pfizer to include a "boxed warning" in the information it provides to patients and health care providers when prescribing Chantix, in which a reference to "homicidal ideations" was made in three separate locations.

Prompted by this new evidence reflecting an actual presence of varenicline in appellant's system at the time of the incident, as well as this most recent change in the FDA's warning scheme, the defense filed a motion for reconsideration of the ruling in the defense motion to compel discovery.[129] The defense noted in its motion that it had withdrawn the request for the stability studies, but argued that the military judge should order Pfizer to produce the information requested in subparagraphs (a), (b), and (c). The defense also requested "in addition to the previous denied matters, . . . any and all post-market surveillance of the drug Varenicline that resulted in or was a contributing factor to the FDA's 1 July 2009 directed

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[128] JA at 832.
[129] JA at 802.

'Black Box' warning or 'Boxed Warning' as described in the Pfizer prepared 'Full Prescribing Information' handout."[130]

The defense noted in the motion that it appeared that the military judge relied on the AFIP test results that were negative for varenicline, and argued that "that factor is no longer valid as evidence by the positive test results from NMS Labs."[131] The defense argued at the hearing that "the change [in the warning is] linked to post-market surveillance, post-market experiences by the company."[132]

The defense also noted that the court relied on the fact that appellant had been subjected to an R.C.M. 706 inquiry, and argued that the military judge assumed that the R.C.M. 706 board considered appellant's use of varenicline and factored his use of the drug into its examination.[133] Another hearing was held on 27 July 2009 on the motion for reconsideration. The defense proffered that Dr. Lupcho, the psychologist who performed the R.C.M. 706 board, "[n]ever factored into any of her analysis whether or not there was a pharmaceutical or pharmacological basis" for appellant's actions despite a specific request by the defense team to review appellant's medical records and CID documents including an Agent Investigative Summary (AIS) entry

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[130] JA at 802.
[131] JA at 802.
[132] JA at 802.
[133] JA at 802.

in which "CID talks about the issue of Chantix and the fact that they need to get with the FDA and see what role if any that drug played in it."[134]

Ultimately, the military judge stated, "It doesn't make any difference as far as I can see whether it's caused by Chantix or not caused by Chantix. Chantix is an explanation."[135] The military judge found that nothing had changed since the last ruling, and denied appellant's motion to reconsider his ruling on its motion to compel.[136]

Rule for Courts-Martial 703(f)(4)(B) provides for the subpoena of evidence not under the control of the Government. "The only restrictions placed upon the liberal discovery of documentary evidence by the accused are that the evidence must be 'relevant and necessary' to the subject matter of the inquiry and the request must be reasonable."[137] In this context, the Military Rules of Evidence "establish a low threshold of relevance," and relevant evidence is "necessary when it would contribute to a party's presentation of the case in some positive way on a matter in issue."[138]

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[134] JA at 77.
[135] JA at 98.
[136] JA at 105.
[137] *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987).
[138] *Reece*, 25 M.J. at 95 (citing the Discussion accompanying R.C.M. 703(f)(1)).

Appellant's defense in this case was that his homicidal ideation was caused by varenicline, and the clinical trials data, the adverse event reports, and post-market surveillance of the drug were relevant to that issue because they may have supported the complete defense of lack of mental responsibility, or they may have negated premeditation or specific intent to kill. In *United States v. Reece*, this Court recognized there may be times where the defense might not be able to state with precision what the records would show, and accepted that in that case the appellant had "made as specific a showing of relevance as possible, given that he was denied all access to the documents."[139] The same is true here. The defense never received any of the requested documents from Pfizer. The documents the defense received from the FDA were not copies of any Pfizer documents. Instead, they were summaries prepared by the FDA — summaries which may or may not accurately reflect the contents of the original documents.

The military judge erred in determining that the evidence was neither relevant nor necessary without even looking at it.[140] The military judge apparently believed that "it doesn't make any difference . . . whether [the severe mental disease or defect] was caused by Chantix or not caused by Chantix. Chantix is an

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[139] *Reece*, 25 M.J. at 95.
[140] *United States v. Wuterich*, 67 M.J. 63, 77 (C.A.A.F. 2008).

explanation."[141] Whether it is couched in terms of "causation" or "explanation" the result is the same: without this evidence, the defense was hamstrung in its ability to show that there *was* a severe mental disease or defect, or that there was an impairment of the ability to premeditate or form the specific intent to kill.

