IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
	)	REPLY BRIEF ON BEHALF
v.	)	OF APPELLANT
	)	
George D. MACDONALD Private First Class (E-3), 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:

Appellant hereby replies to the government's answer brief, filed in this Court on April 23, 2014.

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.

At the outset, appellant notes that in its exposition of additional facts related to this issue the government states, "[d]efense counsel concluded, 'I think the [Pfizer] Patient Guide plus [the July 2009 drug labeling information from Pfizer] will meet - will more than adequately meet the needs of the defense." (Gov't Br. 12). When the defense counsel made this

statement the military judge had already issued his final ruling, and the topic of the Article 39(a) session in which this statement was made was whether the military judge would take judicial notice of certain items that were already in the possession of the defense (some of which had been published by Pfizer, and some of which had been produced by the Department of Health and Human Services). (SJA at 347). This statement was not made in the context of whether the defense had received all of its requested discovery.

The government argues that "An accused must also show that he is unable to appreciate the magnitude or wrongfulness of his crime." (Gov't Br. 13). The government repeats the term "magnitude" in at least three other places in its brief. Respectfully, nothing in Article 50, UCMJ, or any military or federal case places the burden on an accused to show he is unable to appreciate the "magnitude" of his crime.

The government argues that "Even if the clinical studies from Pfizer showed, by clear and convincing evidence, that Chantix caused appellant to suffer a severe mental disease or defect, appellant cannot overcome the vast amount of evidence showing that he appreciated the nature, quality, and wrongfulness of what he was doing when he murdered Private Bulmer." (Gov't Br. 13). First of all, as discussed below, appellant does not dispute that he appreciated the nature and

quality of his act — that is to say, he knew what he was doing when he killed Private Bulmer; what he disputes is that he appreciated the *wrongfulness* of his act. This reply therefore focuses only on the wrongfulness portion of the insanity defense.

But whatever evidence that supports any conclusion that appellant appreciated the wrongfulness of his act can only be considered "overwhelming" in relation to everything else that was presented — or could have been presented — at the trial. For example, the government states that appellant "behaved methodically so as to avoid detection and punishment," that he "waited 30 seconds and attacked PVT Bulmer when no witnesses were present," that he "[made] sure he and his victim were alone," and that appellant "chose a victim who lived in a bay he had never before entered, and where there was less of a chance of being discovered." Initially, appellant notes that there is no support in the record for any contention that appellant was "making sure he and his victim were alone," or that appellant consciously "chose a victim . . . where there was less of a chance of being discovered." Appellant never admitted to any of that in his statement to Special Agent Maier. Rather, it appears that appellant "chose" Private Bulmer as a victim merely because he was there when appellant happened to be walking by.

But in any event, the evidence the government cites is only "overwhelming evidence of guilt" when considered in context. It is entirely possible that the information contained in the Pfizer documents would have significantly undercut any claim that appellant was not acting under the grip of any delusion. As Dr. Glenmullen testified, a delusion is a false belief that can affect a person's behavior. (JA at 408). It does not necessarily follow that a person operating under a delusion would be unable to think and act rationally with respect to *every* aspect of what they were doing, or would appear outwardly "crazy" (although, as noted, at least one witness thought that appellant did).

The government states with apparent certainty, "appellant's fight-and-flight reaction clearly demonstrates that he appreciated the wrongfulness and magnitude of his crime. Had he been oblivious to reality, he would not have attempted to escape." (Gov't Br. 16). A person operating under a delusion need not be "oblivious to reality." And even if the evidence of flight suggests that appellant later knew his conduct was wrongful, he had to know it was wrongful *at the time he committed the act*. What if, for example, there is evidence in the Pfizer documents that tends to show that once a person acts on whatever compulsion or ideation the drug caused in that individual the compulsion or ideation rapidly dissipates and the

person starts to think normally again? If that is the case, then the things the government cites as "overwhelming evidence of guilt" would not carry the same weight.

