IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	USCA Dkt. No. 14-0001/AR
Private First Class (E-3) **GEORGE D. MACDONALD,** United States Army, Appellant	)	Crim.App. Dkt. No. 20091118

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

Granted Issues

I

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform

Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.[2]

Statement of the Case

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of resisting apprehension; one specification of premeditated murder; and two specifications of assault, in violation of Articles 95, 118, and 128, UCMJ.[3] The panel sentenced appellant to reduction to E-1, a reprimand, forfeiture of all pay and allowances, confinement for life without the possibility of parole, and to be dishonorably discharged from the service.[4] The convening authority approved the sentence as adjudged and credited appellant with 572 days of pretrial confinement.[5]

On 3 July 2013, the Army Court affirmed the findings and sentence.[6] Subsequently, on 21 February 2014, this Court granted appellant's petition for review of the Army Court's decision.

Statement of Facts

On 18 May 2008, appellant, a permanent party at Fort Benning, Georgia, entered an open-bay barracks and discovered

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[1] UCMJ, Art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, Art. 67(a)(3), 10 U.S.C. § 867(a)(3).
[3] 10 U.S.C. §§ 895, 918, and 928 (2008).
[4] SJA 328.
[5] Action.
[6] United States v. MacDonald, 2013 WL 3376714 at *10 (A. Ct. Crim. App. July 3, 2013) (mem. op).

Private (PVT) Rick Bulmer asleep in his bunk.[7] PVT Bulmer, who had been excused from training due to a leg injury, was the only other person in the bay with appellant.[8] Appellant attacked the sleeping PVT Bulmer with a double-edged knife, stabbing or cutting him over 50 times.[9] PVT Bulmer eventually died from his wounds. Appellant was interrupted by PVT Justin Harrison and PVT Kyle Hansard, who were alerted by PVT Bulmer's screams.[10] When PVT Harrison called out to appellant, appellant stopped stabbing PVT Bulmer and charged at PVT Harrison with the knife.[11] Although appellant's hand connected with PVT Harrison's body, the knife did not.[12] Appellant then ran out of the bay[13] and back to his room, whereupon he showered off PVT Bulmer's blood, put his bloody clothes and the knife into a knapsack, and fled with the knapsack to an isolated, densely-wooded part of post.[14]

Staff Sergeant Martin Jones was dispatched to search for appellant.[15] He soon found appellant near the wood line and confronted him.[16] After telling SSG Jones he didn't "have time to deal with [him]" because he was going to buy a pair of

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[7] JA 691 (Pros. Ex. 4, pg. 3).
[8] JA 691 (Pros. Ex. 4, pg. 3).
[9] SJA 169-178; JA 692 (Pros. Ex. 4, pg. 4).
[10] JA 107-108.
[11] JA 110.
[12] JA 110-111.
[13] JA 112.
[14] JA 692 (Pros. Ex. 4, pg. 4); SJA 127-128.
[15] SJA 126.
[16] SJA 127-128.

sneakers, appellant took off running into the woods.[17] Staff Sergeant Jones gave chase and eventually captured appellant.[18] Because appellant continuously struggled to break free, SSG Jones held appellant until the police arrived.[19] Fort Benning police officer Corey Michael discovered the bloody clothes in appellant's knapsack.[20]

Appellant voluntarily waived his Article 31(b), UCMJ, rights at CID and confessed to killing PVT Bulmer.[21] Appellant explained that he was "stretched thin" due his extended stay as a private at Fort Benning. He also complained of being abused by drill instructors.[22] Appellant wrote that he spent 30 seconds contemplating PVT Bulmer's murder, and generally had been thinking about killing someone for the previous five days.[23]

At court-martial, appellant raised the affirmative defense of lack of mental responsibility. Specifically, he argued that Chantix (Varenicline), the smoking-cessation drug he was prescribed on 18 April 2008, made him homicidal.[24] Although the Armed Forces Institute of Pathology laboratory could find no traces of Varenicline in appellant's urine or blood, a private

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[17] SJA 128, 131.
[18] SJA 131-134.
[19] SJA 134.
[20] SJA 135; SJA 165-168.
[21] JA 137-141; JA 688-695 (Pros. Ex. 4).
[22] JA 690 (Pros. Ex. 4, pg. 2).
[23] JA 690, 692 (Pros. Ex. 4, pgs. 2, 4).
[24] JA 697 (Def. Ex. A).

lab contacted by defense counsel found .58 nanograms/mL in his urine. No trace of Varenicline was ever found in appellant's blood.[25]

Appellant's experts averred that Chantix causes users to become aggressive and, in some cases, experience homicidal ideations. They cited to Adverse Event Reports (AERs) submitted to the Food and Drug Administration (FDA) by Chantix users, as well as warnings on the packaging itself (i.e., the "black box" warning and other associated warnings not inside the black box). The government countered with its own expert witnesses who testified that appellant was not suffering from a mental disease or defect, and was fully aware of the nature, quality, and wrongfulness of his acts. Moreover, appellant's girlfriend, Haley Safronoff, testified that appellant asked her one day before the murder, "If I killed someone would you still love me?"[26] Ms. Safronoff's testimony was corroborated by appellant's confession.[27]

Additional facts necessary for the disposition of the assignments of error are contained in the argument below.

Summary of Argument

Appellant suffered no prejudice when the military judge quashed the Pfizer subpoena. First, appellant's behavior

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[25] JA 697, 698, 704 (Def. Ex. A).
[26] JA 178.
[27] JA 693(Pros. Ex. 4, pg. 5.)

before, during, and after he murdered PVT Bulmer overwhelmingly demonstrates that he appreciated the nature and quality or wrongfulness of his acts. Even if the materials subject to the subpoena showed, by clear and convincing evidence, that appellant was suffering from a severe mental disease or defect, appellant cannot show that he lacked mental responsibility. Second, all relevant and necessary materials were produced by the FDA. Not only did the defense team receive the Adverse Event Reports it requested, appellant's own expert stated under oath that he did not need the clinical trials. Also, while the hundreds of thousands of pages that comprise the clinical trials may have been relevant, they were hardly necessary in light of the fact that summaries of the findings were available. Appellant ultimately was able to take full and unfettered advantage of his Chantix defense.

The military judge also did not abuse his discretion when he denied defense counsel's tailored instruction regarding involuntary intoxication. First, the proposed instruction incorrectly stated the law because it did not require the fact-finder to determine whether appellant suffered from a severe mental disease or defect. The proposed instruction also improperly reduced appellant's burden of proof. Second, the proposed instruction was substantially covered in the judge's instruction on mental responsibility. Because the panel was

charged with determining whether appellant was mentally responsible for his crimes, the panel still had to determine whether appellant was suffering from a severe mental disease or defect. Third, the requested instruction did not pertain to such a vital point that the failure to give it deprived the accused of a defense. Appellant did not argue that he was involuntarily intoxicated; rather, he argued that Chantix exacerbated his underlying mental illness. Appellant's purported intoxication also was not involuntary since he continued to use Chantix despite recognizing that he was becoming increasingly aggressive. Moreover, even if the military judge abused his discretion, appellant suffered no harm. As stated previously, the evidence is overwhelming that appellant appreciated the nature and quality or wrongfulness of his acts. Finally, the amount of Chantix in appellant's system was so minimal that a reasonable fact-finder could conclude that appellant was not acting under its influence. The military judge also did not err by failing to instruct on the effects of intoxication on appellant's ability to form specific intent and premeditation. The military judge instructed the panel that partial mental responsibility could negate scienter and, even if the military judge did err, there was no prejudice.

Granted Issue 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 ADVERSE EVENT REPORTS, AND POST-MARKET SURVEILLANCE OF THE DRUG VARENICLINE WAS HARMLESS BEYOND A REASONABLE DOUBT

Additional Facts

At defense counsel's request, trial counsel subpoenaed Pfizer, the maker of Chantix, for the following materials:

> (a) All clinical trial data related to the drug Varenicline [the active ingredient in Chantix].
>
> (b) Any and all adverse event reports of any kind describing adverse reactions to the drug Varenicline that have, within their description or characterization, actual violence towards self or other thoughts of violence towards self or others to include but not limited to suicidal or aggressive thoughts.
>
> (c) Any and all post-market surveillance of the drug Varenicline.
>
> (d) The stability studies of the drug Varenicline.[28]

Pfizer refused to turn over materials falling under subsections (a), (b), and (c), and would only turn over materials falling under (d) with a protective order.[29]

Defense counsel moved for appropriate relief.[30] The military judge ruled:

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[28] SJA 333 (App. Ex. 21).
[29] JA 39-40.
[30] JA 45, 47; SJA 333 (App. Ex. 21).

1. There was evidence that the appellant was prescribed Chantix a month before the murder.

2. Two toxicology reports found no Chantix in appellant's system in the hours after the murder.

3. The R.C.M. 706 board found that appellant had no mental responsibility issues.

4. The R.C.M. 706 board appeared to be properly performed.

5. Despite the government's willingness to subpoena the requested materials, the military judge would make an independent determination as to whether the materials were relevant and necessary.

