IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ALAN J. KILLION, JR.
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. S32193
USCA Dkt. No. 15-0425/AF

REPLY BRIEF ON BEHALF OF APPELLANT

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UNITED STATES, *Appellee*,	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. S32193
Airman First Class (E-3) **ALAN J. KILLION, Jr.**, USAF, *Appellant*.	)	USCA Dkt. No. 15-0425/AF

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

Pursuant to Rule 19(b)(3) of this Court's Rules, Appellant hereby replies to the government's answer, dated 31 August 2015.

Argument

I.

Appellant's conviction for provoking speech is legally insufficient because "under the circumstances" his words were not reasonably likely to provoke violence.

A service member has a "substantial right to be tried only on charges presented in a specification." *United States v. Plant*, ___ M.J. ___, No. 15-0011/AF, 2015 CAAF Lexis 609, *5 (C.A.A.F. 2015) (internal alterations and citation omitted). Here, Appellant was charged with uttering certain words in the presence of law enforcement and trained medical professionals. The government now points to conduct not included in the Specification of Charge III as a potential remedy for the Specification's legal insufficiency.

For example, in arguing for the legal sufficiency of the charged speech, the government references words uttered to "medical technicians" without citation to the record (Gov't Br. 3). The record indicates these individuals were civilian medical personnel (J.A. 43, 75, 104-05). As such, statements to these individuals could not violate Article 117, UCMJ because civilian medical technicians are not "subject to the code." See MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM) pt. IV-61, ¶42.b (2012 ed.) (requiring that "the person toward whom the words or gestures were used was a person subject to the code").

Likewise, the government incorrectly points to uncharged use of the word "chink" in hopes of supporting the legal sufficiency of the charged speech (Gov't Br. 2, 6). The "Government is free to prosecute under specifications couched in the language of its choice." *Plant*, 2015 CAAF Lexis 609 at *5 (quoting *United States v. Geppert*, 7 C.M.A. 741, 743 (C.M.R. 1957). Here, it elected through the charging instrument not to include certain language, *e.g.*, "chinks," *etc.*, that is not a reasonable variant of the charged speech (*See* J.A. 22 (alleging that Appellant wrongfully used provoking words "to wit: "Cunt!," "Asian Douche bags!," and "I'll kill all of you!," or words to that effect towards" Capt JK, Capt MDS, and SSgt KMB)). Due process demands that this Court hold the government to its charging decision in its legal sufficiency inquiry. *See id.* at

*5 (noting that a reviewing court "may not examine" other theories of guilt based on uncharged or acquitted conduct).

A. Appellant's statements while intoxicated to medical professionals in the course of their duty to provide treatment to the Appellant—who was under constant restraint by law enforcement officers—were not of a nature to provoke violence.

The government concedes that while uttering the charged speech Appellant was under significant restraint (*See* Gov't Br. 6, noting that——once inside the hospital——Appellant was physically restrained by both security forces and medical professionals, along with passive restraints attached to the hospital bed prior to chemical sedation). According to the government, Appellant's uncharged gestures and futile struggles in a drunken state somehow negate the overpowering presence of two security forces members on each side of him holding him down, the use of passive restraints, and three or four medical professionals stationed at Appellant's head, arms, and legs prior to his chemical sedation (*See* Gov't Br. 10; J.A. 74, 90-91). This contention fails to adequately address the legal implications of the significant restraint imposed on Appellant—— coupled with the fact that he was not charged with provoking gestures.

The restraints used against Appellant were more significant than the simple use of handcuffs in *United States v. Shropshire*, 34 M.J. 757, 757-58 (A.F. Ct. Crim. App. 1992), where Judge

Rives noted the appropriateness of "a separate standard" where the subject is "handcuffed" and "under apprehension," even though the offensive speech charged was "Here's another nigger" and "I'm going to kill you, nigger." Likewise, the Court of Military Appeals found insufficient the words "[d]on't yell at me or I'll wring your – neck" accompanied by the charged gestures of "jumping out of bed and cock[ing] his arm as if he were going to swing at the guard," where the accused was inside a cell. *United States v. Thompson,* 46 C.M.R. 88, 90 (C.M.A. 1972).

