UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
First Lieutenant MARK C. BASHAW
United States Army, Appellant

ARMY 20220213

ORDER

WHEREAS:

The Court has considered the motion for reconsideration of the denial of the application for grant of review of the decision of the Judge Advocate General.

NOW THEREFORE, IT IS ORDERED:

The motion for reconsideration is hereby DENIED.

DATE: 26 May 2023

FOR THE COURT:

STEVEN P. HAIGHT
Chief Deputy Clerk of Court

CF: JALS-DA
JALS-GA
JALS-TJ
JALS-CCR
JALS-CR4

IN THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. First Lieutenant (1LT) **MARK C. BASHAW,** United States Army, Applicant[1]	**BRIEF ON BEHALF OF APPELLEE - SPECIFIED AND GRANTED ISSUES** Docket No. ARMY 20220213 Tried at Aberdeen Proving Ground, Maryland, on 28-29 April 2022, before a special court-martial convened by Commander, US Army Communication Electronics Command, Lieutenant Colonel Robert A. Cohen, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Specified Issue

THE APPLICANT MAY APPEAL THE ARTICLE 69(c) FINDINGS BY THE JUDGE ADVOCATE GENERAL OF THE US ARMY PURSUANT TO ARTICLE 69(d)(1)(B). THE APPLICANT REQUESTED REPRIEVE FROM THE GUILTY RULING BASED ON DEMONSTRATING THE ORDER TO RECEIVE UNLICENSED EMERGENCY USE AUTHORIZED (UNLICENSED)

[1] The government refers to 1LT Mark Bashaw as the Applicant for the specified issues.

PRODUCTS IS PATENTLY UNLAWFUL. THE APPLLICANT IS FILING A RECONSIDERATION OF THE ACCA'S DENIAL OF APPLICANT'S ARTICLE 69(d)(1)(B) PETITION FOR REVIEW.

Assignment of Error

THE ACCA IN THEIR 17 APRIL DENIAL LETTER DID NOT SPECIFY THE LEGAL BASIS OR JUSTIFICATION FOR DENYING APPLICANT'S PETITION FOR APPEAL UNDER ARTICLE 69(d)(1)(B). APPLICANT SEEKS AN ACCA PETITION RECONSIDERATION PURSUANT TO ACCA RULE 31.2(B)(1) TO DETERMINE WHETHER THE ORDER TO COERCIVELY SUBJECT APPLICANT TO TAKING UNLICENSED EMERGENCY USE AUTHORIZED PRODUCTS WITH FULL LIABILITY IMMUNITY IS PATENTLY UNLAWFUL?

Statement of the Case

On 28 April 2022, a military judge sitting as a special court-martial judge on behalf of the General Courts Martial Convening Authority, convicted Applicant of violating a lawful order under of Article 92, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 892. The military judge found Applicant guilty of violating a lawful order pursuant to Article 92, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 892 on 28 April 2022. (Judgment). The determination of lawfulness was made on 28 April 2022. The military judge ruled against applying further

sentencing and recommended the General Courts Martial Convening Authority drop the guilty charge on the basis of witness testimony noted in block 35 of the "Statement of Trial Results."

Applicant acknowledged his post-trial and appellate rights on 29 April immediately following the sentencing on 29 April 2022 (App. Ex.) and sought to appeal the ruling. The Applicant's only mechanism to appeal his case is through requesting an Article 69(c) review by the Judge Advocate General (TJAG).

On 26 May 2022, the General Courts Martial Convening Authority upheld the conviction/findings of the court martial and denied the Judge's motion to dismiss the guilty charge. The General Courts Martial Convening Authority, under his command authority, then moved to involuntarily separate Applicant because Applicant was a probationary officer with a guilty verdict on 27 June 2022. The Applicant issued a formal elimination rebuttal on 17 July 2022 and issued his formal Article 69(c) case review to the TJAG, in writing, on 27 July 2022.

On 5 December 2022, the TJAG made a formal ruling to Applicant's request and stated "Applicant has not established a proper and specific basis for relief under one or more of the enumerated statutory grounds. Accordingly, the Application for Relief is denied."[2]

[2] Action of the Judge Advocate General Application for Relief Article 69 UCMJ; 05 December 2022

The 5 December 2022 letter from the TJAG did not clarify which statutes Applicant did not specifically address nor did the TJAG address any of the exhaustive evidence presented by the Applicant provided as additional evidence to his 29 April 2022 ruling. Applicant received a second letter informing Applicant of the right to appeal to the ACCA pursuant to Article 69(d)(1)(B).

