11 April 2014

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES**,
Appellee,

v.

**ADRIAN TORRES,**
Airman First Class (E-3), USAF
Appellant.

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Crim. App. No. 37623
USCA Dkt. No. 14-0222/AF

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***BRIEF OF BEHALF OF APPELLANT***

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**IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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| *Appellee*, | ) | **APPELLANT** |
| v. | ) | |
| | ) | USCA Dkt. No. 14-0222/AF |
| Airman First Class (E-3) | ) | |
| **ADRIAN TORRES,** | ) | Crim. App. No. 37623 |
| USAF, | ) | |
| *Appellant*. | ) | |

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

## Issue Presented

**WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE REQUESTED INSTRUCTION.**

## Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

## Statement of the Case

On 21-24 July 2009 and 21-23 September 2009, Appellant was tried by a general court-martial composed of officer members at Vandenberg Air Force Base (AFB). Contrary to his pleas, Appellant was found guilty of one specification of aggravated assault and three specifications of assault consummated by a battery, in violation of Article 128, UCMJ. Appellant was sentenced to be reduced to the grade of E-1, to 6 months'

confinement, and to a bad-conduct discharge. J.A. 189. On 5 February 2010, the convening authority approved the adjudged findings and the sentence and, except for the bad-conduct discharge, ordered it executed.

In a decision issued on October 2, 2013, AFCCA affirmed the findings and sentence. J.A. 10-11. Appellant filed a timely petition for grant of review on December 3, 2013. *United States v. Torres*, __ M.J. __, No. 12-0222/AF (C.A.A.F. Dec. 3, 2013). This Court granted Appellant's petition for review on March 12, 2014. *United States v. Torres*, __ M.J. __, No. 12-0222/AF (C.A.A.F. Mar. 12, 2014).

**Statement of Facts**

The Specification of Charge I alleges that Appellant assaulted VJT (Appellant's spouse) by choking her throat with his hands with a force likely to produce death or grievous bodily harm. J.A. at 12. Appellant had epileptic seizures.

*Appellant's First Seizure*

Staff Sergeant (SSgt) Galindo was a firefighter at Vandenberg AFB. J.A. 82. Sometime in June 2007 he responded to a call for a vehicle accident around 0630. J.A. 82-83. When he arrived at the scene he saw Appellant in the front seat of the vehicle with his eyes closed. J.A. 83. Appellant was not responsive, so SSgt Galindo and the rescue workers took precautions for a spinal injury. *Id.* They put a C-collar on

him, transferred him to a backboard, and strapped him down. J.A. 84.

After removing Appellant from the vehicle he started to cry. *Id.* Then he started shouting and tried to forcefully get up. *Id.* Appellant's efforts succeeded in snapping the C-collar and starting to pop the straps holding him down. J.A. 86. After being transferred to the back of an ambulance Appellant looked at SSgt Galindo and asked, "What's going on?" *Id.* When SSgt Galindo informed him that he was in an accident he replied, "Really? Are you serious?" *Id.*

Master Sergeant (MSgt) Ilsley was a member of security forces who responded to this same accident. J.A. 92. According to MSgt Ilsley, the Appellant was in the front seat of the vehicle and he was not responsive. J.A. 93. Appellant's eyes were "halfway open," dilated, and rolled back in his head. *Id.* Shortly after Appellant was removed from the vehicle and placed on the backboard, he became conscious and then combative with medical personnel. *Id.* He appeared to be unaware of what was going on around him. *Id.* Because he was fighting against the medical personnel, they taped his hands in front of him with medical tape. *Id.* About ten to fifteen minutes later, Appellant stopped fighting, became alert, and calm. *Id.* He had no recollection of the moments prior. *Id.*

*The Night of 11 May 2008*

On the night of 11 May 2008, Appellant was at one of the gas pumps on Vandenberg AFB when he began complaining of chest pain, lightheadedness, and loss of feeling on one side of his body. J.A. 54. His wife, VJT, called the paramedics. *Id.*

*The Night of 12 May 2008*

At trial, VJT testified that on the night of 12 May 2008, she and the Appellant had a party at their house. J.A. 31. They both drank alcohol. J.A. 33. VJT and Appellant did not argue at the party and were not upset with each other. J.A. 34. When they saw each other or passed by each other during the party, they would hug or kiss. J.A. 34, 55. At around 0200, VJT and Appellant went to bed. J.A. 34, 56. Some of the party guests also went to sleep at the house. J.A. 34.

