IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Docket No. ARMY 20120585
	)	USCA Dkt. No. 14-0199/AR
Private (E-1) **BRYCE M. PHILLIPS,** United States Army, Appellant	)	

PATRICK A. CROCKER
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060-5546
(703)693-0713
USCAAF No. 35796

AARON R. INKENBRANT
Captain, Judge Advocate
Branch Chief,
Defense Appellate Division
USCAAF No. 35750

KEVIN BOYLE
Colonel, Judge Advocate
Chief,
Defense Appellate Division
USCAAF No. 35966

INDEX

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

U.S. Supreme Court

Court of Appeals for the Armed Forces

Court of Criminal Appeals

Statutes

Uniform Code of Military Justice

Manual for Courts-Martial, United States, 2008 Edition

Other Authorities

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Private (E-1) **Bryce M. Phillips,** United States Army, Appellant	)	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20120585 USCA Dkt. No. 14-0199/AR

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

Issue Granted

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO DISOBEYING THE ORDER OF HIS COMMANDER IN VIOLATION OF ARTICLE 90, UCMJ, WHEN THE ULTIMATE OFFENSE AT ISSUE WAS THE MINOR OFFENSE OF BREAKING RESTRICTION DESCRIBED UNDER ARTICLE 134, UCMJ, AND THE RECORD DOES NOT REFLECT APPELLANT'S UNDERSTANDING THAT THE ORDER IMPOSING RESTRICTION WAS ISSUED WITH THE FULL AUTHORITY OF HIS COMMANDER'S OFFICE TO LIFT THE DUTY, IN THE PARLANCE OF THIS COURT'S EARLIER OPINION, "ABOVE THE COMMON RUCK."

Statement of Statutory Jurisdiction

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

Statement of the Case

On May 7 and June 13, 2012, at Fort Carson, Colorado, a military judge sitting as a special court-martial tried Private Bryce M. Phillips [hereinafter appellant]. The military judge convicted appellant, in accordance with his pleas, of absence without leave (two specifications), use of a controlled substance, and failure to obey a lawful order in violation of Articles 86, 112a, and 90, UCMJ, 10 U.S.C. §§ 886, 912a, and 890 (2012).

The military judge sentenced appellant to nine months confinement and a bad-conduct discharge and granted sixty-two days of confinement credit against the sentence to confinement. The convening authority approved the sentence as adjudged and approved sixty-two days of confinement credit against the sentence to confinement.

The Army Court initially set aside the finding of guilty to The Additional Charge and its Specification and affirmed the remaining findings and sentence. (JA 1-3). The Army Court granted the government's request for reconsideration en banc and affirmed the approved findings and sentence in its entirety. (JA 5-9). Appellant was notified of the Army Court's decision and subsequently petitioned this Court for a grant of review on November 22, 2013. On June 3, 2014, this Honorable Court granted appellant's petition for grant of review.

Statement of Facts

On March 14, 2012, Captain (CPT) PE, appellant's company commander, gave appellant an order restricting appellant to the limits of Fort Carson, Colorado. (JA 43). CPT PE gave this order as a result of appellant's recent period of absence without leave (AWOL). (JA 32, 43).

On April 11, 2012, appellant left Fort Carson, Colorado, without authorization and travelled to an off post apartment to visit his girlfriend. (JA 34). Because appellant left the geographical limits of Fort Carson, the government charged him with violating the order of his commander by breaking the imposed restriction. (JA 19).

On June 13, 2012, the military judge found appellant guilty, in accordance with his pleas, of violating his commander's order to remain within the geographical limits of Fort Carson by leaving Fort Carson on April 11, 2012. (JA 38).

Additional facts necessary for disposition of the issue presented are contained in the argument below.

Summary of Argument

In evaluating the providency of appellant's plea, the Army Court failed to properly consider whether the appellant understood how the ultimate offense doctrine applied to the facts of his case. (JA 5-9). Specifically, appellant needed to

articulate not just a factual basis to support his plea, but also an understanding of why he was guilty of willfully disobeying a commissioned officer instead of merely breaking restriction. *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *United States v. Care*, 18 USCMA 535, 538-39, 40 C.M.R. 247, 250-51 (1969)). *See also United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013); *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011); *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006); *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003).