On 7 February 2023, the ACCA accepted Applicant's initial petition for ACCA consideration.

On 17 April 2023, the ACCA denied the Applicant's petition with no legal reason, justification, or basis. The absence of any legal basis or justification is the legal basis for Applicant's reconsideration under ACCA rule 31.2(b)(1).

Credentials

The applicant serves in the Army Medical Service Corps in the Preventative Medicine (67C) career field, and applicant's specialty is Entomology (72B). Applicant's official duties include participating in fact-finding inquiries and investigations to determine potential public health risk to DoD personnel from diseases caused by insects and other non-battle related injuries. Applicant received an Associates of Science in Environmental Studies through the Community College of the Air Force (CCAF) in 2010, a Bachelor of Science degree in Management Studies from the University of Maryland, University College in 2013, and a Master of Science in Entomology from the University of Nebraska Lincoln in 2018. The applicant

enlisted in the U.S. Air Force on 17 January 2006 and currently has 17 years of total active federal military service (TAFMS). The applicant served tours overseas to include Japan, Republic of Korea, Germany and multiple deployments to Africa, Middle East, and Central America. Applicant directly commissioned in the U.S. Army Medical Service Corps in September 2019. The applicant initially attended the Direct Commission Course at Fort Sill, OK, followed by the Basic Officer Leadership Course at Fort Sam Houston, TX. The applicant was then stationed at the APHC in January 2020. While at the APHC, the applicant has successfully served as the Headquarters and Headquarters Company (HHC) Commander from May 2020 to July 2021. Currently, applicant serves in the Entomological Science Division as a Medical Entomologist. Applicant's specific duties at the Entomological Science Division within Army Public Health Center (APHC) requires that applicant participates in fact-finding information regarding entomological threats to public health and safety, and properly communicate the risk to our Soldiers. These threats included insect borne diseases, zoological, and other potential non-battle related issues. Applicant also supervised three enlisted Soldiers (Preventative Medicine Specialists, 68S). Additionally, applicant worked in a mosquito insectary to help with quality checks and standard operating procedures (SOPs). Applicant's official duties also include supporting the Army Public Health Program (Army Regulation 40-5) by sustaining the readiness of the force by protecting Army personnel from potential and actual

harmful exposures to chemical, biological, radiological, nuclear, and high yield explosive (CBRNE) warfare agents; endemic communicable diseases; food, water, and vector-borne diseases; zoonotic diseases; ionizing and nonionizing radiation; combat and operational stressors; heat, cold, altitude, and other environmental extremes; environmental and occupational hazards; toxic industrial chemicals and toxic industrial materials.

Statement of Facts

In July 2020, September 2021, and October 2021, the Applicant addressed his medical concerns with his Army Public Health Center chain of command and the COVID-19 Task Force with visible vaccine safety signals and injuries. Additionally, as a preventative medical officer, the Applicant inquired about therapeutic usage, specifically hydroxychloroquine, Ivermectin, Zinc, Vitamin D, Vitamin C, and Quercetin, regarding treatment and prevention of SARS-CoV-2. The Applicant furthermore pointed to serious safety signals and substantial specific dangers to public health and safety by showing them data from the CDC Vaccine Adverse Event Reporting System (VAERS), which is also the DOD's tool to report adverse events from vaccinations. The Applicant repeatedly requested that the Army change its risk communication strategy to address COVID-19 vaccination safety signals and reliance of using unlicensed EUA products as definitive countermeasures.

On 21 September 2021, 1LT Bashaw submitted a religious accommodation to

CPT McCarthy, his company commander, for all vaccinations due to his firmly held religious beliefs. He sought a religious accommodation for all vaccinations even before the Secretary of Defense issued his 24 August 2021 Memo, mandating the FDA Approved COVID19 vaccination directive. The Applicant later found out that the fully FDA Approved COVID19 vaccine labeled "Comirnaty" had not been produced and/or available to DOD Service Members, and the only available COVID19 "vaccinations" are emergency use authorized (EUA) and are subject to 10 U.S.C § 1107a and 21 U.S Code § 360bbb-3. These laws are the same laws that govern all emergency use authorized (EUA) products (masks, tests, and vaccines). Emergency use authorized products are clearly defined in Title 21 U.S.C 360bbb-3 as "a drug, device, or biological product intended for use in an actual or potential emergency" that "is not approved, licensed, or cleared for commercial distribution" by the FDA.