The government also cites to the portion of appellant's confession in which he answers "[y]es and [y]es" to the question, "[d]o you understand that what you did is wrong and a crime" as evidence that appellant in fact appreciated the wrongfulness of his conduct. (Gov't Br. 18). Again, the fact that he knew it was wrong hours later is not proof that he knew it was wrong *at the time*.

The government states that appellant "didn't suddenly 'snap' – he armed himself, left his room, and hunted his victim." (Gov't Br. 21). The government is taking liberties with the facts. To say that appellant "armed himself" suggests that appellant had some nefarious purpose for carrying a knife at the time he left his room, and there is simply nothing in the record to suggest that he did. Indeed, appellant said in his confession that he uses the knife "to cut string," and did not know why he put it in his pocket. (JA at 691). Nor is there any evidence in the record that appellant "hunted his victim." He came across Private Bulmer sleeping in the bay, saw him there, paused for 30 seconds, and then attacked him.*

* Other parts of the government's brief similarly take such liberties, including that appellant "continued to use Chantix

The government claims in its brief that the AERs provided to appellant "that describe violence did not describe random violence. Rather, the acts reported were committed against people known to the perpetrator . . . . [c]ontrast with appellant who put a knife in his pocket, left his room, deliberately walked to another bay, and laid in wait for 30 seconds before pouncing." (Gov't Br. 25). The portion of Dr. Jacobs' testimony that the government cites does not support a conclusion that violence and aggression in all cases was directed towards people known to the perpetrator. Dr. Jacobs said, "The majority of 'physical assaults' were against family members." (JA at 602). What is unknown, of course, is whether Pfizer was in possession of any evidence of ideations of violence or aggression against strangers. And if it was, it would certainly have been relevant and necessary.

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despite recognizing that he was becoming increasingly aggressive" (Gov't Br. 7); that appellant "laid in wait" (Gov't Br. 25); that "according to the defense's theory of the case, appellant continued to ingest Chantix rather than seek help" (Gov't Br. 51); that appellant "should have or, in fact, saw the signs of his deterioration and did nothing to mitigate them" (Gov't Br. 52); and that that he "stalk[ed] a sleeping victim inside a barracks where he would not be recognized and when no witnesses were present" (Gov't Br. 63). There is simply no support in the record for any of these statements. While appellant recognizes the need to advocate from a particular point of view, hyperbole that is unsupported in the record adds nothing to the discussion, and only serves to detract from the resolution of the issues in this case.

The government notes that its expert, Dr. Jacobs, testified that Dr. Glenmullen's conclusions were flawed because he based them off of the AERs. (Gov't Br. 25). Assuming that is true, this actually highlights the need for the other documents in the possession of Pfizer and specifically requested by the defense, including the clinical trial data, and the post-market surveillance materials.

The government also argues that because Mr. Moore already had the Med Watch reports, the defense did not need anything produced from Pfizer. (Gov't Br. 33-34). But the government ignores what the med watch report actually contains. The Mr. Moore testified that "[t]he narrative is removed for privacy and other reasons and instead there are one or more standard medical terms that actually come from a standardized dictionary that describe what that event was." (JA at 255). And while the AER is the principle tool for monitoring safety of drugs once they have been approved, "it is not the only tool for post-market surveillance." *Id.*

The government states:

> [a]ssuming Mr. Moore could do the impossible and single-handedly read through over one hundred thousand pieces of paper within a condensed timeframe, it is difficult to believe that someone with a Bachelor of Arts degree in English and International Relations, who has never worked in a laboratory, could fully comprehend the dense scientific jargon contained on all of those pages.

(Gov't Br. 36-37). As this Court is undoubtedly aware, many people develop expertise in areas outside of their degree fields. In any event, Mr. Moore was recognized by the military judge as an expert in the areas of drug safety and the regulation of drug safety. (JA at 235). He has been monitoring and studying drug safety for fifteen years. (JA at 233). To suggest that he is incapable of "fully comprehend[ing] the dense scientific jargon contained on all of those pages" is simply offensive.