In failing to apply binding authority for determining an adequate factual and legal basis to accept a plea of guilt, the Army Court erodes the distinction between willful disobedience and breaking restriction while also undermining the scheme of crime and punishment established by Congress and the President. In addition, the Army Court's decision implicitly violates the historical principle of favoring a more specific criminal provision over a more general one. Under the Army Court's reasoning, breaking restriction would be relegated to an offense that is either superfluous or, at best, limited to situations where a commander gives an order through an intermediary or where an accused unintentionally breaches the limits of his restriction. This was not the intent of Congress and the

President in creating two distinct crimes with two different sets of elements, therefore the Army Court should be reversed.

Issue

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO DISOBEYING THE ORDER OF HIS COMMANDER IN VIOLATION OF ARTICLE 90, UCMJ, WHEN THE ULTIMATE OFFENSE AT ISSUE WAS THE MINOR OFFENSE OF BREAKING RESTRICTION DESCRIBED UNDER ARTICLE 134, UCMJ, AND THE RECORD DOES NOT REFLECT APPELLANT'S UNDERSTANDING THAT THE ORDER IMPOSING RESTRICTION WAS ISSUED WITH THE FULL AUTHORITY OF HIS COMMANDER'S OFFICE TO LIFT THE DUTY, IN THE PARLANCE OF THIS COURT'S EARLIER OPINION, "ABOVE THE COMMON RUCK."

Standard of review

Courts review a military judge's decision to accept a guilty plea for abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "Any ruling based on an erroneous view of the law . . . constitutes an abuse of discretion." *Id.* (citations omitted).

Law

The test for an abuse of discretion is whether the record shows a substantial basis in law or fact for questioning the plea. *Id.* A military judge also abuses his discretion by accepting a plea of guilty without adequately explaining each element of the offense to the accused. *Schell*, 72 M.J. at 345. "[T]o find a plea of guilty to be knowing and voluntary, the record of trial 'must reflect' that the elements of 'each

offense charged have been explained to the accused' by the military judge." *Redlinski*, 58 M.J. at 119 (quoting *Care*, 18 C.M.A. at 541, 40 C.M.R. at 253); *see also* Article 45, UCMJ; Rule for Courts-Martial [hereinafter R.C.M.] 910(c)(1).

"Rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." *Redlinski*, 58 M.J. at 119. The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts. *Medina*, 66 M.J. at 26 (citing *Care*, 18 C.M.A. at 538-39, 40 C.M.R. at 250-51).

Military law prohibits escalating the severity of minor offenses by charging them as order violations or willful disobedience of superiors. *United States v. Hargrove*, 51 M.J. 408, 409 (C.A.A.F. 1999)(citing *United States v. Loos*, 4 U.S.C.M.A. 478, 16 C.M.R. 52 (1954); *United States v. Peaches*, 25 M.J. 364 (C.M.A. 1987)). Military courts have carved out a narrow exception to this rule when an order is issued "with a view to adding the full authority of [the commissioned officer's] position and rank to ensure the accused's compliance with the directive." *United States v. Traxler*, 39 M.J. 476, 479 (C.M.A. 1994)(citations omitted). The test for whether an

Article 90, UCMJ, offense is the ultimate offense at issue is whether the order given by the officer is given "with the full authority of his office" with the intent to "lift [the order] above the common ruck." *Loos*, 4 U.S.C.M.A. at 480-81, 16 C.M.R. at 54.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see also United States v. Gaudin*, 515 U.S. 506, 510 (1995). The United States Supreme Court has stated "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013); *see also United States v. Castellano*, 72 M.J. 217, 222 (C.A.A.F. 2013) (citing *United States v. Apprendi*, 530 U.S. 466, 490 (2000)). "It is no answer to say that the defendant could have received the same sentence with or without that fact." *Id.* at 2162.