A. There was no waiver.

The Army Court stated that the "specter of waiver was raised" by the defense's "failure to renew its demand," but ultimately concluded that it did not have to address that issue because the military judge's error in quashing the subpoena was harmless beyond a reasonable doubt.[142]

There was no waiver in this case. The Army Court cited to several cases in support of the notion that "the specter of waiver is raised." Respectfully, none of the cases cited stand for the proposition that when the defense repeatedly brings an issue to the attention of the military judge, asks for a definitive ruling on the issue and gets one, then asks for reconsideration of the ruling in light of new evidence, that the defense is required to continue to pound on that door when the motion for reconsideration is denied. This *was* "a definitive ruling." Appellant knows of no other way to interpret the

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[141] JA at 96.
[142] *United States v. Macdonald*, Dkt. No. 20091118, 10-11 (A.Ct.Crim.App. 3 July 2013).

words, "the defense motion for a reconsideration of [the] ruling of 24 June is hereby denied."[143] There was, therefore, no waiver.

B. The Army Court of Criminal Appeals erred in concluding that the quashing of the subpoena was harmless beyond a reasonable doubt.

The Army Court concluded, rightly, that the military judge abused his discretion in failing to enforce the subpoena because the evidence was "relevant and worthy of discovery" because it "possessed a tendency to establish the fact of appellant's mental responsibility, or lack thereof, as more or less probable than it would have been without the evidence."[144]

The court also believed that the military judge's decision was "influenced by an erroneous view of the law" and was "outside the range of choices reasonably arising from the applicable facts and the law."[145] The military judge's conclusion that Chantix "was merely an explanation for the offense, rather than evidence relevant to the defense of mental responsibility," "effectively denied the existence of an involuntary intoxication defense."[146]

While the Court found that the military judge erred in quashing the subpoena, it nevertheless inexplicably concluded

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[143] JA at 105.
[144] JA at 10.
[145] *Id.*, citing *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010).
[146] JA at 10.

that the error was "harmless beyond a reasonable doubt." This was apparently so because the evidence that appellant "appreciated the nature, quality and wrongfulness of his acts is sufficiently powerful and overwhelming to establish the reliability of the conviction in this case," and enforcement of the subpoena "would not create a reasonable doubt that did not otherwise exist."[147]

The Court cites to *United States v. Morris*[148] for this proposition. But in *Morris* the military judge himself was aware of the content of the non-disclosed material because he reviewed the records in camera, and the appellate courts were able to review the records because they were included in the record as an appellate exhibit.[149] As discussed elsewhere, the entire defense in this case was a lack of mental responsibility and an inability to premeditate or form specific intent. The documents sought were relevant to those questions, but the Army Court — just as the trial court did — merely assumes that nothing in those documents would assist appellant in presenting his case without actually looking at them.

Although the Army Court cited *Wuterich* in its decision, it did not follow it. Just as in *Wuterich*, the material at issue

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[147] JA at 11.
[148] *United States v. Morris*, 52 M.J. 193 (C.A.A.F. 1999).
[149] *See Morris*, 52 M.J. at 199 (JJ Effron and Sullivan, dissenting).

constituted "a potentially unique source of evidence that is not necessarily duplicated by any other material," and consideration of whether the evidence was cumulative "require[d] review of the requested material by the military judge." The Army Court found in this case that "the government's expert in rebuttal effectively undermined the credibility of the defense experts' psychiatric diagnoses of appellant and that there is no reasonable probability that enforcement of the subpoena would result in the establishment of any lack of mental responsibility on the part of appellant by clear and convincing evidence."