The government goes on to argue that "it would have been prejudicial to let appellant's experts get bogged down in such crushing detail while appellant sat in pretrial confinement." (Gov't Br. 37). While appellant appreciates the government's looking out for his interests, he is confident that his trial team, including his counsel and his experts, were acutely aware of what information they needed to adequately represent his interests at trial and would not have asked for the information if they did not believe it was relevant and necessary to his defense. While additional time in pretrial confinement would certainly have involved some level of hardship, it is infinitely preferable to an unjust sentence of life without the possibility of parole.

Just as with its discussion of what evidence Mr. Moore already had, it appears from the remainder of the government's

argument that it is simply re-litigating the issue of whether it was error for the military judge to quash the subpoena. The Army Court concluded that it was, and that decision was not appealed by the government. It is therefore the law of the case. *See United States v. Savala*, 70 M.J. 70, 76-77 (C.A.A.F. 2011). The only question before this Court is whether appellant was prejudiced by the error.

Appellant does not know, the government does not know, the Army Court does not know, and, respectfully, this Court does not know precisely what is contained in the records the defense sought, although, as the Army Court concluded, it is apparent they were "relevant and worthy of discovery." As the Army Court concluded:

> [t]here is no doubt the material existed, there is no doubt it included information that informed the FDA warnings, and there is no doubt that the information would inform the testimony of the defense experts," and therefore "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.

United States v. Macdonald, No. 20091118, Slip Op. at 10 (Army Ct. Crim. App. Jul. 3, 2013). The Army Court concluded that it was error, and appellant respectfully submits that the error was not harmless beyond a reasonable doubt, despite the Army Court's conclusion and the government's argument regarding "overwhelming

evidence of guilt" because it is entirely possible that the Pfizer documents would have undercut that evidence.

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.

1. The military judge erred in failing to instruct on the defense of involuntary intoxication.

a. The proposed instruction was not technically precise, but it did inform the military judge of the issue the defense requested the panel be instructed about.

In discussing whether the proposed instructions were correct, the government states, "[n]owhere do the proposed instructions require a preliminary finding of mental disease or defect, severe or otherwise." (Gov't Br. 45). Nowhere in *United States v. Hensler,* 44 M.J. 184 (C.A.A.F. 1996) did this Court require a "preliminary finding" of a severe mental disease or defect before the defense of involuntary intoxication could be raised by the evidence. The involuntary intoxication *itself*, or in combination with appellant's other mental conditions, could amount to legal insanity so long as it caused in appellant an inability to distinguish right from wrong. Whether it did was a question for the members.

The government argues that the military judge was not required to give the proposed instruction because it was flawed. Appellant does not deny that the instruction was imprecise, and has not suggested that the military judge was required to give the exact instruction the defense requested. As this Court noted in *United States v. Dearing*, a deficiency in a defense instruction "does not excuse the military judge from his duty to [properly] instruct the panel." *Dearing*, 63 M.J. 478, 484 (C.A.A.F. 2006). The instruction was not so "fatally compromised" that the military judge could not have substituted the terms "prove by clear and convincing evidence" for "produce sufficient evidence to raise a reasonable doubt." (Gov't Br. 46). The proposed instruction was sufficient to put the military judge on notice of the issue, and indeed the military judge had "an affirmative, sua sponte duty to instruct on special defenses reasonably raised by the evidence." *United States v. McMonagle*, 38 M.J. 53, 58 (C.M.A. 1993); R.C.M. 920(e)(3).

In any event, the Army Court held as a matter of law that the proposed instruction was correct.

b. <u>The proposed instruction was not substantially covered in the main instruction.</u>

The government argues that this Court "ruled in *Hensler* that a mental responsibility instruction 'cover[s] all elements

of involuntary intoxication, except the causes of intoxication . . . .'" (Gov't Br. 46-47). Respectfully, this statement mischaracterizes the holding in *Hensler* somewhat. The full quoted paragraph in *Hensler* stated:

> [i]nvoluntary intoxication is treated like legal insanity. It is defined in terms of lack of mental responsibility. See *United States v. F.D.L.* and Model Penal Code, both *supra.* The military judge told the members that appellant's sanity was an issue for them to decide, and he correctly instructed on the standard for determining mental responsibility. He instructed them that alcoholism and chemical dependency are a "disease." By instructing on mental responsibility, he covered all elements of involuntary intoxication, except the causes of the intoxication, which were not disputed. By not distinguishing between voluntary and involuntary intoxication, he gratuitously extended the potential defense to all six episodes, even though it was raised only as to the first.