Whether an order is given with the full authority of a commander's office is a distinction of "critical significance" because it distinguishes the serious offense of willful disobedience from the minor offense of breaking restriction. *See Castellano*, 72 M.J. at 222 (the determination of whether *Marcum* factors exist is a matter of critical significance); *see*

also Hartman, 69 M.J. at 468. The colloquy between the military judge and the accused must contain an appropriate discussion and acknowledgement on the part of the accused of a "critical distinction." *See Hartman*, 69 M.J. at 468.

Specific to Article 90, UCMJ, the President has limited the otherwise broad scope of this offense. "Violations of regulations, standing orders or directives, or failure to perform previously established duties are not punishable under this article, but may violate Article 92." *Manual for Courts-Martial, United States*, pt. IV, para. 14.c(2)(b) (2012 ed.) [hereinafter *MCM*]. "An exhortation to 'obey the law' or to perform one's military duty does not constitute an order under this article." *MCM*, pt. IV, para. 14.c(2)(d). Additionally, for circumstances when an accused violates an order restricting his movement to certain limits, the President specifically promulgated the offense of restriction breaking under Article 134, UCMJ. *MCM*, pt. IV, para. 102.

The elements of willful disobedience (Article 90, UCMJ) and breaking restriction (Article 134, UCMJ) are as follows:

	Article 90, UCMJ Willful Disobedience	**Article 134, UCMJ** Breaking Restriction
1	Accused received a lawful command from a commissioned officer;	A certain person ordered the accused to be restricted to certain limits;
2	The officer was superior commissioned officer of the accused;	Said person was authorized to order said restriction;
3	The accused then knew that this officer was the accused's superior commissioned officer;	The accused knew of the restriction and the limits thereof;
4	The accused willfully disobeyed the lawful command.	The accused went beyond the limits of the restriction before being released therefrom by proper authority;
5	N/A	That such conduct was prejudicial to good order and discipline or was service discrediting.

MCM, pt. IV, ¶¶ 14.b.(2), 102.b. The maximum punishment for willful disobedience is confinement for five years, total forfeitures, and a dishonorable discharge. *MCM*, pt. IV, ¶ 14.e.(2). The maximum punishment for breaking restriction is confinement for one month, forfeiture of 2/3 pay for one month, and no discharge. *MCM*, pt. IV, ¶ 102.e.

Argument

A. Private Phillips was improvident because he did not understand how the ultimate offense doctrine applied to the facts of his case in accordance with *Care* and *Medina*.

The Army Court violated controlling precedent in the appellant's case by dispensing with the requirement that "[t]he providence of a plea [be] based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to

those facts." *Medina*, 66 M.J. at 26; *Care*, 18 USCMA at 538-39, 40 C.M.R. at 250-51; *Schell*, 72 M.J. at 345; *Hartman*, 69 M.J. at 468; *Aleman*, 62 M.J. at 283; *Redlinski*, 58 M.J. at 119.

During the providence inquiry, the military judge failed to establish a sufficient factual basis to support a violation of Article 90, UCMJ, or properly advise appellant of the nature of that offense. (JA 31-34). The record does not establish that PVT Phillips understood the distinction between breaking restriction and willfully disobeying an order imposing restriction when the order had been intended to "rise above the common ruck." (JA 31-34).

Willful disobedience of a superior commissioned officer and restriction breaking are distinct offenses. *Cf. Traxler*, 39 M.J. at 478-79 (holding that the offenses of missing movement and violating a commander's order to deploy were distinct offenses when the order served "to emphasize to appellant the importance of compliance with the earlier directive . . . ."). "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne*, 133 S.Ct. at 2158 (citations omitted).