Respectfully, this statement presupposes that there is nothing in the records that would support the defense experts' diagnoses or undermine the credibility of the government expert, something that neither the Army Court nor the military judge could have known without looking at the evidence. There may be things in Pfizer's clinical trials, the adverse event reports, and the post-market surveillance, particularly as it relates to the black box warning, that is relevant to the question of appellant's mental responsibility. What if, for instance, some of this information contains reports by varenicline test subjects or Chantix users whose experiences were identical or nearly identical to appellant's? What if they claim that after using Chantix they felt "stretched thin"? What if they reported that they did things while "telling [themselves] no," and

reporting that "it wasn't [them] talking"? What if they reveal "new and strange thoughts that person telling me . . . and dangerous things that aren't me"? What if they report that they "fought [themselves] with the idea" of doing what they did, that they "didn't think it was wrong," or that they were "supposed" to do it? What if these people reported that even while engaging in unwanted behavior they thought, "I wish I didn't have to do this"?

Appellant does not necessarily suggest that these test subjects or Chantix users would use the exact same language he did, but there may be evidence in these records that reveals that his experience was remarkably consistent with the experiences of others who had adverse reactions to Chantix — consistent enough to convince the members that he was not mentally responsible. Yet the Army Court found, with apparent clairvoyant certainty, that there is nothing in any of those documents that might be helpful to the defense.

As noted previously, the warnings associated with varenicline continued to escalate in severity as the potential side effects of the drug became more clear, culminating in the black box warning that specifically referenced "homicidal ideations." Appellant had homicidal ideations while taking this drug, and he was entitled to see whether his experience was consistent with that of other people who had experienced

homicidal, or even suicidal[150], ideations while on Chantix. This would have assisted the defense in the preparation for its case with respect to both the complete defense and negating elements of premeditation and specific intent; it would have assisted in presenting the defense case and rebutting the government's expert. The error was not harmless beyond a reasonable doubt.

C. The Army Court of Criminal Appeals erred in denying appellant's motion for Appellate discovery for the same reason the military judge erred in quashing the subpoena.

Appellant moved for appellate discovery of the Pfizer documents at the Army Court. The motion was denied "on similar grounds" to the court's conclusion that there is "no reasonable probability that anything found in the material sought would raise a reasonable doubt about appellant's mental responsibility for these offenses."[151] Respectfully, for the reasons just discussed—that no one knows what these records actually contain, but there is a reasonable probability that they contain evidence

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[150] In this regard, appellant does not concede that reports of suicidal ideations, as opposed to homicidal ideations, would not be relevant to the discovery request, depending on what those records reveal. For example, if a feature of the suicidal ideations is that the person experienced the same feelings appellant described, only turned inward – that is, they felt that they were "supposed to" kill themselves as opposed to someone else – then they would certainly be relevant. They would also be relevant if the manner of the suicide featured in the ideation or completed suicide – violent and bloody, as opposed to a drug overdose, for example – was consistent with appellant's experience. In other words, the fact that the ideation is suicidal, as opposed to homicidal, is not itself dispositive.

[151] JA at 11.

relevant to appellant's mental state at the time of the offense—it was error for Army Court to deny appellate discovery.

Because the military judge erred in quashing the subpoena, and because the Army Court erred in concluding that the error was harmless beyond a reasonable doubt, the findings and sentence must be set aside.

ASSIGNMENT OF ERROR

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE REQUESTED INSTRUCTION ON INVOLUNTARY INTOXICATION, AND ERRED IN FAILING TO INSTRUCT THE MEMBERS ON THE EFFECT OF INTOXICATION ON APPELLANT'S ABILITY TO FORM SPECIFIC INTENT AND PREMEDITATION.

Standard of Review

A military judge's decision to give a tailored, defense-requested instruction is reviewed for an abuse of discretion.[152]

Argument

The defense in this case requested additional member instructions, including an instruction on involuntary intoxication.[153] The defense proffered,

> To invoke the defense of involuntary intoxication, the defendant must produce sufficient evidence to raise a reasonable doubt as to the voluntariness of his

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[152] *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993).
[153] JA at 683, 866, 871.

> intoxication. Involuntary intoxication results from fraud, trickery or duress of another, accident or mistake on defendant's part, pathological condition, or ignorance as to the effects of prescribed medication and is a complete defense where the defendant is so intoxicated that he is unable to distinguish between right and wrong, the same standard as applied in an insanity defense.[154]

The military judge stated,

> Got it. But that's not a correct statement of the law. It says here, it says where the defendant is so intoxicated is unable to distinguish between right from wrong the same standard is applied in an insanity defense. Don't you need a mental disease - a serious mental disease or defect causing the accused not to appreciate the wrongfulness of his act or the quality of his act?