6. "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, and therefore the court does not believe the defense has met its burden to show that this evidence is relevant and necessary ...."[31]

The military judge concluded that he would "therefore [deny] the motion to compel . . . production . . . pursuant to the defense requested relief."[32] The military judge also ruled that the court would sign the protective order and that defense counsel was free to accept or reject Pfizer's offer.[33]

At the next Article 39a session (27 July 2009), defense counsel announced that an independent lab determined Varenicline was present in appellant's urine at a level measuring .58

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[31] JA 67.
[32] JA 67.
[33] JA 67.

nanograms per milliliter (nG/mL).[34] Despite this, the military judge would not reevaluate his ruling.[35]

Defense counsel then submitted a "Supplemental Defense Discovery Request," dated 6 September 2009,[36] wherein he requested that the Food and Drug Administration (FDA) produce the same materials indicated in paragraphs (a), (b), (c) of the Pfizer subpoena (respectively, the clinical trials; adverse event reports pertaining to suicide, aggressiveness, homicidal ideation, etc.; and the post-market surveillance that contributed to the black box warning).[37] The government, in its response, asserted that the materials were not in the control of the military, and were subject to the military judge's previous determination that they were not relevant and necessary.[38]

At an Article 39a, UCMJ, session taking place on 1 October 2009, defense counsel argued that because "all of the material is in [the] possession" of a federal entity (the FDA), the government had an obligation to produce it.[39] He then restated his objection to the military judge's ruling with regard to the Pfizer subpoena.[40] The military judge ruled that the government

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[34] JA 75.
[35] JA 105.
[36] SJA 337 (App. Ex. 39).
[37] SJA 337 (App. Ex. 39).
[38] SJA 340 (App. Ex. 40).
[39] SJA 077.
[40] SJA 084.

had approximately one week to turn over the FDA documents to the defense team.[41]

At the next Article 39a, UCMJ, session (18 November 2009), defense counsel requested that the military judge take judicial notice of materials obtained from the FDA as a result of the request for production, including product labeling, warnings, and information on how Varenicline works.[42] According to correspondence included with defense counsel's written request, the Department of Health and Human Services produced a compact disc containing:

1. A database of Adverse Event Reports (AERs).
2. AER instructions.
3. Documents pertaining to the July 2009 Chantix label change.
4. A copy of drug safety reviews already provided to defense in April 2009.
5. A copy of individual AERs already provided to defense in April 2009.[43]

Defense counsel specifically asked that the military judge take judicial notice of a printout of the database, which amounted to 1,443 pages.[44] He also stated that the AER database contained 156 entries for Chantix that mentioned suicide, aggression, and

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[41] SJA 075-076.
[42] SJA 103-104, 110-114.
[43] SJA 347-348 (App. Ex. 41, Encl. 14).
[44] SJA 347-348 (App. Ex. 41, Encl. 14); SJA 121.

homicidal ideation.[45] Defense 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."[46]

Standard of Review and Law

A judge's decision to quash a subpoena is reviewed for abuse of discretion.[47] In the event a military judge abuses his discretion in quashing a subpoena, this Court must determine whether there is a reasonable probability that the result of trial would have been different but for the error.[48] That is, would production of the materials in question "have created a reasonable doubt that did not otherwise exist."[49]

Argument

The Army Court was correct in determining that the military judge's decision to quash the subpoena was harmless error. First, even if the materials sought by defense counsel proved that Chantix caused appellant to suffer from a severe mental disease or defect, there is overwhelming evidence that shows appellant was able to ascertain both the wrongfulness and

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[45] SJA 119.
[46] SJA 117.
[47] United States v. Wuterich, 67 M.J. 63, 77-78 (C.A.A.F. 2008); citing United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987).
[48] United States v. Morris, 52 M.J. 193, 197-198 (C.A.A.F. 1999). See also United States v. Coleman, 72 M.J. 184, 187 (C.A.A.F. 2013), and United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).
[49] Id.

magnitude of his crime. Since the Pfizer materials in themselves would not help appellant satisfy his burden under Article 50a(a), UCMJ, any error committed by the military judge is harmless beyond a reasonable doubt. Second, appellant ultimately received the relevant and necessary materials through the FDA and was able to fully exploit his Chantix defense.

1. Even if the Pfizer documents proved, by clear and convincing evidence, that appellant suffered from a mental disease or defect, the evidence is overwhelming that appellant appreciated the nature, quality, and wrongfulness of his acts.

Under Article 50a(a), UCMJ, an accused has the burden of showing, by clear and convincing evidence, that "as a result of a severe mental disease or defect, [he] was unable to appreciate the nature and quality or wrongfulness of [his] acts."[50] In itself, "mental disease or defect does not otherwise constitute a defense."[51] An accused must also show that he is unable to appreciate the magnitude or wrongfulness of his crime.

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 PVT Bulmer. Said the Army Court in its ruling,

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[50] Article 50a(a), UCMJ.
[51] Article 50a(a), UCMJ.

> 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 we find that enforcement of the subpoena and discovery of the information in Pfizer's and the FDA's possession would not "create[] a reasonable doubt that did not otherwise exist."[52]

a. Appellant's behavior at the time he murdered PVT Bulmer shows that he understood the nature, quality, and wrongfulness of his crime.

Appellant clearly understood during the act of murdering PVT Bulmer that what he was doing was a crime, and behaved methodically so as to avoid detection and punishment.[53] Appellant waited for 30 seconds and attacked PVT Bulmer when no witnesses were present. Making sure he and his victim were alone was, under the circumstances, rational and not at all indicative of someone who was operating under a delusion. Also, a sleeping and, presumably, unarmed victim posed no threat to appellant.[54] Moreover, appellant chose a victim who lived in a bay he had never before entered, and where there was less of a chance of being recognized.[55] Appellant also confessed that he intended to kill PVT Bulmer instantly by aiming his first blow at PVT Bulmer's neck.[56] In essence, appellant made a conscious

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[52] MacDonald, 2013 WL 3376714 at *7, quoting Morris, 52 M.J. at 198.
[53] JA 692 (Pros. Ex. 4, pg. 4).
[54] JA 691 (Pros. Ex. 4, pg. 3).
[55] JA 693 (Pros. Ex. 4, pg. 5) (appellant lived in "a different part[] of the same starship [i.e., building complex]").
[56] JA 691 (Pros. Ex. 4, pg. 3).

effort to commit his crime in the most efficient way possible so he could slip away undetected.

Even though it was a Sunday and appellant was out of uniform, he had with him a double-edged knife.[57] A reasonable fact-finder can infer from this that the murder was premeditated, since the raison d'être of a knife with a double-edged blade is not utility but the infliction of harm.

The totality of the facts – taking a double-edged knife with him as he left his room; walking to another bay to which he had never been; spotting a sleeping victim who posed no threat; waiting for 30 seconds; ensuring no witnesses were present; making a conscious effort to kill with one quick blow – all indicate that appellant was a high-functioning individual with the presence of mind to formulate and carry out a brutal attack.

b. Appellant's behavior immediately after he murdered PVT Bulmer shows that he understood the nature, quality, and wrongfulness of his crime.

Appellant's behavior post-murder also comports with someone who appreciated the gravity of his crime and knew right from wrong. When appellant was interrupted mid-attack, he immediately stopped stabbing PVT Bulmer and charged at PVT Harrison.[58] Defense expert Dr. Joseph Glenmullen testified that

[57] JA 691 (Pros. Ex. 4, pg. 3).
[58] JA 108-110.

this was when appellant "starts to snap out of it."[59] However, if appellant really was operating under a delusion he could so easily "snap out of," it would make more sense if appellant returned to reality when PVT Bulmer began to cry, "Oh my God, Jesus no, please stop" as the blade plunged into his body after perhaps the twentieth or thirtieth time.[60] Also, rather than recoil in horror at the violence he had just unleashed while suffering from an ostensible delusion, appellant assaulted an eye-witness and ran out of the room.[61] 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 an escape.

Appellant took methodical steps to conceal his crime. After being interrupted by PVT Harrison, appellant ran to his room in order to shower off PVT Bulmer's blood and change clothes.[62] Later, when asked by SA David Maier why he decided to take a shower, appellant gave the simplest and most sensible explanation: "I had blood all over me."[63] After eliminating the evidence from his person, appellant took the murder weapon and his bloody clothes, put them inside a knapsack, and escaped from

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[59] SJA 277.
[60] JA 108.
[61] JA 108-110.
[62] JA 691 (Pros. Ex. 4, pg. 3).
[63] JA 692 (Pros. Ex. 4, pg. 4).

the barracks.[64] Appellant's stated reason for collecting up the evidence was similarly rational: "so it wouldn't be in my room."[65] Appellant further admitted that he was "probably [going to] throw it [i.e., the evidence] away."[66]

Rather than taking main roads where he could easily be spotted, appellant fled to a heavily-wooded and isolated area to escape detection.[67] When confronted by SSG Jones, appellant had the presence of mind to try and talk his way free, first by attempting to intimidate SSG Jones, then by spinning a somewhat elaborate lie.[68] When SSG Jones would not back down, appellant made "a dead run . . . into the brush".[69] After SSG Jones recaptured appellant, appellant repeatedly struggled to break free.[70] As with his attempt to get rid of incriminating evidence, appellant's attempts at deflection and escape amply demonstrate his guilty conscience.

c. Appellant's confession shows that he understood the nature, quality, and wrongfulness of his crime at the time he committed it.