United States v. Hensler, 44 M.J. 184, 188 (C.A.A.F. 1996). Appellant believes that rather than holding as a matter of law that an instruction on mental responsibility "cover[s] all elements of involuntary intoxication," this Court was commenting on the sufficiency of the instructions *in that case.* Indeed, if it is true that an instruction on mental responsibility covers all elements of involuntary intoxication, this Court would not have held that the Court of Criminal Appeals erred in concluding that the special defense of involuntary intoxication was not raised by the evidence.

The government argues that the panel:

> was charged with considering appellant's mental state, regardless of origin, in rendering a verdict. Therefore, how appellant became intoxicated is of far less relevance than appellant's state of mind when he committed the crime. It does not matter whether appellant's mental state is attributable to genetics, nature, nurture, or the use of a prescription drug.

(Gov't Br. 47). This argument ignores the difference between the defense of lack of mental responsibility and the defense of voluntary intoxication. Respectfully, it *does matter* whether his mental state was "attributable to genetics, nature, nurture, or the use of a prescription drug." The members were limited in their consideration to a "severe mental disease or defect," and were never told about involuntary intoxication, which may itself affect a person's ability to appreciate the nature and quality of his act or distinguish right from wrong even if the person does not suffer from a "severe mental disease or defect."

The government also argues that the evidence "encompasses both purported congenital defects and defects brought about by the use of Chantix." (Gov't Br. 48). Does it? Respectfully, the government assumes that the panel would make a leap it was never instructed it could make, namely, that it would consider involuntary intoxication a "defect" without having been instructed that it could. Far from giving the panel "considerable freedom to explore all aspects of the defense's theory of the case" the failure to instruct on the special

defense of involuntary intoxication foreclosed consideration of a complete defense. (Gov't Br. 48).

As the Army Court held, involuntary intoxication was not substantially covered in the main instruction. *MacDonald*, Slip Op. at 10.

<u>c. The requested instruction was on such a vital point that the failure to give it deprived appellant of a defense and seriously impaired effective presentation of the defense of involuntary intoxication.</u>

The government argues that the panel "was on notice that appellant's mental state should be a part of their deliberations, and that appellant's evidence regarding a Chantix-induced psychosis was extremely relevant." (Gov't Br. 50). Appellant agrees that the panel was on notice that his mental state should be a part of their deliberations; he respectfully disagrees, however, with the government's claim that the panel necessarily understood how it could consider "appellant's evidence regarding a Chantix-induced psychosis" without an instruction that involuntary intoxication is a complete defense.

The government goes on to argue that since the military judge instructed that appellant could not be held criminally liable for his acts if his delusion "resulted from a severe mental disease or defect," and it "made no difference what the genesis of the disease or defect was, be it a naturally-

occurring chemical imbalance, Chantix, or a combination thereof." (Gov't Br. 50-51). As noted previously, it does make a difference. The members may have believed they had to find an organic disease or defect, and may not have known that they could consider the fact of intoxication alone as a complete defense. In other words, the members may have thought that appellant did not have a severe *organic* mental disease or defect and never reached the question of whether he was able to distinguish right from wrong, and they may have believed that appellant was sufficiently intoxicated to prevent him from distinguishing right from wrong, but thought that intoxication is not a severe mental disease or defect.