The defense counsel stated, "that's what I got out of the case, the federal case," citing *Sallahdin v. Gibson*[155], and noted, "I found no military case law to support this instruction, sir. But that said, that doesn't mean the instruction shouldn't be given."[156] The military judge acknowledged that a court-martial can look at other courts for guidance in a particular area of the law, but said "we're bound by the congressional act, and

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[154] JA at 866.

[155] *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir., 2002), is a case from the Court of Appeals for the Tenth Circuit in which the Court considered whether the failure of the appellant's counsel to raise the defense of involuntary intoxication amounted to ineffective assistance of counsel. It appears that the language the defense requested in this case mirrors the language in the decision in *Sallahdin* defining the defense of involuntary intoxication, although the *Sallahdin* decision does not state how a jury in the Tenth Circuit would be instructed.

[156] JA at 687-688.

therefore I will give the mental responsibility instruction I discussed earlier, but not that particular one."[157]

1. Involuntary Intoxication as a complete defense

This Court applies a three-prong test to determine whether the failure to give a requested instruction is error, including (1) whether the requested instruction is correct; (2) whether the requested instruction is not substantially covered in the main instruction; and (3) whether the requested instruction is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation.[158]

The defense-requested instruction in this case was a correct statement of the law. Involuntary intoxication may be a *complete defense* if it rises to the level of insanity.[159] Because it is "treated like legal insanity,"[160] the burden of production and persuasion was on appellant, and what appellant had to show by clear and convincing evidence was that he was so intoxicated that he did not appreciate the nature and quality of his acts or he was unable to distinguish right from wrong. Appellant acknowledges that this statement of the law differs

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[157] JA at 688.
[158] *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003)(*quoting United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)).
[159] *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996).
[160] *Hensler*, 44 M.J. at 188.

slightly from the statement in the requested instruction inasmuch as the requested instruction states that the burden was on the defense to produce evidence to raise a reasonable doubt as to the voluntariness of his intoxication. But the defense requested instruction need not be "technically precise"[161] and such imprecision does not relieve the military judge of his obligation to correctly instruct the members.

The requested instruction was not covered in the main instruction. Although involuntary intoxication is "treated like" insanity, to actually "treat" involuntary intoxication like insanity, the members must be instructed that they may do so. Although Dr. Glenmullen testified about "substance intoxication,"[162] without an instruction that involuntary intoxication could amount to a severe mental disease or defect, the members were unable to put Dr. Glenmullen's testimony about substance intoxication into its proper context. They may have believed that to acquit appellant they must find a severe mental disease or defect or some organic disorder as opposed to a level of intoxication sufficient to impair his ability to distinguish right from wrong. They were not told that intoxication itself or in combination with appellant's other conditions could impact his ability to distinguish right from wrong.

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[161] *United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006).
[162] JA at 444, 743.

In this regard, this case is distinguishable from *United States v. Hensler* where this Court concluded that the military judge's instructions "as a whole" were correct. In that case involuntary intoxication was at issue and the military judge actually used the term "involuntary intoxication" in the instructions (although apparently only in the context of whether it negated knowledge), whereas in this case the military judge did not use the term at all. And unlike *Hensler*, the defense in this case did request an instruction on involuntary intoxication as a complete defense. Also in *Hensler*, the military judge told the members that alcoholism and chemical dependency are a disease.[163] In this case the concept of involuntary intoxication was not presented to members at all in the instructions, so the members did not know that the intoxicating effects of Chantix were something they could consider in determining whether appellant met his burdens of production and persuasion.