Appellant, in his confession, described his rationale for killing PVT Bulmer, as well as the thoughts coursing through his mind during the act. Although appellant concluded that he was

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[64] JA 692 (Pros. Ex. 4, pg. 4).
[65] JA 692 (Pros. Ex. 4, pg. 4).
[66] JA 692 (Pros. Ex. 4, pg. 4).
[67] SJA 126-127.
[68] SJA 128-130.
[69] SJA 131.
[70] SJA 132-135.

temporarily insane, his confession does not support his lay diagnosis. The following exchange succinctly demonstrates that appellant was lucid and in full control of his mental faculties:

> Q. Do you understand that what you did is wrong and a crime?
>
> A. Yes and Yes.[71]

Appellant said that he deliberately chose his victim because he was a private.[72] There was no hallucination that made him kill. The government's expert, Dr. Jacobs, correctly points out,

> [i]f you read the confession . . . [h]e said he felt bad that he did it, he felt bad for the guy. That's not someone who's delusional. Someone who is delusional would not say that. They would say, "You know this is what I had to do," and they wouldn't feel that guilt. So in my opinion he would not satisfy being delusional at that time.[73]

Appellant wrote in his confession that he was "stretched thin" due to his extended stay as a private in a basic training environment.[74] Appellant stated that he was "mistreated so badly for so long" and that "[y]ou can't stand up for yourself as a private here, your [*sic*] something nasty as a private here in [a] basic training environment where I've been for a couple weeks shy of a year now. I guess this was my lash out against the world."[75] Appellant further stated that the reason he was

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[71] JA 690 (Pros. Ex. 4, pg. 2).
[72] JA 692 (Pros. Ex. 4, pg. 4).
[73] JA 595.
[74] JA 690 (Pros. Ex. 4, pg. 2).
[75] JA 693 (Pros. Ex. 4, pg. 5).

"stretched thin" was "the abuse of the basic training environment."[76] Appellant made clear in his confession that he was angry, and his anger is what caused him to "snap":

> Q. Can you clarify what you mean by abuse as a trainee?
>
> A. From day one, I was in the company that was disbanded because the drill sergeants were choking out the privates. I was in the hardest platoon in the cycle right before the mess-up cycle, these guys didn't have it half as bad as we did. But it's just basic and you move on. I didn't move on and after airborne school I came back to the same battalion and the only difference is now I am not getting physically hazed and now I have my own room. A man can only take so much before he snaps.[77]

The confession clearly indicates that appellant was attempting to paint himself as a victim of trainee abuse in order to deflect blame. However, at no time during the court-martial was evidence averred showing that appellant was hazed or otherwise abused by drill instructors. A reasonable fact-finder would therefore conclude that appellant was scheming and evasive, and that the Chantix defense amounted to a convenient "Plan B" when his original trainee abuse argument failed to pan out. Appellant's attempt to justify his behavior only hours after the crime is still more proof that he understood reality and was never operating under a delusion. His confession shows a lucid, rational mind at work.

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[76] JA 690 (Pros. Ex. 4, pg. 2).
[77] JA 694 (Pros. Ex. 4, pg. 6).

Several times throughout the court-martial, experts on both sides cited to the accused in the seminal M'Naghten case as an example of someone who was operating under a delusion.[78] The accused in M'Naghten insisted that since the English prime minister was plotting to kill him, he was fully justified in making an attempt at his life. Accordingly, both sets of experts concurred that M'Naghten himself was delusional. However, appellant's confession indicates that, unlike M'Naghten, he knew full well that killing PVT Bulmer was wrong as he was killing him. Appellant specifically wrote that while in the throes of his crime, "[he] didn't like it, dispised [*sic*] it."[79] He also wrote that he "[w]as telling himself 'no'", but that he was "stretched thin and snapped."[80] Upon being asked, "What were you thinking as you were stabbing that man," appellant responded, "I wish I didn't have to do this, I hate this. . . ."[81] Unquestionably, appellant knew right from wrong during the commission of the crime and understood the nature and quality of his acts.

Appellant wrote in his confession that he felt as though he was "supposed to kill this man,"[82] which could lend some credence to the argument that appellant was operating under a delusion.

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[78] M'Naghten's Case, 8 Eng. Rep. 718 (1843).
[79] JA 689 (Pros. Ex. 4, pg. 1 (emphasis in original)).
[80] JA 689 (Pros. Ex. 4, pg. 1).
[81] JA 694 (Pros. Ex. 4, pg. 6).
[82] JA 692 (Pros. Ex. 4, pg. 4).

This interpretation is, however, contradicted by the multiple times appellant states that he understood the wrongfulness of his crime as he was committing it. Moreover, appellant didn't suddenly "snap" - he armed himself, left his room, and hunted his victim. A reasonable fact-finder therefore would have to conclude that appellant failed to show, by clear and convincing evidence, that he lacked mental responsibility.

d. Appellant's conversation with his girlfriend one day before he murdered PVT Bulmer shows that he understood the nature, quality, and wrongfulness of his crime at the time he committed it.

Appellant was prescribed Chantix on 18 April 2008.[83] On 17 May 2008, one day before the murder, appellant asked his girlfriend, "If I killed someone would you still love me?"[84] According to appellant's own expert, someone operating under a delusion would have thought that he was supposed to kill.[85] Yet appellant's question demonstrates that he knew murder was wrong and contrary to societal mores, and that he was risking disapproval from someone who loved him.[86]

e. In addition to finding that appellant did not suffer from a severe mental disease or defect, the psychologist who conducted appellant's R.C.M. 706 sanity board found that appellant understood the nature, quality, and wrongfulness of his acts.

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[83] JA 697 (Def. Ex. A).
[84] JA 179.
[85] JA 511.
[86] JA 179.

Dr. Theresa Lupcho, the psychologist who conducted appellant's R.C.M. 706 evaluation[87], testified on behalf of the government. She was admitted as an expert in clinical psychology.[88] Dr. Lupcho found no evidence of prior psychiatric or mental illness, or evidence of psychotic or bizarre behavior, hallucinations, or delusions.[89] She also found no indication of anxiety or thought disorder.[90] If anything, appellant was "perfectly lucid."[91] When asked by government counsel whether appellant was suffering from a long-term auditory hallucination, Dr. Lupcho responded, "[h]e didn't express any to me."[92]

Dr. Lupcho also testified that appellant's behavior immediately after he murdered PVT Bulmer (e.g., running from the scene; showering; collecting the evidence in order to discard it, concocting a story) in no way comported with the behavior of someone acting under a delusion.[93] Ultimately, Dr. Lupcho concluded that appellant was not suffering from a mental disease or defect, and that he appreciated the nature, quality, and wrongfulness of his acts.[94]

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[87] SJA 223.
[88] SJA 223.
[89] SJA 228.
[90] SJA 231.
[91] SJA 231.
[92] SJA 233.
[93] SJA 228-229.
[94] SJA 234.

f. The testimony of appellant's expert, Dr. Sonal Pancholi, undermines appellant's assertion that he was acting under a delusion.

Dr. Sonal Pancholi, appellant's expert psychologist, testified that appellant was operating under a delusion when he murdered PVT Bulmer.[95] However, the following colloquy undermines appellant's entire argument:

> Q: When somebody's in a psychotic state or has a psychotic break . . . are you psychotic at 1800 hours and at 1801 you're normal?
>
> A: No . . . it's not an on/off switch; you're not psychotic and then there's a switch that you turn on and you're psychotic.[96]

The evidence is clear that appellant was calculating both before and after the crime. As his own expert testified, appellant cannot assert that his delusion suddenly was flipped on - like a light switch - as he made his way toward the sleeping PVT Bulmer, knife in hand, and then flipped off when he was startled by PVT Harrison mid-attack.

g. The Army Court was correct in finding that "the government's expert in rebuttal effectively undermined the credibility of the defense experts' psychiatric diagnoses of appellant and ... 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."[97]

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[95] JA 548.
[96] JA 548.
[97] MacDonald, 2013 WL 3376714 at *8.

