

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, R.Q. WARD  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**THOMAS J. HAYES  
MIDSHIPMAN FIRST CLASS (MIDN, 1C), U.S. NAVY**

**NMCCA 201000366  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 4 March 2010.

**Military Judge:** CAPT Bruce MacKenzie, JAGC, USN.

**Convening Authority:** Superintendent, United States Naval Academy, Annapolis, MD.

**Staff Judge Advocate's Recommendation:** CDR Matthew C. Dolan, JAGC, USN.

**For Appellant:** Maj Jeffrey Liebenguth, USMC.

**For Appellee:** LT Kevin Shea, JAGC, USN.

**31 May 2012**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of 11 specifications of selling military property without authority and 10 specifications of theft of military property, in violation of Articles 108 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 908 and 921. The appellant was sentenced to confinement for 36 months, forfeiture of all pay and

allowances, a fine of \$28,000.00, and a dismissal. The convening authority approved the sentence but, pursuant to the pretrial agreement, suspended all confinement in excess of 12 months for the period of confinement served plus three months.

On 27 January 2011, we issued our opinion in this case, *United States v. Hayes*, No. 201000366, 2011 CCA LEXIS 423, unpublished op. (N.M.Ct.Crim.App. 27 Jan 2011) (*per curiam*), wherein we held that the appellant's guilty pleas were improvident because the military judge failed to inquire into the possible defense of duress raised during the appellant's unsworn statement. Having concluded that the military judge erred, we then set aside the findings and sentence and ordered that the record be returned to the Judge Advocate General (JAG) for remand to an appropriate convening authority with a rehearing authorized.

Following certification of this case by the JAG, the Court of Appeals of the Armed Forces (CAAF) agreed with this court's holding that a suicide threat can raise the possible defense of duress requiring further inquiry by the military judge; however, CAAF reversed, concluding that we erred in holding that the appellant's unsworn statement raised the possible defense of duress. *United States v. Hayes*, 70 M.J. 454, 463 (C.A.A.F. 2012). We now address the sole remaining issue of whether the appellant's guilty pleas were improvident because of the possible defense of lack of mental responsibility.

We have examined the record of trial, the appellant's assignment of error, and the pleadings of the parties. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Analysis**

The pertinent facts of this case are laid out in our earlier opinion. During his unsworn statement, the appellant explained his motivations for committing the crimes to the military judge and concluded with these remarks:

The first time this--it was purely curiosity . . . and I was like, "Well, my mom needs money, there's all these extra things laying around." I know it wasn't right, but in my state of mind I just -- I just couldn't differentiate the difference between

doing the right thing for--for home or doing the right thing that's going to make the phone calls stop, or doing the right thing for being a Midshipman.

. . . .

I'm not--I didn't know how to deal with somebody who's threatening to end their life or threatening to, you know, not be there anymore.

And that's--that's the pressures that I was feeling at that time, sir...

Record at 214-15. We now turn to the remaining issue of whether the appellant's unsworn statement necessitated inquiry by the military judge into the possible defense of lack of mental responsibility.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea are reviewed *de novo*. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). An abuse of discretion occurs when there is a substantial basis in law or fact for questioning the guilty plea. *Id.* A potential defense to the charged crime constitutes "matter inconsistent with the plea" under Article 45(a), UCMJ. If, at any time during the proceeding, an accused advances a matter raising a possible defense, then the military judge is obligated to make further inquiry to resolve any apparent ambiguity or inconsistency. *United States v. Phillipe*, 63 M.J. 307, 309 (C.A.A.F. 2006). A failure to do so constitutes a substantial basis in law or fact for questioning the guilty plea. *Id.* at 311. Once the military judge has accepted the pleas and entered findings, an appellate court will not reverse those findings and reject the plea unless it finds a substantial conflict between the pleas and the accused's statements or other evidence of record. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007).

In the present case, the above portion of the appellant's unsworn statement is the only allusion in the record to his state of mind at the time of the offenses. And while he does use the phrase "state of mind," these words, read in the context of his entire unsworn statement and the providence inquiry simply illustrate the emotional pressure he felt from his mother's plaintive pleas for financial assistance as opposed to suffering from a mental disease or defect where he could no longer discern the wrongfulness of his actions. On the

contrary, as he repeatedly told the military judge during the providence inquiry, he recognized the wrongfulness of his actions. Record at 94-114. He also stipulated to the same. Prosecution Exhibit 1 at 1.

We do not find that the appellant' unsworn statement raises a substantial conflict with his statements and guilty pleas at trial. We conclude that his statements explaining his emotionally clouded judgment and perceived moral dilemma were "a mere rationalization of his behavior" rather than a matter inconsistent with his pleas of guilty. *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997). Consequently, we do not find a substantial basis in either law or fact to question his pleas. *Inabinette*, 66 M.J. at 322. Accordingly, we find that the military judge did not abuse his discretion by accepting the appellant's guilty pleas.

#### **Conclusion**

The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court