22 May 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	**REPLY TO GOVERNMENT'S ANSWER**
v.	)	USCA Dkt. No. 14-0222/AF
Airman First Class(E-3) **ADRIAN TORRES,** United States Air Force, Appellant.	)	Crim. App. Dkt. No. 37623

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

Pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby submits his reply to the government's answer.

1. Appellant did not attempt to create a partial mental responsibility instruction for general intent crimes.

The government claims that "Appellant attempted to create, without legal authority, a modified partial mental responsibility instruction for general intent crimes." Gov. Br. 11. Not true. Appellant's trial defense counsel told the military judge the exact opposite. The military judge specifically asked trial defense counsel if they were trying to raise partial mental responsibility, and trial defense counsel answered, "Negative, Your Honor. That is foreclosed under the law, so we are not." J.A. 119-20.

Instead the military judge decided to give the instruction for mental responsibility, over the objection of Appellant's

trial defense counsel. J.A. 177-78. The defense requested instruction, contrary to the government's argument, was not substantially covered by the mental responsibility instruction. Gov. Br. 19. In fact, it was the opposite. As the Military Judge's Bench Book says:

> 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). . .

DA PAM 27-9, Chapter 5, section 5-17, page 918, Note 3.

2. The failure of the military judge to give the defense requested instruction was prejudicial.

"If instructional error is found, because there are constitutional dimensions at play, [Appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (citing *United States v. Kreutzer,* 61 M.J. 293, 298 (C.A.A.F.2005)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *Wolford*, 62 M.J. at 420 (quoting *Kreutzer* at 298)(citations omitted).

The military judge's error contributed to Appellant's conviction. The government avers this error was not prejudicial because Appellant's trial defense counsel "was still able to argue to the members and present evidence that his epilepsy and the postical state called into question whether he intentionally hit his wife." Gov. Br. 22 (emphasis in original). As this Court stated in *Dearing,* "Moreover, without a correct self-defense instruction, the members did not have guideposts for an 'informed deliberation.'" *United States v. Dearing*, 63 M.J. 478, 485 (C.A.A.F. 2006)(quoting *United States v. Anderson*, 13 C.M.A. 258, 259 (1962) and *United States v. Truman*, 19 C.M.A. 504, 507 (1970)). While Appellant's trial defense counsel was able to argue something, he was not able to argue the correct instruction, that "if the [Appellant], due to a medical condition such as a seizure disorder, is incapable of acting voluntarily at the time of the offense, then his actions were involuntary, and he may not be found guilty of the offense listed in the Specification of Charge I."[1] J.A. 191.

Contrary to the government's assertion that "the evidence at trial never supported the defense theory," the evidence presented absolutely supported the defense proposed instruction. Gov. Br. 22. If the military judge gave the requested

[1] In addition he could have argued, "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.).

instruction, Appellant's trial defense counsel would have argued the proposed instruction, coupled with the defense expert's testimony. Dr. Lucey testified it was possible that Appellant's actions towards his wife, in reference to the specification under Charge I, "were a postictal violent response" resulting from an epileptic seizure. J.A. 110. Dr. Lucey was asked, if Appellant was in a postictal violent response brought on by epilepsy, would Appellant have been "conscious and acting voluntarily at that time?" *Id.* Dr. Lucey testified Appellant would not have been conscious and acting voluntarily. *Id.* Appellant's trial defense counsel was unable to argue the correct instruction, therefore the military judge's error contributed towards Appellant's conviction.

WHEREFORE, this Court should set aside Charge I and its Specification and order a sentence rehearing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 22 May 2014.

Respectfully submitted,

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