Dr. Douglas Jacobs testified for the government on rebuttal. He was admitted as an expert in "psychiatry with specialties in the fields of suicide, violence and pharmacologic treatment of mental disorders."[98] Dr. Jacobs testified that he read the same AERs that the defense requested as well as other case-specific material, including the confession and the 706 evaluation.[99] It was Dr. Jacobs' conclusion that appellant "was not suffering from a major psychiatric illness at the time of the stabbing and that he knew the nature of and the consequences of his actions and knew right from wrong."[100]

Dr. Jacobs explained that "a delusion is a false belief that cannot be disproved by reality."[101] He continued,

> If you read the confession of Private MacDonald . . . [h]e said he felt bad that he did it; he felt bad for [PVT Bulmer]. That's not someone who's delusional. Someone who is delusional would not say that. They would say "You know this is what I had to do," and they wouldn't feel that guilt. So in my opinion he would not satisfy being delusional at that time.[102]

Dr. Jacobs also corrected Dr. Glenmullen, the defense's expert, on the "black box" warning. Since "there's been no study that demonstrates causation," the black box says nothing about

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[98] JA 591
[99] JA 594, 638.
[100] JA 594.
[101] JA 595.
[102] JA 595.

Chantix *causing* homicidal ideation.[103] Rather, "[h]omicidal ideation is listed in the warnings" as a side-effect that "has been reported".[104]

Incidents are brought to the attention of the FDA through the AER reporting system.[105] The AERs themselves are neither peer-reviewed nor have any "scientific validity."[106] Moreover, the AERs that describe violence did not describe random violence. Rather, the acts reported were committed against people known to the perpetrator ("[This] wasn't just someone walking in the street . . ."). [107] Contrast 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.

Dr. Jacobs testified that Dr. Glenmullen's conclusions were flawed because he based them off of the AERs.[108] Adverse Event Reports are non-scientific purported observations often written

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[103] JA 597-598; see also JA 604-605, 1933; JA 607; JA 495, wherein Dr. Glenmullen concedes that no such studies have been done; JA 510, wherein Dr. Glenmullen concedes that no studies have been done linking Chantix to psychosis; JA 484, wherein Dr. Glenmullen concedes that the FDA warnings do not say that Chantix causes homicidal ideation, merely that "these symptoms have been reported."

[104] JA 596-597; see also JA 523-524, wherein Dr. Glenmullen concedes that "homicidal ideation" is not in the black box.

[105] JA 601.

[106] JA 601.

[107] JA 602; See also JA 496, 494, wherein Dr. Glenmullen testifies that no studies have even been done to show the rate of homicidal ideation in the general population (let alone the in the population of Chantix users).

[108] JA 609.

by laypeople.[109] In addition to being unscientific, the AERs showed that many people were drinking alcohol or were taking other drugs at the time they acted out.[110] Dr. Glenmullen was also mistaken to compare the number of reported incidents associated with Chantix to the number of incidents associated with nicotine and the antibiotic Amoxicillin:

> [t]hat doesn't tell you anything about the strength of association. In order to determine the strength of association you have to know what is the incident of an event and those who are exposed to it versus not exposed. . . .[111]

Also, Dr. Glenmullen conceded that publicity and FDA warnings would disproportionately increase reporting.[112]

Dr. Jacobs also questioned Dr. Glenmullen's testimony regarding Chantix and dopamine release, since it was based on testing in lab rats.[113] "So how can you then come up here and say that satisfies the criteria for plausibility that dopamine causes psychosis in humans when you're going back to dopamine in rats[?]"[114] As for dopamine and violence, "we don't have a study that shows that if you give dopamine it causes violence in

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[109] JA 674; See also JA 477-480, wherein Dr. Glenmullen concedes that AERs do not establish causation.
[110] JA 611.
[111] JA 610.
[112] JA 502.
[113] JA 611.
[114] JA 611-612; see also JA 486-488, wherein Dr. Glenmullen testifies that much of what we know about Varenicline and the brain comes from studies on animals, and that "we can only speculate" as to the effects on humans.

humans."[115] Dr. Jacobs also noted that cigarettes increase dopamine in the brain twice as much as Chantix does.[116]

Regarding the Pfizer clinical trials, Dr. Jacobs testified that there were four suicides in the drug group and two in the placebo group.[117] However, there were five times as many patients on the drug than on the placebo (5,000 to 1,000), indicating that a disproportionate number of subjects *taking the placebo* committed suicide.[118]

Dr. Jacobs distinguished the psychiatry that makes someone commit suicide as opposed to murder. While 90-95% of persons who commit suicide have an underlying mental illness, only 20% of murderers do.[119] Since 80% of murderers do not have a mental illness, a murderer "can have risk factors for violence such as having an unstable family, maybe being the victim of abuse himself, having episodes of violence or a violent nature, and being under severe life stress, also a history of drug use can be risk factors."[120] He added, "[s]o these are things you take into consideration in trying to . . . understand an event. You have to satisfy all of these. . . ."[121] Earlier, Dr. Jacobs

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[115] JA 660.
[116] JA 658; see also JA 680; JA 490, wherein Dr. Glenmullen testifies that Chantix releases less dopamine than cigarettes.
[117] JA 612.
[118] JA 613.
[119] JA 614.
[120] JA 614.
[121] JA 614.

testified that smoking "in and of itself is a risk factor for a variety of problems including depression, psychosis, [and] impulsivity."[122]

Dr. Jacobs concluded that appellant was not suffering from schizoid personality disorder.[123] Appellant was able to form close relationships. His own witnesses and girlfriend testified that he was social, loving, and had friends.[124] Appellant was an Eagle Scout, he cared about criticism, and did not have a flat affect.[125] Dr. Jacobs also noted that "[ultimately], Dr. Glenmullen does not diagnose schizophrenia."[126] Rather, Dr. Glenmullen stopped short of schizophrenia, and would say only that appellant "had an acute psychotic disorder."[127] According to the Diagnostic and Statistical Manual of Mental Disorders (DSM), a disorder is much less severe than a psychosis."[128] However, even psychotic disorder requires that the subject suffers from "pervasive hallucinations," yet there was no

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[122] JA 596.
[123] JA 614.
[124] JA 179, 203-207, 219.
[125] JA 617-618.
[126] JA 618.
[127] JA 618. See also JA 435 and 445, wherein Dr. Glenmullen testifies that appellant suffers from "schizoid personality disorder" rather than full-blown schizophrenia; JA 545, 547, wherein Dr. Pancholi also stops short of diagnosing appellant with schizophrenia.
[128] JA 618.

evidence that appellant heard voices or had a delusion.[129] Moreover, "there is no evidence that Chantix can cause a psychotic disorder" or that "Chantix [can cause] someone to go from Schizoid Personality Disorder to schizophrenia."[130]

According to FBI statistics, the homicide rate nationally is 5.83 per 100,000.[131] Since there are approximately 2 million people using Chantix, one would expect 117 homicides.[132] However, of those 2 million users, appellant is the only person to assert that Chantix drove him to murder.[133]

The actual rate of suicide for people using Chantix also undercuts appellant's argument. According to Dr. Jacobs, there were 112 reports of suicide out of the 2 million users of Chantix.[134] Nationally, the suicide rate is 11 out of 100,000.[135] Therefore, the expected number of suicides for 2 million Chantix users should be 220, which is almost twice the number actually reported. But because "smoking in and of itself increases the suicide rate two to three times," the real number should be

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[129] JA 620; See also JA 510-511, wherein Dr. Glenmullen concedes that there is no evidence that Chantix can cause a psychotic disorder; SJA 233, wherein Dr. Lupcho testified that appellant did not report to her that he was having auditory hallucinations.
[130] JA 621-633.
[131] JA 626.
[132] JA 626.
[133] JA 626; See also JA 474, wherein Dr. Glenmullen agrees that none of the AERs refer to an actual homicide attributed to Chantix.
[134] JA 625.
[135] JA 625.

closer to 550 if one splits the difference and multiplies 220 by 2.5.[136]

Dr. Jacobs affirmed that appellant demonstrated that he understood the wrongfulness of his crime when he asked his girlfriend whether she would still love him if he killed someone.[137] He added, "I did not see any evidence that he was incapable of understanding what he was doing or knowing the difference between right and wrong."[138]

In sum, the Army Court was correct to conclude that Dr. Jacobs' testimony "effectively undermined the credibility of the defense experts' psychiatric diagnoses of appellant. . . ."[139]

The evidence shows beyond any reasonable doubt that appellant was fully aware of the wrongfulness and magnitude of his crime. Similarly, the evidence also shows that appellant was not operating under a severe disease or defect since not even defendant's own expert would say that appellant was schizophrenic. Nothing appellant said or did in the immediate aftermath of the murder would lead a reasonable fact-finder to believe that appellant was operating under a delusion. In light of his crime, appellant's behavior was, if anything, levelheaded.

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[136] JA 625-626.
[137] JA 627.
[138] JA 628.
[139] MacDonald, 2013 WL 3376714 at *8.

Appellant argued extensively that Chantix could cause a psychotic break. Assuming the Pfizer clinical trials would have helped appellant make this showing, they would have done nothing to overcome the overwhelming evidence that appellant was aware of the nature and quality of his acts and could discern right from wrong.