VJT woke up later that morning to the telephone ringing in the dining room area. J.A. 34, 59. Some of the party guests also woke up and decided it was time to leave. J.A. 35. VJT decided to give them a ride home. *Id.*

According to VJT, she went into the bedroom to tell the Appellant she was going to drop some of the guests off. *Id.* Appellant was lying on the floor, curled up in a ball with just a T-shirt on and no pants. J.A. 35, 60. VJT shook her husband and tried to get him to wake up so she could ask him if he

wanted to come along with her. J.A. 39, 61. Appellant did not respond. J.A. 39. Eventually VJT gave up and left. J.A. 40.

Less than an hour later VJT returned to the house. J.A. 42-43, 63. When she went back into the bedroom, Appellant was still on the same spot on the floor. J.A. 43. VJT again tried to wake Appellant up. J.A. 43,63. This time she tried picking him up and shaking him hard. J.A. 43. VJT testified that she was surprised that he wouldn't wake up. *Id.* On cross-examination, VJT stated that it was unusual for Appellant to lie on the floor instead of the bed; unusual for him to be curled up in a fetal position rather than laying straight; unusual to sleep naked from the waist down; and unusual for him to be in such a deep sleep. J.A. 62.

According to VJT, Appellant woke up suddenly, grabbed her, and threw her on the bed. J.A. 45. Appellant climbed on top of her and squeezed her head with his hands. J.A. 47-48. He also hit her head into the head-board. J.A. 48. VJT tried to scratch and bite Appellant to get away from him. *Id.* Appellant grabbed VJT by her throat and began choking her. J.A. 49-50. VJT tried to call out for help but had difficulty because she wasn't able to breath. J.A. 50. VJT testified that she was crying and asking Appellant why he was doing this to her. J.A. 51. She testified that she began to cough blood onto the Appellant's face. *Id.* According to VJT, the Appellant looked

her in the eyes and asked her if she liked it, if it felt good, then licked her blood off his lips. J.A. 51. VJT testified that she was able to grab hold of a "phone base" from their nightstand. J.A. 52. She used the phone base to hit Appellant in the head. J.A. 53. Appellant fell over. *Id.* VJT then made it out of the bedroom. *Id.*

On cross-examination, VJT stated that she had never seen her husband act like that and agreed that "it was like – it was a different person, not my husband." J.A. 66.

Shortly after VJT left the bedroom, one of the guests spending the night at the house went into the bedroom and saw Appellant laying face-down on the bed. J.A. 72. When Appellant eventually got up and came out of the room, he asked what happened to his wife. J.A. 73.

*The Dorms, 4 October 2008*

SSgt Betts was a firefighter at Vandenberg AFB. J.A. 122. On 4 October 2008 he responded to a call from the dorms on Vandenberg AFB. J.A. 123. Appellant's roommate had called because Appellant had fallen and would not wake up. *Id.* When SSgt Betts arrived, two security forces members were administering first aid to Appellant. *Id.* Appellant had fallen to the floor and had blood around his mouth from biting his own tongue. *Id.* SSgt Betts testified that Appellant never became violent during this seizure. J.A. 125-26.

*Guard Mount, 12 March 2009*

MSgt Flester, a flight chief for security forces, testified that he witnessed Appellant have a seizure during a Guard Mount, in February or March of 2009. J.A. 76, 77-79. According to MSgt Flester, Appellant was on the ground, had a loss of muscle control, and was making quick involuntary movements. J.A. 77. MSgt Flester testified that during this seizure, Appellant did not become violent in any way. J.A. 80.