The government next argues that the evidence did not raise the issue of involuntary intoxication, apparently because appellant's girlfriend, Haley Safronoff, testified that appellant had asked her if she would still love him if he killed someone, and that appellant acknowledged that he had been thinking about killing someone for about five days. The government cites to appellant's confession (JA at 690; Pros. Ex. 2) for the proposition that "according to the defense's theory of the case, appellant continued to ingest Chantix rather than seek help." (Gov't Br. 51). Respectfully, nowhere in Prosecution Exhibit 2 or anywhere else in the record does it say that appellant was aware of the side-effects of Chantix but

continued to take it anyway. Indeed, it is not at all clear from the record when the defense first considered that appellant might have been involuntarily intoxicated as a result of ingesting Chantix.

In this regard, the government's argument that "[i]f appellant continued to ingest Chantix despite being cognizant of his transformation into someone driven to commit murder, he cannot argue that his ingestion was involuntary," assumes not only that appellant knew what was happening to him, but knew why. There is simply nothing in the record to suggest that Appellant was aware that Chantix was the cause of his delusion.

The government argues that because others who believed Chantix was causing them to behave aggressively apparently reported the change through the filing of Adverse Event Reports (AERs), appellant must similarly have been aware of what was happening to him and should have done something about it, and the defense of involuntary intoxication is therefore unavailable. The government presumes that all of the AERs were filed by the individuals who were taking the drug, and that is simply not the case. It seems unlikely, for example, that a person who had completed suicide would have filed an AER, but we know that "completed suicide[s] have been reported." (JA at 716). As the evolving nature of the warnings associated with this drug makes clear, Chantix affects different people

differently. For some, there are little or no side-effects. For others, the side-effects are very serious. But it would be a mistake to assume that all Chantix users experiencing the serious neuropsychiatric events that occasioned the requirement for the boxed warning would necessarily have been aware at the time that Chantix was the cause.

The government argues that appellant "attempts to have it both ways: he cites the AERs as proof Chantix users understand that Chantix causes aggression, yet claims involuntary intoxication despite never reporting his gradual transformation into someone with homicidal tendencies." (Gov't Br. 52). Appellant does not "cite[] the AERs as proof Chantix users understand that Chantix causes aggression," although he acknowledges that to the extent a given AER was submitted to Pfizer or the FDA directly by an individual Chantix user, it would seem to support a conclusion that the user knew that. But as noted previously, not all AERs were submitted by users; as the government argued at trial, "[t]hose documents can come from anyone; it's not just the doctor or scientist . . . ." (R. at 736). Mr. Moore, one of the defense experts, testified that a "med watch report" is the method for submitting adverse event reports to the FDA; they are submitted by "a consumer or any health professional . . . but probably 70 percent of these are

actually written and produced by the pharmaceutical companies and then submitted to the FDA." (JA at 250, 253-54).

The government appears to argue that since appellant did not prove that he was "unaware of the gradual changes occurring within," he has failed to show that he was intoxicated, involuntarily or otherwise. (Gov't Br. 53). But the question at the Army Court was whether there was "some evidence" of the special defense of involuntary intoxication, and that court concluded that there was. That court also concluded that the military judge's failure to give the instruction "seriously impaired [the defense's] effective presentation." *United States v. MacDonald*, Slip Op. at 10.

d. Appellant was prejudiced by the error.

The government argues that appellant was not prejudiced by the error because "the panel had to make the same determination as to mental responsibility." (Gov't Br. 54). Respectfully, that is not entirely true. While the panel had to make the same determination whether appellant was able to distinguish right from wrong with respect to both lack of mental responsibility and involuntary intoxication, a determination that appellant was or was not involuntarily intoxicated is not the same as a determination that appellant did or did not suffer from a severe mental disease or defect.

Appellant disagrees with the government and with the Army Court that "the ultimate issue to be decided by the panel relative to [involuntary intoxication and a lack of mental responsibility] is sufficiently equivalent to ensure the reliability of the convictions in this case." (Gov't Br. 54). Nor does appellant agree that "[s]ince the panel did not find that appellant was suffering from a severe mental disease or defect based on the instructions given, the panel would not have acquitted appellant had the military judge given an instruction on involuntary intoxication. (Gov't Br. 55). In appellant's view, the members may well have acquitted him had they known they could consider involuntary intoxication as a complete defense.