Finally, the requested instruction in this case was on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation. The entire defense in this case was that appellant lacked mental responsibility for the offense and his lack of mental responsibility was caused by involuntary intoxication. The military judge in this case apparently

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[163] *Hensler*, 44 M.J. at 188.

believed that "[i]t doesn't make any difference as far as I can see whether [appellant's mental state is] caused by Chantix or not caused by Chantix. Chantix is an explanation,"[164] and asked the defense, "[d]on't you need a mental disease - a serious mental disease or defect causing the accused not to appreciate the wrongfulness of his act or the quality of his act?" These statements reveal the military judge's misapprehension about relevance of involuntary intoxication to the issue of appellant's mental state. The purpose of the involuntary intoxication instruction was to show the members that they could find a severe mental disease or defect from the fact of the intoxication alone, or in combination with appellant's other psychiatric conditions. This entire case was about involuntary intoxication, and failure to instruct on it left the members with the erroneous impression that they must rely on appellant's psychiatric conditions alone, particularly where there was no instruction that involuntary intoxication can itself be a severe mental disease or defect.

The Army Court concluded that the evidence presented at trial "raised the involuntary intoxication defense," and that the defense of involuntary intoxication

> is similar to that of lack of mental responsibility in that the defense must prove by clear and convincing evidence that he did not appreciate the nature and

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[164] JA at 78.

> quality or wrongfulness of his acts, but different in that he need not prove that he suffered a severe mental disease or defect, but rather that he was intoxicated by some substance that results in what amounts to legal insanity.[165]

The Army Court concluded that "the proposed instruction was essentially correct, it was not substantially covered in the main instruction, and the failure to give it seriously impaired its [sic] effective presentation."[166] The court concluded that while the ability to present the defense of involuntary intoxication was "seriously impaired," his presentation of the mental responsibility was "not impaired," that the "ultimate issue to be decided by the panel relative to each is sufficiently equivalent to ensure the reliability of the convictions," and appellant "cannot escape the overwhelming evidence of his mental responsibility."[167]

The circular nature of this conclusion aside, the Army Court ignores the very difference between the defenses of mental responsibility and involuntary intoxication that it had previously identified, which is that for involuntary intoxication appellant had to show that he was intoxicated by some substance; whereas for a lack of mental responsibility, appellant had to show he was suffering from a severe mental defect. It is entirely possible that the members may have

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[165] JA at 12.
[166] JA at 13.
[167] JA at 13.

believed that it could not acquit appellant since he had not proved a severe *organic* mental disease or defect, but may have acquitted him if it knew that he needed to prove by clear and convincing evidence that he was involuntarily intoxicated by varenicline.

In any event, the only way the panel could have concluded that there was "overwhelming evidence of [appellant's] mental responsibility" was to consider it in context. But the panel was never told that it could, or how to go about doing that.

2. Involuntary Intoxication as negating the elements of specific intent and premeditation.

In addition to mental responsibility, involuntary intoxication was relevant also to whether appellant formed the specific intent to kill, and whether he premeditated, and the military judge should have so instructed the members.

Voluntary intoxication may negate the specific intent required for some offenses because it "may raise a reasonable doubt about actual knowledge, specific intent, willfulness, or premeditation when they are elements of a charged offense," so long as there is "some evidence that the intoxication was of a severity to have had the effect of rendering the appellant

incapable of forming the necessary intent," as opposed to evidence of mere intoxication. [168]

If *voluntary* intoxication can render an accused incapable of forming a specific intent or premeditation, then surely involuntary intoxication could have the same effect; it is the effect of the intoxication on the ability to form the intent rather than its voluntary or involuntary nature that matters when the issue is whether intoxication negates an element of the offense. This Court recognized as much in *United States v. Higgins*[169] when it said,

> [I]f an accused person may lessen his criminal responsibility by a showing that he was not able to entertain premeditation, intent, or knowledge due to voluntary intoxication -- a condition largely within his own control, and disapproved by society and the law -- we would regard as anomalous a refusal to permit a showing that premeditation, intent, or knowledge was or might be wanting due to some mental derangement -- usually without the accused's control.

The military judge in this case had a sua sponte obligation to instruct the members, consistent with but not necessarily identical to, Instruction 5-12 of the Military Judge's Benchbook, which is the instruction on "voluntary intoxication." Although appellant voluntarily ingested the drug, the unexpected intoxicating effect was involuntary, in which case it would have been appropriate, at a minimum, to substitute the term

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[168] *United States v. Peterson*, 47 M.J. 231, 233-34 (C.A.A.F. 1997).
[169] *United States v. Higgins*, 15 C.M.R. 143, 148 (C.M.A. 1954).