*Expert Testimony*

Major (Maj) Lucey was Chief of Neurology at Nellis AFB. J.A. 95. He was called as an expert in Neurology, testifying for the defense. *Id.* According to Maj Lucey, a typical seizure lasts 30 seconds to 2 minutes, but some can last longer. J.A. 102. During the seizure, the brain has abnormal electrical activity and there is loss of consciousness. *Id.* The brain has mechanisms that suppress the abnormal electrical activity. *Id.* These mechanisms engage in order to stop, or suppress the seizure. *Id.* When suppression occurs, the person having the seizure stops shaking and jerking and becomes unresponsive for a time. J.A. 103. This is called the "Postictal Period." J.A. 102. During the postictal period, the person would appear to be sleeping, or may be confused. J.A. 103.

A person experiencing a suppression of electrical brain activity during the postictal period would be difficult to

arouse. J.A. 104. They could be confused. *Id.* They could engage in abnormal behaviors, such as taking off clothes. *Id.* According to Maj Lucey, during the postictal period, a person can do activities that appear fairly well directed, but have no memory of that activity. *Id.* Some patients may even become resistive or exhibit aggressive activity towards people. J.A. 105-106. According to Maj Lucey, these actions would not be voluntary. J.A. 107.

Maj Lucey testified that, in his opinion, the Appellant was suffering from epilepsy. J.A. 108-110, 111, 113. According to Maj Lucey, it is possible that Appellant's actions toward his wife, once she roused him from sleep, were an involuntary postictal response. J.A. 110. On cross-examination, Maj Lucey agreed with the trial counsel that although it is possible Appellant's actions were an involuntary postictal response, it was not probable. J.A. 114-115, 118. On recross-examination, Maj Lucey further explained that it appeared Appellant was coming out of the postictal period, and regaining his ability to interact with his surroundings, but there may still have been some residual effect. J.A. 116.

Maj Baugh was a neurologist at Lackland AFB. J.A. 129. She was called as an expert in Neurology, testifying for the government. *Id.* Maj Baugh agreed with the defense expert that Appellant was suffering from epilepsy. J.A. 136, 139-40. Maj

Baugh also testified that well-directed postictal violence is very rare. J.A. 141. According to Maj Baugh, in case reports of people who have well-directed postictal violence, it is consistent and happens every time they experience a generalized tonic-clonic seizure. J.A. 141-42. Although Maj Baugh did not give an opinion as to whether she believed Appellant's actions were an involuntary postictal response, she seemed skeptical during her testimony.

*Instructions to the Jury*

Trial defense counsel specifically stated they were not raising the defense of "Lack of Mental Responsibility." J.A. 119, 162. In its written motion, the defense emphasized that they did not believe the defense of lack of mental responsibility applied in this case. App. Ex. IV; J.A. 190. Instead, the trial defense counsel argued that the Appellant's actions were not voluntary and thus raised a reasonable doubt as to Appellant's guilt. *Id.* The defense counsel argued that Rule for Courts-Martial (R.C.M.) 916(k)(l) was not relevant to the case and that reading the "Lack of Mental Responsibility" instruction would unfairly shift the burden to the defense to prove that Appellant was not acting voluntarily. *Id.*

The defense presented a proposed jury instruction for the military judge's consideration. The defense presented its entire case with a view towards arguing this proposed

instruction. J.A. 161-63. The instruction began by stating, "The evidence in this case has raised an issue whether the acts alleged in the Specification of Charge I were committed voluntarily." App. Ex. IV; J.A. 190. The instruction ended by stating, "What is in issue is whether the government has proven beyond a reasonable doubt that the accused acted voluntarily." *Id.*

The military judge did not read any part of the proposed instruction. J.A. 177-78. Instead, the military judge read, line-for-line, the standard benchbook instruction on lack of mental responsibility. J.A. 180-82.