2. All relevant and necessary material requested in the subpoena was made available to the defense.

To reiterate, the government's subpoena to Pfizer ordered delivery of the following materials:

> (a) All clinical trial data related to the drug Varenicline;
>
> (b) Adverse event reports regarding Varenicline and actual violence towards self or thoughts of violence towards self or others.
>
> (c) Post-market surveillance of the drug Varenicline.
>
> (d) The stability studies for Varenicline.[140]

Eventually, defense counsel withdrew his request for (d).[141]

a. Defense counsel assured the military judge that his expert had all of the Adverse Event Reports (AERs) he needed, and that the clinical trials were unnecessary.

During an Article 39(a) session, the defense counsel explained that members of the general public can submit an Adverse Event Report to the FDA if they believe that a drug

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[140] SJA 333-336 (App. Ex. 21).
[141] JA 81.

caused a harmful reaction.[142] "From those reports what are call[ed] Full Medical Watch reports, that are broader, have greater detail, . . . [are] highly scientific, [and] contain medical terminology [are generated], and then you study those to see if there is a link between the drug and a certain effect . . . ."[143]

Defense counsel's purpose in explaining all of this was to argue in favor of obtaining an expert witness, Mr. Thomas Moore, who monitors Med Watch reports for a living. According to defense counsel, Mr. Moore would "do[] an analysis, and [would] educate[] us on the pros and cons of this defense. . . ."[144] The military judge then asked, astutely, "If he is in the business of statistical analysis of all of this stuff, why doesn't he have this stuff already?" Defense counsel responded, "He does have a great deal of it, sir, already compiled."[145]

When the military judge expressed concern that defense counsel essentially was asking the court to order a research grant, defense counsel responded that all Mr. Moore would be doing is helping him to understand the arcane language in the Med Watch reports.[146] Mr. Moore also would "pull[] out the facts and circumstances of those cases and compare[] them to the facts

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[142] SJA 001.
[143] SJA 001-002.
[144] SJA 003-004.
[145] SJA 005.
[146] SJA 007-009.

and circumstances of our case and what our client would tell him and then we see what the similarities are and then it strengthens the opinion."[147] Defense counsel continued, "[Mr. Moore] has the raw data, he has all the reports," even going so far as to estimate that Mr. Moore had between 7-10,000 AERs.[148] He further argued that Mr. Moore was a necessary witness because "he has evaluated [the AERs] . . . and then the medical watch reports."[149]

Not only did defense counsel argue with certitude that his expert had everything he needed, he went so far as to discount the utility of contacting Pfizer, especially with respect to the clinical trials:

> There has got to be a certain level of reporting, documented history associated with risks that weren't foreseen in the initial clinical trials, and he can also talk about the initial clinical trials that Pfizer engaged in, I mean, because that is part of what was written up in his report.[150]

When the military judge continued to express concern that he was being asked to approve funding for a research grant, defense counsel maintained that the data was available and that Mr. Moore only needed to analyze it:

> MJ: No, my – I guess my biggest difficulty with your position is not explaining the risk necessarily; it's

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[147] SJA 009.
[148] SJA 009.
[149] SJA 012.
[150] SJA 014.

this idea that somehow there is a responsibility to develop new data for him.

DC: *Sir, the data is out there.* He doesn't have to---

MJ: Then he doesn't need new data.

DC: Sir, he needs to walk - - take what is out there now, evaluate it, okay, educate us, get the full med watch reports, and assist us in determining the viability of this Chantix defense.

MJ: He does not have sufficient information now to provide you with that type of opinion?

DC: *I believe he has the stuff* -- [151]

In sum, defense counsel told the military judge that Mr. Moore had the AERs and could get the Med Watch reports. Defense counsel also asserted that the clinical trials would not be useful because "risks . . . weren't foreseen."[152]

b. Mr. Moore, under oath[153], assured the military judge that (i) he had all the Adverse Event Reports he needed, and (ii) the clinical trials were unnecessary.

At the next Article 39(a), UCMJ, session, the assistant defense counsel told the judge that "the studies have not already been done in regard to violence to self, violence to others," and that Mr. Moore would "actually [have to] get the proper information."[154] The military judge again expressed concern that the defense was asking him "to order the government

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[151] SJA (emphasis added).
[152] SJA 014.
[153] SJA 038; JA 226.
[154] SJA 031.

to provide money to this guy to do a research project in the hope that there may be something there."[155]

When defense counsel put Mr. Moore on the phone, he assured the court that the AERs were all he needed.[156] He then added, "the principle evidence that [violence] is a potential problem for this drug comes from the adverse event reporting and perhaps the mechanism of action as well, *and not from the clinical trials*."[157] Also, ". . . of the three types of scientific evidence in this case, the adverse event report data is the most important. . . ."[158] Not once did Mr. Moore say that he needed the clinical trials or anything from Pfizer, only that he needed "a representative sample of the much more detailed [FDA] reports."[159]

At the 27 March 2009 Article 39a, UCMJ, session, trial counsel told the military judge that he had subpoenaed Pfizer based on a defense request.[160] According to trial counsel, he requested "stuff that looked like [what] [Mr.] Moore would need."[161] Paragraph 1(a) of the subpoena demanded the Chantix clinical trials. Understandably, the military judge expressed concern since, during his telephonic testimony, Mr. Moore asked

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[155] SJA 033.
[156] SJA 040.
[157] SJA 042 (emphasis added).
[158] SJA 043.
[159] SJA 046.
[160] SJA 058.
[161] SJA 058.

only for the surveys of adverse events (i.e., the AERs and the more-detailed FDA reports) and specifically said he did not need the clinical trials.[162] Defense counsel first replied that Mr. Moore was getting a "random sampling" of the detailed reports from the FDA.[163] But for the first time, defense counsel announced to the court that, despite earlier assurances, Mr. Moore would also need "stuff from Pfizer."[164]

At court-martial, Mr. Moore referred to the AERs as "the principle tool" for "post-market surveillance."[165] He testified that clinical trials are "a very substantial research program that involves chemical studies about the nature of the molecule ... animal studies . . . [and] studies in human beings. . . ." He also testified that, typically, clinical trials were "10's of thousands and frequently more often 100's of thousands of pages long."[166] Assuming 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

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[162] SJA 060.
[163] SJA 061.
[164] SJA 062.
[165] JA 255.
[166] JA 238.

all of those pages.[167] The defense forensic psychiatrist, Dr. Glenmullen, relied upon articles containing the results of the clinical trials.[168] Needless to say, this is much more realistic and effective than attempting to blindly cull through the actual clinical trials in search of some relevant crumbs. If anything, it would have been prejudicial to let appellant's experts get bogged down in such crushing detail while appellant sat in pretrial confinement. The clinical trials may very well have been relevant; however, it stands to reason that they were not necessary, especially when condensed accounts were available.

Mr. Moore further testified that the conclusory "clinical report," could be upwards of 10,000 pages long (although "1,000 pages is typical").[169] He told the court that studying the FDA reviews of the clinical studies (5-20 pages) "was sort of my area."[170] Indeed, this is what he reviewed before testifying.[171] It is also how he came to know that "serious 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."[172] Mr. Moore later testified that he reviewed "scientific studies about its mechanism of action . . .

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[167] JA 227, 303.
[168] JA 465.
[169] JA 239.
[170] JA 238.
[171] JA 241.
[172] JA 244.

peer reviewed literature . . . the fairly voluminous FDA studies of the clinical studies . . . [and] the adverse event data."[173] Because Mr. Moore was able to testify as to the results of the clinical trials, opine as to how the clinical trials were flawed, and aver that a small number of participants underwent psychiatric change, appellant suffered no prejudice.

c. Pfizer is required, by law, to submit its post-marketing surveillance AERs to the FDA, which appellant later obtained from the FDA.