"involuntary" for the word "voluntary." But what was not appropriate was for the military judge to fail to instruct the members that they could consider appellant's involuntary intoxication in determining whether the government had proved each element of the offenses, including the elements of specific intent and premeditation, beyond a reasonable doubt.

3. The error was not harmless beyond a reasonable doubt.

The Army Court found that the military judge erred in failing to instruct on involuntary intoxication as a complete defense.[170] The Army Court did not specifically rule on whether the failure to instruct on involuntary intoxication as it relates to premeditation or specific intent, and stated only, "[i]n light of the entire record, we find nothing credible about any indication that Chantix or appellant's mental condition prevented or undermined his ability to form the specific intent necessary for the crimes alleged."[171]

Of course, the "entire record" may have been different if the military judge had not erred in quashing the subpoena. But in any event, irrespective of Army Court's finding, the instructional error was not harmless beyond a reasonable doubt, because it cannot be said that the error did not contribute to appellant's conviction. Had the members known that involuntary

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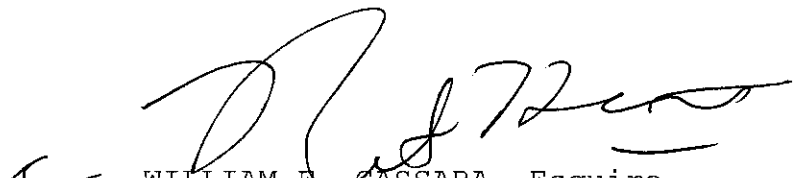
[170] JA at 13.
[171] JA at 14.

intoxication, as opposed to an organic mental condition, can be a complete defense, they may have acquitted appellant outright. In other words, as discussed previously, the members may have credited the defense theory of the case as it related to involuntary intoxication but thought they needed to find some physiological defect as opposed to involuntary intoxication alone or in combination with his other mental conditions in order to acquit. Had the members known that involuntary intoxication can negate the elements of intent and premeditation, they may have convicted credited the defense theory of the case as it related to involuntary intoxication, concluded that appellant could not or did not have the requisite mens rea, and convicted appellant of a lesser included offense.

RELIEF REQUESTED

Because the military judge erred in failing to instruct the members on involuntary intoxication, and because appellant was prejudiced by the error, the findings and sentence should be set aside.

Wherefore, appellant respectfully requests that this Honorable Court grand the requested relief.



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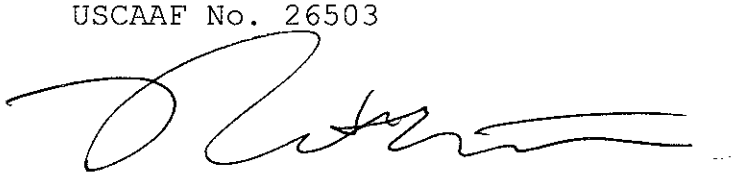

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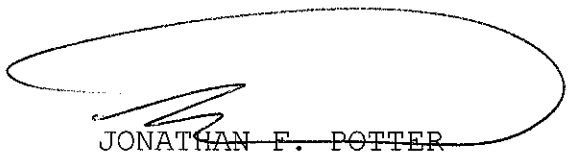

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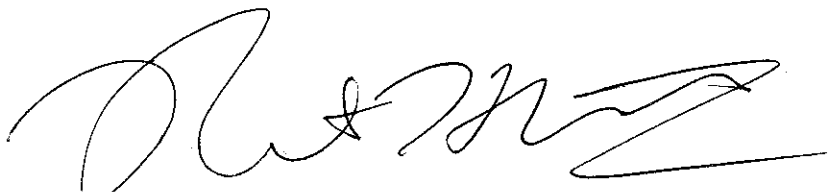

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. MacDonald*, Army Dkt. No. 20091118, USCA Dkt. No. 14-0001/AR, was electronically filed with both the Court and Government Appellate Division on March 21, 2014.

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