The government also argues that "[s]ince there was no showing by clear and convincing evidence that appellant was unable to appreciate the wrongfulness of his acts or form the necessary intent, the underlying question of mental disease or defect is rendered moot." (Gov't Br. 55). Appellant did not dispute at trial, and does not dispute on appeal, that he understood the nature and quality of his acts. That is, he knew what he was doing when he killed Private Bulmer. What he disputed at trial, and what he disputes on appeal, is whether he was able to appreciate the wrongfulness of that act at the time he committed it. He respectfully submits that he was not; that

that inability was the result of involuntary intoxication; that he was entitled to have the members decide that question; and the members were unable to do so because they were improperly instructed.

The government argues that the defense "proffered no medical evidence at court-martial showing that appellant was suffering from a mental disease or defect" (Gov't Br. 56), that the levels of varenicline in appellant's system could not have affected his mental state (Gov't Br. 57), and that while there was varenicline in appellant's urine, there was none in his blood. (Gov't Br. 58). As discussed in more detail below, whether any of that is actually the case given the length of time the samples sat around before they were tested is subject to dispute. But in any event, whether any of this would have undermined appellant's proof of involuntary intoxication was a question for the members. But because they were never instructed that they could consider involuntary intoxication as a complete defense, appellant's ability to effectively present the defense of involuntary intoxication was seriously impaired.

Before leaving this topic, appellant notes that the government takes issue with appellant's attack at trial of the lack of stability studies available to the government's forensic toxicologist, Captain (O-6) (CAPT) Lesser, and argues that because Pfizer was willing to make the stability studies

available but the defense would not accede to Pfizer's request for a protective order, "appellant cannot now argue that Varenicline may have a much shorter half-life than Dr. Lesser thought, when defense counsel's maneuvering prevented the production of the stability studies that could have proved this point." (Gov't Br. 58-59). It is true that the defense would not accede to Pfizer's request for a protective order. But it is also true that the defense ultimately withdrew the request for the stability studies after it received analytical standards that permitted the defense to retest appellant's urine and detect the presence of varenicline in his system, and determined that the stability studies were no longer needed by the defense. (*See* JA at 802 (App. Ex. XXIV); JA at 81).

But there was no "maneuvering." It was *the government* who called CAPT Lesser to testify; and the defense did not "prevent production" of anything. If CAPT Lesser thought he needed the stability studies to adequately review the evidence, or if the government believed the stability studies might be an issue in its case in rebuttal, the government could have issued a subpoena. If the government was concerned that Pfizer would not comply with a subpoena, it could have asked the military judge to order the evidence produced, with or without a protective order. The defense's withdrawal of the discovery request did not mean that the stability studies were no longer relevant,

only that the defense was no longer seeking them. That the defense was able to impeach the testimony of the government's expert by asking him about his failure to consider relevant evidence is not "maneuvering," and it is offensive to due process to suggest that appellant bore any obligation to accede to Pfizer's demands in order to preserve evidence *for the government*, particularly in light of the efforts of the defense to obtain discovery in this case.

2. The military judge erred in failing to instruct the members on involuntary intoxication as it related to premeditation and intent.

As the government notes, the military judge instructed the members on the defense of "partial mental responsibility" (however misleading to the members that term might be). If the military judge thought that there was "some evidence" in the record sufficient to require an instruction on "partial mental responsibility, it logically follows that there was "some evidence" sufficient to require an instruction on involuntary intoxication as it relates to "partial mental responsibility," given the amount of testimony about the effects of Chantix on the brain. The government concedes as much when it argues that the instruction that the military judge did give was "broad enough and generic enough so a fact-finding could determine that Chantix caused some 'defect, condition, or disorder' that would negate scienter." (Gov't Br. 60). The problem, of course, is

that the instruction given focused on "mental disease, defect, condition, or disorder," rather than intoxication. The members may have believed that there was no "mental disease, defect, condition, or disorder" that would negate the ability to premeditate or form specific intent, but may have believed appellant was involuntarily intoxicated to the point he could not premeditate for form specific intent, yet they were never instructed that they could consider that. "Broad" and "generic" is not the test for determining the adequacy of an instruction; it must be tailored to the facts of the case.