Mr. Moore referred to the AERs as "the principle tool" for "post-market surveillance."[174] The government produced the FDA AER database, which listed 156 Chantix-related adverse events pertaining to suicide, suicidal ideation, homicidal ideation, and aggression.[175] In accordance with 21 C.F.R. §314.80(c), drug manufacturers are *required* to submit post-marketing surveillance reports to the FDA. Therefore, if Mr. Moore obtained AERs from the FDA, he would have gotten AERs from the post-marketing surveillance.[176] Mr. Moore even testified that a member of the public or a physician "may submit a voluntary adverse event report to the United States Food and Drug Administration either directly or [he] can call the drug company *and they will be*

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[173] JA 249.
[174] JA 255.
[175] SJA 120.
[176] JA 315.

required to take [the] information and send it on to the FDA."[177] He added, "probably 70 percent of these are actually written and produced *by pharmaceutical companies* and then submitted to the FDA."[178]

As with the clinical trials, the sheer number of AERs can be daunting. Said Mr. Moore, "I mean, it's a mountain of about – there are about 100,000 adverse event reports submitted to the Food and Drug Administration in some form in every calendar quarter."[179] To facilitate research, the AERs "are all computerized and . . . the key information from the fields of these [is] placed in a computer database."[180] Mr. Moore added, "the FDA maintains this. It is called the Adverse Event Reporting System."[181] As discussed hereinabove, the FDA produced the database, from which the defense team was able to identify 156 AERs of interest. Mr. Moore testified, "We requested and received 78 full reports that had contained the narratives."[182]

Because Mr. Moore received everything he said he needed, the accused suffered no prejudice and was in no way denied the full scope of his Chantix defense. Mr. Moore was able to easily

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[177] JA 250 (emphasis added).
[178] JA 254 (emphasis added); see also JA 315.
[179] JA 254.
[180] JA 254.
[181] JA 254.
[182] JA 272. See also JA 276, wherein Mr. Moore also testified that "it wouldn't really be physically possible" for him to review the 600 reports that actually piqued his interest. He requested and received 78, and excluded all but 25.

locate the exact AERs he wanted rather than rifle through every AER pertaining in some way to Chantix.[183] Mr. Moore also received from the FDA each of the 78 full AERs he requested. It makes no difference that the AERs were produced by the FDA rather than Pfizer, since, in accordance with 21 C.F.R. §314.80(c), Pfizer was legally obligated to submit to the FDA every AER in its possession. Mr. Moore even made this point.[184] It also stands to reason that the FDA had a larger pool of AERs from which to select than Pfizer, since the FDA is under no apparent legal obligation to make a reciprocal AER submission to a drug manufacturer. Finally, Mr. Moore testified several times that he did not require the actual clinical trials since they would have been far too voluminous to parse through. The summaries, said Mr. Moore, sufficed.[185]

Granted Issue II

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

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[183] Note that (c) of the defense request, post-market surveillance, is overbroad since it would cover, for example, reports of nausea or headaches. The relevant materials falling under paragraph (c) would be produced under paragraph (b) (all AERs that pertain in some way to aggression) since all AERs are submitted after a drug is put on the market.

[184] JA 315.

[185] JA 238-241.

Additional Facts

Before closing arguments, defense counsel moved for a jury instruction that covered involuntary intoxication.[186] He and the military judge engaged in the following dialog:

> MJ: Okay. On a factual predicate is there any evidence the act was involuntary?
>
> DC: If you're under the influence of that substance, correct?
>
> MJ: No, I didn't ask you that. You are extrapolating the influence thing. Did not your own witness say that he knew he was operating under a delusion and knew he was killing a human being, but felt he had to kill a human being? How would that make the act involuntary?
>
> DC: If you go with the argument that you're acting based on a substance that causes you to do that; it's not a volitional act being in an altered state of mind.
>
> MJ: Exactly, and that's covered by the mental responsibility defense. I'm just saying there's no evidence this act was involuntary. Your own evidence was it was delusional, and it goes to the mental responsibility defense, and therefore I don't intend to give that instruction.[187]

Defense counsel, in his written motion for a tailored instruction, cited Sallahdin v. Gibson[188] as his guiding legal principal:

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

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[186] JA 687, 870 (App. Ex. 56).
[187] JA 686.
[188] Salahdin v. Gibson, 275 F. 3d 1211 (10th Cir. 2002).

> 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.[189]

However, the military judge ruled that Salahdin was inapposite:

> Got it. But [Salahdin is] not a correct statement of the law. It says here, it says where the defendant is so intoxicated he is unable to distinguish between right and wrong the same standard is applied in an insanity defense. Don't you need a mental disease - serious mental disease or defect causing the accused not to appreciate the wrongfulness of his act or quality of his act?[190]

The military judge then denied the defense counsel's motion, stating that they were "bound by congressional act."[191]

On appeal, the Army Court ruled that the military judge erred by not giving an instruction on involuntary intoxication. However, the Army Court also ruled that the error was harmless.

Standard of Review and Law

A military judge's refusal to give a tailored instruction is reviewed for an abuse of discretion.[192] This Court applies a three-pronged test to determine whether there is error: (1) is the requested instruction correct; (2) is the requested instruction not substantially covered in the main instruction;

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[189] JA 870 (App. Ex. 56), citing id.
[190] JA 687.
[191] JA 688.
[192] United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993).

and (3) is the requested instruction 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.[193] In the event that there was error, this Court must then determine de novo whether the error was harmless or whether it had "substantial influence" on the findings.[194]

Involuntary intoxication "rises to the level of an affirmative defense . . . only if it amounts to legal insanity."[195] Accordingly, an accused has the burden of meeting the standard announced in Article 50a, UCMJ.

Argument

1. Under the Gibson test, the military judge did not commit error.

a. The requested instruction was not correct.

While a tailored instruction "need not be 'technically precise'"[196], the instruction at issue was so defective as to be fatally flawed. Accordingly, the military judge was under no obligation to give it.

Defense counsel's reliance on Sallahdin was mistaken. The defendant in Sallahdin claimed that, unbeknownst to him, his use

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[193] United States v. Gibson, 58 M.J. 1, 7 (C.A.A.F. 2003); citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A.1993).
[194] Id., quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946).
[195] United States v. Hensler, 44 M.J. 184, 187 (C.A.A.F. 1996).
[196] Appellant's Br. at 49, quoting United States v. Dearing, 63 M.J. 478, 486 (C.A.A.F. 2006).

of steroids made him physically aggressive.[197] The Sallahdin court ruled that "Involuntary intoxication is a complete defense, but only where the defendant is so intoxicated that he is unable to distinguish between right and wrong, the same standard as applied in an insanity case."[198]

Sallahdin is correct to the limited extent that involuntary intoxication and insanity hew to the same standard. However, the standard for insanity applicable in Sallahdin is different from the standard applicable at court-martial. The military judge therefore was correct when he asserted that tailored instructions must comport with congressional intent.

In United States v. Hensler this Court said, "Involuntary intoxication is treated like legal insanity. It is defined in terms of lack of mental responsibility."[199] Article 50a(a), UCMJ, defines the standard for lack of mental responsibility:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, *as a result of a severe mental disease or defect*, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.[200]

Congress, when defining mental responsibility, expressly intended that severe mental disease or defect be a precursor to

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[197] Sallahdin, 275 F. 3d at 1236.
[198] Id.
[199] United States v. Hensler, 44 M.J. 184, 188 (C.A.A.F. 1996).
[200] Article 50a(a), UCMJ (emphasis added).

the inability to appreciate the nature and quality or the wrongfulness of a criminal act.[201] Not only is Sallahdin silent on this point, so were defense counsel's proposed instructions.[202] Nowhere do the proposed instructions require a preliminary finding of mental disease or defect, severe or otherwise.

The proposed instructions also incorrectly state the burden of proof. Had the military judge granted defense counsel's motion, he would have instructed the panel as follows: "To invoke the defense of involuntary intoxication, the defendant must produce sufficient evidence to *raise a reasonable doubt* as to the voluntariness of his intoxication."[203] However, Article 50a(b) requires an accused to affirmatively prove lack of mental responsibility *by clear and convincing evidence*.[204] Needless to say, chipping away at an opposing argument by creating reasonable doubt is far less burdensome than affirmatively proving a point by clear and convincing evidence.

Appellant cites United States v. Dearing for the proposition that a "technically imprecise" tailored instruction can still be acceptable.[205] In Dearing, this Court ruled that a proposed instruction on escalation of conflict was correct as a

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[202] JA 870 (App. Ex. 56).
[203] JA 870 (App. Ex. 56 (emphasis added)).
[204] Art. 50a(b), UCMJ.
[205] Dearing 63 M.J. at 486.

matter of law despite a single minor blemish - an "imprecise statement as to the force that Appellant might lawfully use in response to an escalation." In contrast, the flaws in the proposed involuntary intoxication instruction transcend mere imprecision. The proposed instructions disregard the requirement that the fact-finder determine whether the accused was suffering from a severe mental disease or defect, and both drastically and improperly reduce appellant's burden of proof. Because the proposed instructions were fatally compromised, the military judge had no choice but to deny them. Appellant therefore fails the first prong in Gibson.

b. The requested instruction was substantially covered in the main instruction.

The military judge gave a lengthy mental responsibility instruction that substantially covered whether or not appellant was suffering from a mental disease or defect.[206] The panel members therefore were charged with determining, by clear and convincing evidence, whether appellant lacked the required mens rea due to a Chantix-induced psychosis. Moreover, the military judge gave an instruction on partial mental responsibility, which also would have permitted the members to find that appellant was not responsible for his crimes.[207] This Court ruled in Hensler that a mental responsibility instruction

[206] SJA 309-313.
[207] SJA 313-316.

"cover[s] all elements of involuntary intoxication, except the causes of intoxication ...."[208]

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 his crime. It does not matter whether appellant's mental state is attributable to genetics, nature, nurture, or the use of a prescription drug.