During closing arguments, the trial counsel exploited this instruction by arguing that the defense has the burden to show Appellant was suffering from a severe mental disease or defect. J.A. 183. The trial counsel conceded that Appellant had epilepsy. *Id.* Trial counsel also conceded that the testimony showed the defense's theory was "a possibility." *Id.* However, the trial counsel argued, "That does not meet the clear and convincing evidence standard." *Id.*

Later, during trial counsel's rebuttal argument, he commented on testimony from MSgt Flester. J.A. 187. Specifically, the trial counsel argued, "He said, is it 'probable' that Airman Torres was in a postictal state? Yes.

That's not the standard. Probable is preponderance of the evidence." J.A. 188.

Additional facts are included in the argument below.

## Summary of Argument

The military judge denied the defense requested instruction, without supplementing the record with his analysis. This was error. The instruction was accurate and not substantially covered by other instructions. In addition, it was of such vital importance that the failure to give the instruction deprived Appellant of a defense. Accordingly, Appellant's conviction under Specification 1 of the Charge must be set aside.

## Argument

### THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE REQUESTED INSTRUCTION.

*Standard of Review*

The military judge must give a defense requested instruction if the instruction is "accurate or correct," is not substantially covered in the rest of the given instructions, and is on such a vital point that failure to give it deprived the accused of a defense. *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2002) (citations omitted). "Any doubt whether an instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F.

2000) (citing *United States v. Steinruck,* 11 M.J. 322, 324 (C.M.A. 1981)).

*Law*

All crimes under the Uniform Code contain *mens rea* elements, ranging from specific intent to simple negligence. *United States v. Curry*, 38 M.J. 77, 80 (C.M.A. 1993).

"If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery." Manual for Courts-Martial United States (MCM), Part IV, para. 54 (c)(2)(d) (2008 ed.). Involuntary acts are rarely treated as an affirmative defense, but instead almost universally treated as a required element of every offense.[1] Under the Model Penal Code, each offense element must be proved beyond a reasonable doubt, conduct is an offense element, and conduct must include a voluntary act. *See* Model Penal Code §§ 1.12(1), 1.13(9), 2.01.

Seizures attendant to epilepsy render an accused unable to form the *mens rea* required for conviction. *United States v. Rooks*, 29 M.J. 291, 292 (C.M.A. 1989).

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[1] *See*, *e.g.*, Model Penal Code § 2.01(1); Alaska Stat. § 11.81.600(a)(1982); Ariz. Rev. Stat. Ann. § 13-201 (1978); Ark. Stat. Ann. § 41-202(1)(1977); Del. Code Ann. Tit. 11, § 242 (1979); Idaho Code § 18-201(2)(1979); Ill. Ann. Stat. ch. 38, p. 4-1 (1972); *People v. Spani*, 46 Ill. App. 3d 777 (Ill. App. Ct. 1977)(a material element of every offense); Ind. Code Ann. § 35-41-2-1(a)(1983); Ky. Rev. Stat. § 501.030(1)(1975); La. Rev. Stat. Ann. § 14:8 (1974); Me. Rev. Stat. Ann. Tit. 17-A, § 31 (1983); Mo. Ann. Stat. § 562.011(1)(2)(1)(1979); Mont. Code Ann. § 45-2-202 (1981); Nev. Rev. Stat. § 194.010(6)(1977); N.H. Rev. Stat. Ann. § 626:1(1)(1974); N.J. Stat. Ann. § 2C:2-1(a)(1)(1982); Ohio Rev. Code § 2901.21(A)(1)(p. 1982); Okla. Stat. Ann. Tit. 21, § 152(6)(1983); 18 Pa. Cons. Stat. Ann. § 301 (a)(1983); Tex. Penal Code Tit. 2, § 6.01(a)(1983); V.I. Code Ann. Tit. 14, § 14(6)(1964).