The government analogizes this case to *United States v. Watford*, 32 M.J. 176 (C.M.A. 1991), and argues that in *Watford* there was no showing that the appellant had consumed excessive amounts of alcohol, and in this case "not only was there no Varenicline whatsoever in appellant's bloodstream, appellant put on no evidence showing that Varenicline in the excretory system can influence the normal functioning of the nervous system." (Gov't Br. 61). It is beyond doubt that appellant took Chantix in the days leading up to the killing; it is also beyond doubt that before Chantix can enter the urine, it must first be in the blood. (R. at 1794, 1817). And it is beyond doubt that blood and urine samples were taken some 36 hours after the event. (R. at 1802). And the blood and urine samples sat around for over a year before they were tested (JA at 697) under unknown

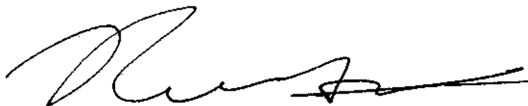
conditions that could affect the results. (R. at 1813). Thus, although the government speaks in terms of absolutes — "no Varenicline whatsoever in appellant's bloodstream" — the evidence is not nearly as clear on this point as the government would have this Court believe.

The government focuses on appellant's admission that he contemplated killing someone for the previous five days, and considered killing Private Bulmer for about 30 seconds before he began stabbing him, and because of this, appellant was able to premeditate and form specific intent. (Gov't Br. 61). But appellant respectfully submits that this argument ignores the very nature of the defense of involuntary intoxication, particularly where the intoxicating substance is known to have unexpected effects on the brain. If the desire to kill and intent to kill is itself the product of the intoxication, then the ability to premeditate or form the intent is absent. As the Benchbook states with respect to voluntary intoxication, "[t]he law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone, or together with other evidence in the case cause you to have a reasonable doubt" that the accused premeditated or had the requisite specific intent. Military Judge's Benchbook, Dep't of Army Pam. 27-9, ¶ 5-12, Note 2.

The government essentially argues that appellant was not entitled to the instruction because of the overwhelming evidence of guilt. But whether appellant was guilty was a question for the members, and all the facts and circumstances that the government points out in support of its claim of overwhelming evidence of guilt may have taken on a different significance for the members if considered in light of involuntary intoxication. In this context, intoxication doesn't necessarily mean that appellant appeared to be falling-down-drunk. Although one witnesses described him as "acting completely crazy," "like he was possessed," and "like he was on something," a person intoxicated by a substance like Chantix could appear and act lucid and rational, yet still be operating under the grip of a delusion that impacted his ability to distinguish right from wrong. (JA at 120-21). The members may have believed all of appellant's conduct was the product of involuntary intoxication, and may have convicted appellant of a lesser offense had they been properly instructed.

RELIEF REQUESTED

Based on the foregoing, appellant requests that the findings and sentence bet set aside. WHEREFORE appellant respectfully request that this Honorable Court grant the requested relief.



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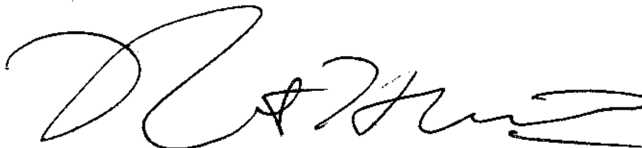

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(2) because it contains 6,122 words.

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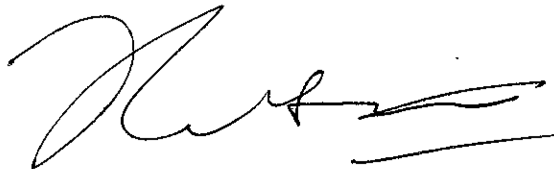

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CERTIFICATE OF FILING AND SERVICE

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 May 5, 2014.

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