Typically, the violation of a moral restraint "imposed by an order directing a person to remain within specified limits . . . in the interest of training, operations, security, or

safety[]" represents the minor offense of restriction breaking under Article 134, UCMJ. *MCM*, pt. IV, para. 102.c. An Article 90, UCMJ, violation is not established by the mere failure "to perform one's military duty." *MCM*, pt. IV, para. 14.c(2)(d). This Court has stated that an order establishing a routine duty, such as a standing administrative restriction to specified limits, cannot establish a violation of Article 90, UCMJ, absent evidence that the issuing officer "did anything to lift his routine order above the common ruck." *See United States v. Ranney*, 67 M.J. 297, 300 (C.A.A.F. 2009) (citations and internal quotation marks omitted).

The ultimate offense doctrine is well established and should have been addressed by the military judge with respect to appellant's plea to The Additional Charge. The facts distinguishing willful disobedience from breaking restriction constitute an "element" or "ingredient" of the charged offense. *See Apprendi*, 530 U.S. at 483, n.10 (holding that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed); *see also Alleyne*, 133 S. Ct. at 2158. Whether CPT PE's order to appellant "rose above the common ruck" is an essential element or ingredient of the charged offense that must be understood by the appellant during the providence inquiry.

In this case, the military judge did not explain the critical difference between the serious offense of willful disobedience and the minor offense of restriction breaking. (JA 29-35). The record is devoid of any discussion as to whether appellant understood that CPT PE intended the order as anything other than a routine establishment of restrictions imposed because the appellant had been absent without leave on prior occasions. (JA 31-34). The record also does not reflect that appellant understood how the law (the ultimate offense doctrine) applied to the facts of his case (the order given by CPT PE), therefore he was not provident. *Schell*, 72 M.J. at 345 (C.A.A.F. 2013); *Hartman*, 69 M.J. at, 468; *Redlinski*, 58 M.J. at 119.

In its en banc decision, the Army Court erroneously noted that "[b]ecause the elements were met for willful disobedience under Article 90, UCMJ, this charge was not preempted by Article 134, UCMJ (breaking restriction), *nor was there a requirement during the providence inquiry to distinguish between these two offenses.*" *United States v. Phillips*, 73 M.J. 572, 574 (A. Ct. Crim. App. 2014) (emphasis added). The Army Court also erroneously found facts in the record, which, *in its view*, established an order issued with the "full authority" of the commander's position without regard to any "understanding of how

the law relates to those facts" on the appellant's part. *Medina*, 66 M.J. at 26.

The Army Court erred by applying a legal sufficiency analysis to what should have been a providence review. The military judge bore the responsibility to establish the appellant's understanding of how the law applied to the facts during providence. The Army Court's decision removes this responsibility. In doing so, the Army Court contravenes this Court's long standing requirement that an accused not just provide a factual basis sufficient to support a plea, but also understand why he is guilty of the crime to which he is pleading. *Medina*, 66 M.J. at 26; *Jordan*, 57 M.J. at 238. Here, the record does not establish that appellant understood the ultimate offense doctrine, nor does it indicate that he understood why or how his restriction violations supported a plea to willfully disobeying the order of his commander. Therefore the Army Court should have set aside and dismissed The Additional Charge.

B. The effect of the Army Court's decision renders any distinction between willful disobedience and breaking restriction meaningless and guts the historical rule of enforcing a more specific crime over a more general crime.

As indicated by Senior Judge Yob in his dissent, willful disobedience and breaking restriction are qualitatively different crimes with the former carrying a maximum penalty

sixty times greater than the latter in addition to the possibility of a punitive discharge. *Phillips*, 73 M.J. at 575 (Yob, Senior Judge, dissenting). The Army Court's decision, and specifically their reasoning that an accused only need know of the order and intentionally defy it to commit willful disobedience, blurs the distinctions established by Congress and the President between willful disobedience and breaking restriction. *See Id.* at 576 (Yob, Senior Judge, concurring in part and dissenting in part; Krauss, J., concurring in part and dissenting in part).