Synthesizing these precedents in *United States v. Davis*, 37 M.J. 152, 153-155 (C.M.A. 1993), the Court of Military Appeals affirmed a conviction for provoking speech where the accused was in an argument at the enlisted club with another solider and responded to a military policeman with the words: "Fuck you, Sergeant," and "Fuck the MPs." The Court's rationale was that, unlike *Shropshire* or *Thompson*, the accused in *Davis* "was neither apprehended and handcuffed nor confined in a prison cell." *Id.* at 155. Accordingly, the significant restraint imposed upon Appellant——who was not charged with provoking gestures—— undermines the government's contentions of legal sufficiency.

While the significant restraint employed is alone sufficient to undermine the verdict, the government likewise fails to address evidence in the record highlighting the

specialized training of all who heard Appellant's drunken utterances. The "design" of Article 117 is, "to prevent retaliation by individuals who are the hearers of the words." *Davis*, 37 M.J. at 154. Here, the limited "hearers" were a specialized, professional audience in a trauma bay where combative patients are transferred for treatment (J.A. 87, 90, 94-95, 97, 108-09).

Article 117, UCMJ requires, *inter alia*, that the charged speech be of such an offensive nature that "a reasonable person would expect to induce a breach of the peace under the circumstances." MCM, pt. IV-62 at ¶42.c.(1). This Court has endorsed looking to the training of the audience in evaluating whether the circumstances are such that a reasonable person would be expected to breach the peace.

In *United States v. Adams*, 49 M.J. 182, 183 (C.A.A.F 1998), the Navy Judge Advocate General certified as potential error that the service court considered "the special training of the victim in determining whether appellee's words were provoking" (original capitalized). This Court specifically rejected the government's contention "that the victim's status as a police officer cannot be considered where the accused 'was not apprehended, handcuffed, or confined at the time he uttered his defiant comments.'" *Id.* at 185. In answering the certified question in the negative, this Court held that the special

training of the victim was a circumstance that "should be considered in determining" whether the words uttered were provocative. *Id.* at 185. *Adams* is consistent with other military cases that evaluated the training of the audience in determining whether a reasonable person "under the circumstances" would have been provoked. *See, e.g., Shropshire*, 34 M.J. at 758 (noting the specialized training of the listener rather than simply the duty of officers in general not to respond with violence); *Thompson,* 46 C.M.R. at 89-90 (applying the standard of "a reasonable guard" and noting testimony that "as a result of special training in correctional custody" the hearer "had been taught to expect encounters such as this and how to handle them," citing *United States v. Shropshire*, 43 C.M.R. 214 (C.M.A. 1971) (applying a "reasonable guard" standard in assessing a conditional threat)).

The jurisprudential method of the above authorities——which considers the professional status of the audience——is entirely consistent with application of the objective, reasonable person standard endorsed by Article 117. *See* MCM, pt. IV-62 at ¶42.c.(1). The proposition that the professional skills or knowledge of an actor is an appropriate, objective component of the "reasonable person" standard is so widely accepted that this rule is enshrined as a restatement of the common law. *See* RESTATEMENT THIRD, TORTS § 12 ("If an actor has skills or knowledge

that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.”). The government’s protest that no court has had occasion to recognize this principle outside of the professional police officer, security forces member, or prison guard context fails to address the substance of the argument (Gov’t Br. 8).

Likewise insufficient is the government’s contention that Capt JK had seen a nurse “get physical” with a patient in an unspecified past incident (*See* Gov’t Br. 9; J.A. 98-99). A medical professional’s physical restraint of a patient is not the sort of criminally violent response by an innocent hearer at which Article 117, UCMJ was directed. *See Davis*, 37 M.J. at 154 (noting “design” of Article 117 “to prevent retaliation by individuals who are the hearers of the words”). Accordingly, a medical professional could “brace” a patient to get their attention to ensure compliance, such as described by Capt MDS (J.A. 87), while remaining innocent and avoiding the result Article 117, UCMJ was designed to prevent. *See United States v. Holiday*, 16 C.M.R. 28, 32 (C.M.A. 1954) (“This Article is designed to prevent the use of violence by the person to whom such speeches and gestures are directed, and to forestall the commission of an offense by an otherwise innocent party.”).