The prosecution must sustain its initial burden of establishing, beyond a reasonable doubt, every element of the offense, including *mens rea*. *United States v. Berri*, 33 M.J. 337, 342-43 (C.M.A. 1991). The burden of disproving elements of the offense never shifts to the defense. *Id.* at 343.

In *United States v. Berri*, the defense contended that evidence that the accused suffered from post-traumatic stress disorder negated elements of intent for the charged offenses. *United States v. Berri*, 30 M.J. 1169, 1170 (C.G.C.M.R. 1990), *aff'd*, *United States v. Berri*, 33 M.J. 337 (C.M.A. 1991). The military judge refused to instruct the jury with regard to the impact of the appellant's mental condition on the element of intent. *Id.* Instead, the military judge instructed the jury to consider evidence of the accused's mental condition as an affirmative defense, lack of mental responsibility. *Id.*

On appeal, the Coast Guard Court of Military Review (CGCMR) held that the military judge erred by not instructing the jury to consider the psychiatric evidence when initially determining if the government satisfied its burden with respect to intent. *Id.* at 1170. According to the CGCMR, the evidence of the accused's mental state should have been considered not only to determine if there was an affirmative defense, but also to determine if the government had met its burden in proving the element of intent beyond a reasonable doubt. *Id.*

*Analysis*

At Appellant's trial, the experts for the government and the defense both agreed that Appellant suffered from epilepsy. During closing arguments, the trial counsel conceded that Appellant had epilepsy.

The evidence showed it was possible Appellant's actions were an involuntary postictal response. If Appellant's actions were in fact an involuntary postictal response, then his actions were not willful. If Appellant's actions were not willful, then he would not be guilty of aggravated assault, because the government would not be able to prove *mens rea*.

Under *Berri*, 33 M.J. at 337, evidence of an accused's mental state can be used to both 1) show the existence of an affirmative defense by clear and convincing evidence, and 2) show that the government did not prove an element of the offense beyond a reasonable doubt. In Appellant's case, the defense counsel informed the military judge that he intended to use the evidence of Appellant's epilepsy to show that the government did not prove an element of the aggravated assault specification beyond a reasonable doubt. Specifically, defense counsel attempted to show that the government did not prove beyond a reasonable doubt that Appellant's actions were voluntary, or willful.

The military judge instructed the jury on how an accused's mental state can be used to show the existence of the affirmative defense of lack of mental responsibility, but never explained how this evidence could also be used to negate *mens rea*. The defense requested such an instruction, and the military judge's bench book provides such an instruction. DA PAM 27-9, Chapter 5, section 5-17, page 918, Note 3 states, "If there is a need to explain that *mens rea* negating evidence should not be confused with the defense of lack of mental responsibility, the following may be given:"

> This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his)(her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the government has proven beyond a reasonable doubt that the accused had the ability to (act willfully). . .

**i. The requested instruction was accurate.**

Trial defense counsel's proposed instruction began with, "The evidence in this case has raised an issue whether the acts alleged in the Specification of Charge I were committed voluntarily. An accused may not be held criminally liable for his actions unless they are voluntary . . . ." App. Ex. IV; J.A. 190. Trial defense counsel, in discussing a Third Circuit Court of Appeals case, told the military judge that "unconsciousness due to an epileptic seizure did not amount to a mental disease, but did find that such evidence could raise a reasonable doubt

as to his consciousness at the time of the offense." *See* App. Ex. IV; J.A. 190 (quoting generally from *Gov't of the Virgin Islands v. Smith*, 278 F.2d 169 (3d Cir. 1960)). In *Smith*, the Third Circuit Court of Appeals remanded the case because the judge erred by stating he felt the accused in that case did not have a seizure and therefore it had no bearing on reasonable doubt.