It was crucial to appellant that the military judge instruct the panel to take into account his mental condition. The military judge did precisely this. There was no need for the military judge to mention Chantix in the instructions, which were simple, generic, and broad enough for the panel members to determine what role, if any, Chantix played in influencing appellant's mental state. To this end, the military judge instructed:

> [in] considering the issues of mental responsibility, and partial mental responsibility, you may consider evidence of the accused's mental disease or defect and mental condition before and after the alleged offenses, as well as the evidence as to the accused's mental disease or defect and mental condition on that date. The evidence as to the accused's mental disease or defect and mental condition before and after the date was admitted for the purpose of assisting you to determine the accused's mental disease or defect and mental condition on the date of the offenses.[209]

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[208] Hensler, 44 M.J. at 188.
[209] SJA 318.

The military judge instructed the panel to consider appellant's mental state before and after the crime. He also reminded the panel that evidence of appellant's mental state was averred. Again, such evidence encompasses both purported congenital defects and defects brought about by the use of Chantix. The record clearly shows that there is no merit to appellant's exhortation that the panel "may have believed that to find a serious mental disease or defect there must have been some organic disorder as opposed to a disease or defect caused by intoxication."[210] If anything, the military judge's instructions gave the panel considerable freedom to explore all aspects of the defense's theory of the case.

By virtue of the military judge's comprehensive instructions on mental responsibility, appellant fails the second Gibson prong.

c. The requested instruction is not on such a vital point that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation.

"The military judge has an affirmative duty to instruct on all special defenses that are 'reasonably raised by the defense.'"[211] In the instant case, involuntary intoxication was not reasonably raised.

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[210] Appellant's Br. at 49.
[211] Hensler, 44 M.J.at 187, quoting United States v. Barnes, 39 M.J. 230, 232 (C.M.A. 1994).

Appellant argues, "this entire case was about involuntary intoxication. . . ."[212] More accurately, this case is about appellant's mental responsibility. Appellant put forth evidence that he was suffering from an underlying mental condition that was exacerbated by the medication he was taking, resulting in "the equivalent of an acute psychotic break in someone who is schizophrenic."[213] The defense team's expert psychiatrist, Dr. Glenmullen, testified at length that appellant had "untreated psychiatric conditions":

> He had what's called a schizoid personality disorder, which was kind of his reaction to his childhood . . . . He also had a history of long term mild depression . . . . And the third thing that he had was a history of auditory hallucinations . . . . *This is all in the period pre-Chantix.*[214]

Dr. Pancholi, the defense team's expert psychologist, maintained that appellant was suffering from "Psychotic Disorder Not Otherwise Specified Schizoid Personality Disorder and Dysthymania."[215] She arrived at her diagnosis by interviewing appellant's pre-Army (and, by extension, pre-Chantix) acquaintances.[216] Even the Army Court's ruling said, matter-of-factly:

> His defense was that Chantix, combined with preexisting mental conditions, drove him to a tragic,

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212 Appellant's Br. at 51.
213 JA 445.
214 JA 435-436 (Emphasis added).
215 JA 545.
216 JA 545, 547.

> psychotic, homicidal assault upon PVT Bulmer and that he was not guilty by reason of lack of mental responsibility.[217]

To this end, the military judge gave a lengthy instruction on mental responsibility. The military judge even stated at the very beginning of the instruction,

> the evidence in this case raises the issue of whether the accused lacked criminal responsibility for all of the charged offenses as a result of a severe mental disease or defect. In this regard the accused himself has denied criminal responsibility because of a severe mental condition.[218]

The panel therefore 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. Moreover, the military judge instructed the members that they needed only to determine whether appellant was suffering from a severe mental disease or defect at the time of the alleged crime.[219] The military judge also stated the pertinent language from Article 50a(a), UCMJ: "if the accused had a delusion of such a nature that he was unable to appreciate the nature and quality or wrongfulness of his acts, the accused cannot be held criminally responsible for his acts, provided such a delusion resulted from a severe mental disease or

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[217] MacDonald, 2013 WL 3376714 at *2.
[218] SJA 309.
[219] SJA 311.

defect."[220] 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.

More important, however, the evidence simply did not raise the issue of involuntary intoxication.[221] As this Court ruled in Hensler, once the side-effects of a substance are known to an accused, any continued ingestion is voluntary and the defense of involuntary intoxication cannot apply.[222] The testimony of Dr. Glenmullen establishes that, to the extent Chantix had any side-effects (including the onset of aggressive or homicidal tendencies), they would have built up gradually over the course of time.[223] Haley Safronoff testified that appellant asked her on the day before the murder, "If I killed someone would you still love me?"[224] Appellant also acknowledged in his confession that he had been "thinking about killing someone for about 5 days." However, according to the defense's theory of the case, appellant continued to ingest Chantix rather than seek help.[225] There is also no evidence that appellant was unaware of the drug's ostensible side-effects, which, in accordance with Article 50a(b), UCMJ, appellant had the burden

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[220] SJA 311.
[221] This would also go to the first Gibson prong, i.e., whether the proposed instruction was correct.
[222] Hensler, 44 M.J. at 187.
[223] JA 457.
[224] JA 178.
[225] JA 689 (Pros. Ex. 4, pg. 2).

of showing by clear and convincing evidence. Not only does Ms. Safronoff's testimony indicate the exact opposite, so does appellant's confession. If 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. More accurately, his continued ingestion would be entirely volitional.[226]

At court-martial, appellant relied heavily on the Adverse Event Reports filed by others who believed Chantix was causing them to behave aggressively. If accurate, the AERs would tend to show that users suffering from this purported side-effect were fully aware of the metamorphosis occurring within. Since appellant should have or, in fact, saw the signs of his deterioration and did nothing to mitigate them, the defense of involuntary intoxication is simply incorrect as a matter of law.

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. If appellant continued to use Chantix while

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[226] "The only safe test of involuntary drunkenness and the one almost if not quite universally found in the authorities, *is the absence of an exercise of independent judgment and volition* on the part of the accused in taking intoxicant . . . ." United States v. Craig, 3 C.M.R. 304, 311 (A.B.R. 1952), quoting Johnson v. Virginia, 115 SE 673, 677 (1923) (emphasis added).

cognizant of its effects, then he is not entitled to an involuntary intoxication instruction. Hence, appellant's ignorance or mistake of fact was neither honest nor reasonable.[227] The military judge therefore was exactly right when he made the following insight:

> I'm just saying there's no evidence this act was involuntary. Your own evidence was it was delusional, and it goes to the mental responsibility defense. . . .[228]

Had appellant put forth even a shred of evidence that he was unaware of the gradual changes occurring within, he would have been able fulfill this prong of the Gibson test. His failure to do so only underscores the fact that he was not intoxicated, involuntarily or otherwise. If anything, Ms. Safronoff's testimony and the confession show that appellant was lucid, knew right from wrong, and was not operating under a delusion. Appellant therefore fails the third and final prong of the Gibson test.

2. No Prejudice.

Even if we were to assume that the military judge committed error by failing to instruct on involuntary intoxication, such

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[227] Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 5-12 (1 Jan. 2010).
[228] JA 686.

error did not have "substantial influence" on the findings and was harmless beyond a reasonable doubt.[229]

a. No matter which instruction was given, the panel had to make the same determination as to mental responsibility.

Involuntary intoxication is treated like insanity.[230] It therefore follows that a proper involuntary intoxication instruction would require the panel to determine whether appellant was suffering from a severe mental disease or defect. However, because the military judge instructed the panel on mental responsibility, the panel already was charged with determining precisely this. "By instructing on mental responsibility, [the military judge] covered all elements of involuntary intoxication, except the causes of the intoxication, which were not disputed."[231] No matter which instruction was given, the panel had to make the same determination as to mental responsibility. Said the Army Court, "[t]he ultimate issue to be decided by the panel relative to each is sufficiently equivalent to ensure the reliability of the convictions in this case."[232]

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[229] Gibson, 58 M.J. at 7 (C.A.A.F. 2003); citing Damatta-Olivera, 37 M.J. at 478 (C.M.A.1993); United States v. DiPaola, 67 M.J. 98, 102 (C.A.A.F. 2008).
[230] Hensler, 44 M.J. at 188.
[231] Id.
[232] MacDonald, 2013 WL 3376714 at *9.

Since 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.

b. Appellant appreciated the nature, quality, and wrongfulness of his acts.

Even if Chantix was the catalyst for chemical changes within appellant's brain that caused or exacerbated a severe mental disease or defect, the evidence indicates that appellant was fully aware of the nature, quality, and wrongfulness of his acts. In itself, "[m]ental disease or defect does not otherwise constitute a defense."[233] The same holds true with respect to intoxication, "[t]here must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent, not just evidence of mere intoxication."[234] Since 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. It therefore follows that the denial of the involuntary intoxication instruction in no way prejudiced appellant.

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[233] Art. 50a, UCMJ.

[234] United States v. Peterson, 47 M.J. 231, 233-234 (C.A.A.F. 1997), quoting United States v. Box, 28 MJ 584, 585 (A.C.M.R. 1989) (internal quotations omitted).

As previously discussed, appellant's behavior before, during, and after the murder incontrovertibly demonstrates that appellant understood the nature, quality, and wrongfulness of his acts.[235] Appellant, at all times, was cognizant of reality and not operating under a delusion.