B. Appellant's speech should be considered Constitutionally protected.

The government also complains that Appellant's brief in support of the granted petition attacks the constitutional sufficiency of the conviction (Gov't Br. 10). Of course, the government had ample opportunity to contest the manner in which Appellant framed the issues in his supplement to the petition for grant of review, yet it explicitly waived its right to file a brief. *See* Letter from Air Force Appellate Government Associate Division Chief to Clerk of the Court, United States Court of Appeals for the Armed Forces (Mar. 23, 2015) (entering "general opposition to the assigned errors" and waiving "right to file a brief in response to the Petition"). Appellant's constitutional argument was included in the supplement in the same manner presented by the principal brief.

Evaluation of the MCM's standard for provoking speech is a somewhat parallel track with the constitutional standard for "fighting words" or those that evoke a "clear and present danger." *See* MCM, pt. IV-62 at ¶42.c.(1); Major Michael A. Brown, *Must the Soldier be a Silent Member of Our Society*? 43 MIL. L. REV. 71, 78-82, 87-89 (1969), cited in *Thompson*, 46 C.M.R. at 89.[1] Accordingly, counsel believed the as-applied

[1] *See also Cohen v. California*, 403 U.S. 15 (1971) (reversing a conviction for breach of the peace where the defendant had worn a jacket bearing the words "F—k the draft"

constitutional sufficiency of Appellant's conviction was a matter intertwined with the legal sufficiency of the conviction and, thus, fairly before this Honorable Court. But Appellant's constitutional arguments are presented secondary to his statutory arguments challenging the sufficiency of his conviction. As this Court is aware, it may apply the doctrine of constitutional avoidance and resolve Appellant's appeal in his favor on the legal insufficiency of the evidence under Article 117, UCMJ without reaching the constitutional arguments.

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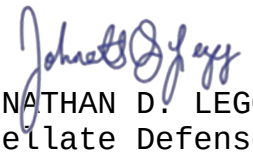
inside a courthouse); *Gooding v. Wilson*, 405 U.S. 518 (1971) (striking down conviction for disorderly conduct based on statute criminalizing "opprobrious words or abusive language, tending to cause a breach of the peace" where the defendant told a police officer "White son of a bitch, I'll kill you," and "You son of a bitch, I'll choke you to death."); *Lewis v. New Orleans*, 415 U.S. 130 (1974) (striking down conviction under city ordinance prohibiting "obscene or opprobrious language" to police officers where defendant yelled obscenities at a police officer who asked her husband to produce his driver's license); *Houston v. Hill*, 482 U.S. 451 (1987) (striking down city law prohibiting a person from opposing, molesting or abusing, or interrupting a police officer during his duties); *Buffkins v. Omaha*, 922 F.2d 465 (8th Cir. 1990) (holding that swear words spoken to police, to include "I will have a nice day asshole" were not an incitement to immediate lawless action); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1989) (holding police officer not entitled to qualified immunity for disorderly conduct arrest where arrestee made obscene gestures and yelled profanity at him while traveling along the highway); *Johnson v. Campbell*, 332 F.3d 199 (3d Cir. 2003) (finding that calling a police officer a "son of a bitch" did not constitute fighting words).

II.

The Military Judge's instructions regarding provoking speeches or gestures were deficient under the facts and circumstances of Appellant's case.

In opposing Appellant's instructional error challenge, the government contends that the trial counsel's argument referencing the "average person" described in the military judge's instructions was effective, fair argument (Gov't Br. 16). No doubt, if this Court fails to correct the error perpetuated by the bench book's reference of the "average person," future military judges will erroneously rely on that language——as did the military judge here (J.A. 120). This Court should ensure that military judges faithfully instruct on the correct "reasonable person" standard articulated in MCM, pt. IV-62, at ¶42.c.(1). In a contested case where the audience receiving Appellant's drunken statements was either law enforcement or medical professionals, the military judge's instructional error cannot be found harmless.

Respectfully submitted,



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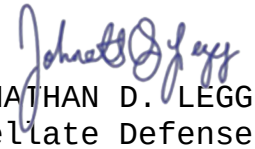
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 10 September 2015.



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