At least in *Smith*, we know what the trial judge did and what he thought. In Appellant's case, the record is absent of any analysis by the military judge why he rejected trial defense counsel's instructions. This is in stark contrast to the analysis he did for giving the lack of mental responsibility instruction and ordering another sanity board. J.A. 157, 161. The only time on the record the military judge denied the defense requested instruction is when he provided instructions to both counsel and asked if there were any objections. J.A. 177. Trial defense counsel brought up that the military judge had not included the proposed instruction. *Id.* The military judge asked if the instruction was marked as an appellate exhibit, but beyond that the record is silent as to his analysis for excluding the required instruction. J.A. 177-78.

The proposed instruction correctly applied the law. In *United States v. Rooks*, the Court of Military Appeals said seizures attendant to epilepsy render an accused unable to form

the *mens rea* required for conviction. *United States v. Rooks*, 29 M.J. 291, 292 (C.M.A. 1989). The evidence at trial showed it was possible Appellant was still unconscious from a seizure when he assaulted his wife. Therefore, he was unable to form the requisite *mens rea*.

Likewise, in *United States v. Axelson*, the Army Court of Criminal Appeals, quoting Wayne R. LaFave, Criminal Law 206 (3d ed. 2000), said that "in assessing the physical component or *actus reus,* '[a] bodily movement, to qualify as an act forming the basis of criminal liability, must be voluntary.'" *United States v. Axelson*, 65 M.J. 501, 513 (A. Ct. Crim. App. 2007) (citations omitted). It was uncontroverted at trial that someone having a generalized seizure would not be aware of what was going on around them. J.A. 101. Maj Lucey testified it was possible Appellant had an epileptic seizure on the day of the attack, that it is possible his actions against his wife were from a postical violence response, and if that was the case, Appellant's actions would have been unconscious and involuntary. J.A. 110.

**ii. The proposed instruction was not substantially covered by the rest of the instructions.**

The military judge, over defense objection, chose to give an instruction on lack of mental responsibility. J.A. 177, 190; App. Ex. IV. The military judge said he "cut and pasted" the

defense proposed instruction, however that is not the case when Appellate Exhibit IV is compared to Appellate Exhibit XVIII. Instead, what the military judge chose to do, without providing any analysis, was to give the standard instruction on lack of mental responsibility. App. Ex. XVIII; J.A. 193. By doing so, he put the burden on the defense to prove Appellant was acting under a mental disease or defect by clear and convincing evidence. However, epilepsy is not clarified as a mental disease (and the military judge did not instruct that it was.). J.A. 149. Instead of being covered by instructions given to the members, the proposed instruction was completely absent from the instructions.

**iii. The proposed instruction was vital and by failing to give it, the military judge deprived Appellant of the defense.**

The defense presented its entire case with a view towards arguing this proposed instruction. J.A. 161-63. The fact that the military judge felt it was such a central issue to order another sanity board speaks volumes about its vitality. As stated in *Davis,* "any doubt whether an instruction should be given should be resolved in favor of the accused." 53 M.J. at 205 (citations omitted). Without this instruction, Appellant's trial defense counsel was left with the opposite instruction, lack of mental responsibility.

In a similar case, this Court in *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006), reversed the conviction where a military judge refused to give a defense requested instruction on self-defense. This Court found the defense theory was a vital point in the case. *Id.* at 484-85. The Court went on to say,

> This instructional error eviscerated the Appellant's self-defense theory rooted in the concept of escalation of the conflict. Because of this instructional error, Appellant was denied the opportunity to argue that he had a right to exercise self-defense due to the escalating violence being perpetrated against him. Moreover, without a correct self-defense instruction, the members did not have guideposts for an "informed deliberation."

*Id.* at 485.

Much like in *Dearing*, this Court should determine the instruction was vital and by the military judge refusing to give it, and failing to give any analysis as to why, deprived Appellant of the defense.

**WHEREFORE**, this Court should set aside the Charge and its Specification.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 11 April 2014.

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