To the extent the military judge erred by failing to give an instruction on involuntary intoxication, the error was ". . . unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."[236] Since "appellant cannot escape the overwhelming evidence of his mental responsibility for the offenses he committed"[237], he suffered no prejudice and his conviction for premeditated murder must stand

c. Appellant proffered no physical evidence showing severe mental disease or defect.

Despite requesting an MRI scan of appellant's brain, defense counsel proffered no medical evidence at court-martial showing that appellant was suffering from a mental disease or defect.[238] Rather than aver direct proof of a cranial injury or chemical imbalance, the defense theory amounted to hypothesis and conjecture.

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[235] See Section I(1) hereinabove.
[236] United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007), quoting Yates v. Evatt, 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), overruled on other grounds by Estelle v. McGuire, 502 U.S. 62, 72 n. 4, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).
[237] MacDonald, 2013 WL 3376714 at *9.
[238] SJA 330-331 (App. Ex. IV, enclosure 13).

d. At best, there is scant evidence that Chantix was causing or exacerbating a severe mental disease or defect.

Appellant and SA Maier engaged in the following exchange:

> Q. Did you consume any medications, supplements, alcohol or other drugs prior to stabbing that man?
>
> A. No.[239]

A reasonable fact-finder can conclude from appellant's unqualified 'no' that appellant was not abiding by his Chantix prescription. This would explain why only one of three urinalyses tested positive for Varenicline, and only a miniscule trace at that. It would also explain why none of the three blood tests detected any Varenicline whatsoever. A reasonable fact-finder could also conclude that the slight trace of Varenicline that may have been in appellant's urine could not have affected his mental state during the commission of the crime. Moreover, Dr. Jacobs, the government expert, testified that, for a drug to influence the brain, traces would have to be present in the blood, not the urine.[240]

The evidence showed that the presence of Varenicline in appellant's urine immediately after the crime was at a level consistent with someone who had discontinued use. The government called Capt. David R. Lesser of the Armed Forces

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[239] JA 694 (Pros. Ex. 4, pg. 6).
[240] JA 678.

Institute of Pathology as an expert in forensic toxicology.[241] Capt. Lesser addressed the private lab's finding of .58 nanograms per milliliter of urine by explaining that one nanogram equals 1/1,000,000,000th of a gram.[242] Hence, .58 nanograms amounts to approximately 6/10ths of one billionth of a gram.[243]

Not only was the Varenicline in appellant's urine barely detectable, no Varenicline whatsoever was detected in appellant's bloodstream. Capt. Lesser explained that, according to the literature he reviewed, the half-life of Varenicline is one day.[244] Had appellant been taking Chantix in the prescribed dosage, Varenicline would have been detectible in his bloodstream for five or six days.[245] It was his opinion that appellant had not been taking the prescribed amount of Chantix, since the findings "[were] more consistent with discontinuing use some days prior."[246]

On cross-examination, defense counsel attacked the stability studies upon which Capt. Lesser relied.[247] However, Pfizer was perfectly willing to make the stability studies available, except that defense counsel was adamant in his

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[241] SJA 179, 182.
[242] SJA 190.
[243] SJA 190.
[244] SJA 190.
[245] SJA 191; See also JA 515, wherein Dr. Glenmullen concurs.
[246] SJA 192.
[247] SJA 198-201, 210-212.

refusal to execute the protective order.[248] 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.

3. The military judge did not err by failing to instruct on the effect of intoxication on appellant's ability to form specific intent and premeditation.

In the absence of an objection, a military judge's failure to sua sponte give an instruction is reviewed for plain error.[249] Under plain error review, this Court "will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused."[250] In the instant case, there was no error and, even if there was, appellant suffered no material prejudice.

Defense counsel did not request a tailored instruction on intoxication and partial mental responsibility. However, the military judge did instruct the panel on partial mental responsibility generally.[251] He listed the specific elements of

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[248] JA 41; See also JA 50 for a definition of "stability study": "The stability studies will show how long the drug remains, how it degrades, how the body processes it . . . does it degrade to the point of undetecability [*sic*]. . . ."; JA 71, wherein defense counsel summarily withdraws his request for the stability studies.[248]

[249] United States v. Garner, 71 M.J. 430, 434 (C.A.A.F. 2013).

[250] Id., citing United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F.2011).

[251] SJA 313.

each charge that a finding of partial mental responsibility would negate.[252] The military judge further explained that

> an accused may be sane and yet, because of some underlying mental disease, defect, condition, or disorder, may be mentally incapable of entertaining the state of mind required for the three offenses I just told you about[,] that is, reason to believe Sergeant Jones was empowered to apprehend [appellant], a premeditated design to kill Private Bulmer, and the intent to kill or inflict great bodily harm on Private Bulmer.
>
> You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a mental disease, defect, condition or disorder of such consequence and degree as to deprive him of the ability to entertain these states of mind.[253]

As explained above, the instruction was broad enough and generic enough so a fact-finder could determine that Chantix caused some "defect, condition, or disorder" that would negate scienter.

In his brief, appellant cites to United States v. Higgins for the proposition that a military judge must instruct the members "when the issue is whether intoxication negates an element of the offense."[254] However, this Court's predecessor also said in Higgins,

> We have frequently recognized that the effects of drunkenness may be so severe as to obliterate all knowledge of the nature demanded in this case—and thus

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[252] SJA 314.
[253] SJA 614-315.
[254] Appellant's Br. 54, citing Higgins, 15 C.M.R. 143, 148 (C.M.A. 1954).

> to remove an ingredient which is ultimately essential to a finding of guilt. . . .[255]

As explained at length hereinabove, there is ample proof that appellant was lucid and rational, and that his mental faculties were not so "obliterate[d]" as to destroy his ability to premeditate. Appellant admitted to formulating PVT Bulmer's slaying for 30 seconds and to contemplating the commission of a murder for the previous five days.[256] It also stands to reason that if appellant did not have the cognitive ability to premeditate, he would not have had the presence of mind systematically to eliminate incriminating evidence and plot his escape to a densely wooded area of post.

This case is very similar to United States v. Watford, another premeditated murder case in which a military judge did not give an instruction on [voluntary] intoxication and partial mental responsibility.[257] In deciding that there was no error, this Court's predecessor looked to the fact that "[there was] no showing that [Watford] had consumed excessive amounts of alcohol."[258] In the instant 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.

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[255] Higgins, 15 C.M.R. at 148.
[256] JA 690 (Pros. Ex. 4, pg. 2).
[257] United States v. Watford, 32 M.J. 176 (C.M.A. 1991).
[258] Id. at 178.

Moreover, Watford's "recollection of the events of the evening was lucid and straightforward. This hardly is the sort of testimony one would expect if he had been so intoxicated as to be unable to form the specific intent to kill."[259] Similar to this, the confession in the instant case shows that appellant recalled with great detail the events surrounding his murder of PVT Bulmer.[260]

Appellant argues that, in order to address partial mental responsibility, the military judge should have read a modified version of the standard instruction for voluntary intoxication, substituting the word "involuntary" for "voluntary".[261] Appellant's suggestion would have required the military judge to give the following concluding instruction:

> If you are convinced beyond a reasonable doubt that the accused in fact (entertained the premeditated design to kill) (had the specific intent to [kill]) . . . ., the accused will not avoid criminal responsibility because of voluntary intoxication.[262]

Again, appellant simply cannot overcome the massive amount of evidence indicating that his behavior was deliberate and reflective. He admitted to spending five days thinking about killing someone generally and 30 seconds thinking about killing

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[259] Id.
[260] JA 689-695 (Pros. Ex. 4).
[261] Appellant's Br. at 54-55.
[262] Benchbook, para. 5-12.

PVT Bulmer in particular.[263] Before leaving his room, appellant armed himself with a double-edged knife.[264] There is no evidence whatsoever showing that appellant did not know who he was or where he was, or that he lacked cognition and control. No witnesses testified that appellant was behaving in a peculiar manner or was experiencing delusions. Appellant had the presence of mind to stalk a sleeping victim inside a barracks where he would not be recognized and when no witnesses were present. As for appellant being so intoxicated that he could not recognize SSG Jones as someone with the authority to apprehend him, SSG Jones testified that appellant called him "sergeant" and went to parade rest when his attempt to cow the NCO into submission failed.[265]

In sum, appellant cannot negate scienter because his mind was not "significantly diminished in capacity" by Chantix.[266] It therefore follows that there was no error and, even if there were, appellant was not materially prejudiced.

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[263] JA 690, 692 (Pros. Ex. 4, pgs. 2, 4).
[264] JA 691 (Pros. Ex. 4, pgs. 4).
[265] SJA 129.
[266] United States v. Curtis, 44 M.J. 106, 122 (C.A.A.F. 1996).

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on civilian defense counsel, Mr. William Cassara and on appellate defense counsel, CPT Robert Meek on April 23, 2014.

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