In doing so, the Army Court "undermines the scheme of crime and punishment" established by Congress and the President and "runs afoul of an essential corollary to the rule of lenity by favoring the general over the specific criminal provision." *Id.* at 576, 579 (discussing the prosecutorial choice between Article 90, UCMJ, and Article 95, UCMJ, for a soldier ordered into pretrial confinement who then escapes from pretrial confinement) (Krauss, J., concurring in part and dissenting in part). The Army Court's decision essentially relegates breaking restriction as an offense that is either superfluous or, at best, limited to situations where a commander gives an order through an intermediary or where an accused unintentionally breaches the limits of his restriction. *Id.* at 579 (Krauss, J., concurring in part and dissenting in part).

C. The Army Court recognized the distinction between willful disobedience and breaking restriction as "elemental," but failed to apply a complete analysis in evaluating the appellant's plea.

In footnote 7 of their opinion, the Army Court addressed the dissent's argument that their decision blurs the distinction between willful disobedience and breaking restriction:

> The dissenting opinions insist that we are either abolishing or ignoring any distinction between willful disobedience and breaking restriction. We do neither. *The distinction is elemental.* Willful disobedience requires an intentional defiance of authority while breaking restriction merely requires going beyond the limits of the restriction before being released therefrom by proper authority. *MCM,* pt. IV, ¶ 102.b(5). We find the facts of this case, as admitted to by appellant, meet the elements of willful disobedience. *That the same facts may also satisfy the elements of breaking restriction is irrelevant to the sufficiency of appellant's plea.*

Id. at 574 n.7 (emphasis added).

The Army Court acknowledged *a* distinction between these crimes with regard to intent on the part of the accused, but left the analysis incomplete. "Willfulness" only determines whether an order was violated intentionally or negligently. This Court has historically distinguished between willful disobedience and breaking restriction by analyzing *the nature of the order,* not the manner in which the order was violated. *See Loos,* 16 C.M.R. at 54-55, 4 U.S.C.M.A. at 480-481; *Peaches,* 25 M.J. at 366; *Traxler,* 39 M.J. at 478-479. The elements of willful disobedience indicate that the gravamen of the crime is prohibiting blatant disrespect for the authority of commissioned

officers. *See MCM*, pt. IV, ¶ 14. (which includes the alternate offenses of striking or assaulting a superior commissioned officer). This principle is the very foundation upon which an effective military force rests, which is why the penalty for a malicious disregard for such authority is so significantly higher than that of breaking restriction. *See* Traxler, 39 M.J. at 478-479; *see also Ranney*, 67 M.J. at 300; MCM, pt. IV, ¶ 14.e.(2).

Conversely, the essence of breaking restriction concerns the object of the order and not the authority under which the order is given. *See MCM*, pt. IV, ¶ 102.b. Instead of requiring knowledge that the person giving the order is a superior officer, breaking restriction requires knowledge of the substance of the order itself without the requirement that failing to comply with the order be "willful." *Id.* Breaking restriction is a minor offense, and the President has recognized that the lesser punishment should apply in instances of restriction breaking regardless of whether an accused is convicted under Article 92, UCMJ, or Article 134, UCMJ. *Phillips*, 73 M.J. at 577 & n.8.

Here, there was no discussion during the colloquy regarding whether CPT PE's order was given with the full authority of his office, and therefore no indication that there was any impact on the authority of his office as the company commander. (JA 29-

35). Appellant's commander gave the order as a matter of routine to keep the appellant from absenting himself from his unit, and appellant only stated that he violated his commander's order to visit his girlfriend. (JA 32-34); *see generally* R.C.M. 304 (indicating the routine nature of restrictions imposed by commanders in lieu of pretrial confinement). The Army Court failed to consider the purpose of willful disobedience in conjunction with the facts adduced during appellant's plea, and thereby failed to properly apply law to the facts of this case.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss The Additional Charge.

PATRICK A. CROCKER
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060-5546
(703)693-0713
USCAAF No. 35976

AARON R. INKENBRANDT
Captain, Judge Advocate
Branch Chief, Defense
Appellate Division
USCAAF No. 35750

KEVIN BOYLE
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF No. 35966

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Phillips, Crim. App. Dkt. No. 20120585, Dkt. No. 14-0199/AR, was delivered to the Court and Government Appellate Division on June 19, 2014.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736