On 23 November 2021, CPT McCarthy ordered Applicant to self-procure and self-administer the experimental EUA rapid antigen SARS-CoV-2 tests. According to the FDA emergency use authorized (EUA) agreement letters, these rapid antigen CV19 test kits and masks are both "devices." According to the legally binding EUA agreements between the FDA and test kit manufacturers, *"Negative results should be treated as presumptive and confirmation with a molecular assay, if necessary, for patient management, may be performed. Negative results do not rule out SARS-CoV-2*

infection and should not be used as the sole basis for treatment or patient management decisions including infection control decisions. Negative results should be considered in the context of a patient's recent exposures, history and the presence of clinical signs and symptoms consistent with COVID-19." The FDA agreement letters with the manufacturers also go on to waive a manufacturer's requirement to follow good manufacturing practices, which means all test kits are inherently less safe for anyone using them. These letters also state that "***No*** *descriptive printed matter, advertising, or promotional materials relating to the use of your product* ***may represent or suggest*** *that this* ***test is safe or effective*** *for the* ***detection*** *of SARS-CoV-2.*"

This testing/screening was to start 30 November 2021 with a negative test result no more than 72 hours prior to accessing my place of duty. On 24 November 2021, the Applicant informed CPT McCarthy that his order was both unlawful and discriminatory. CPT McCarthy then stated in an email *"you are more than welcome to disagree with the order. Does this mean that you will likely refuse the weekly COVID testing?"* Again, the Applicant stated that this order was unlawful and discriminatory based on 21 U.S.C. §360bbb-3 and due to his religious accommodation/unvaccinated status.

On 26 November 2021, the Applicant submitted an Informal Article 138 Inquiry via email to see if CPT McCarthy was aware of the EUA laws and individual

rights. The Applicant did not receive a response to the informal inquiry prior to 30 November 2022.

On 30 November 2021, the Applicant reported to his duty location to execute his responsibilities. During this time, 1LT Bashaw chose not to participate with unlicensed EUA testing and masking. Shortly after reporting to work, CPT McCarthy ordered Applicant to attend a counseling in his office later that day. When 1LT Bashaw reported to his office for the counseling, he was notified of the following: his security clearance was suspended by the Army Public Health Center's Director, his security badge and access to all APHC facilities was revoked, he was threatened, his military record flagged, and he was threatened with violations of Article 92, UCMJ charges.

At the end of the counseling, the Applicant hand delivered and verbally read another initial Article 138 complaint even though Applicant already satisfied this requirement IAW AR 27-10 on 26 November 2021. During this process, 1LT Bashaw requested that CPT McCarthy cease and desist discrimination against Applicant and any others under his command. Applicant also provided the EUA laws where it shows that an individual has the absolute right to refuse EUA products (vaccines, masks, and tests), regarding COVID19.

On 18 January 2022, COL Yevgeny Vindman, the Staff Judge Advocate for Major General Edmonson, signed off on Article 92 UCMJ charges against the

Applicant for disobeying an order to participate with unlicensed COVID19 EUA masking and testing.

On 19 January 2022, Major General Edmonson dismissed the Applicant's Article 138 complaint UCMJ redress.

On 14 April 2022, CPT McCarthy called to inform Applicant that Applicant would need to have a "go-bag" ready for Fort Leavenworth Correctional Facility. Shortly after the phone call, he sent an email with the packing list for the "go-bag." He later rescinded this Fort Leavenworth "go-bag" order on 16 April 2022.

On 29 April 2022, 1LT Bashaw received a guilty conviction in a special court martial for not participating with the experimental EUA COVID19 masking/testing (United States v 1LT Mark Bashaw). The judge sentenced him to "No Additional Punishment" and made a recommendation to MG Edmonson to drop the conviction/findings. During the court martial, 1LT Bashaw went into detail about the dangers associated with the rapid antigen test kits that the DoD was mandating, and the masking, and Applicant also highlighted the deaths and injuries associated with the experimental EUA COVID19 "mRNA" injections, which are a substantial and specific danger to public health.

On 26 May 2022, MG Edmonson upheld the conviction/findings of the court martial and denied the Judge's motion to dismiss the guilty charge.[3]

[3] Appendix 1, United States v. 1LT Mark Bashaw Case Number 20220213

On 27 June 2022, MG Edmonson initiated involuntary separation elimination against 1LT Bashaw.

On 17 July 2022, 1LT Bashaw submitted a rebuttal to MG Edmonson's initiation of elimination, in accordance with Army regulation AR 600-8-24.[4]

On 27 July 2022, 1LT Bashaw petitioned the Army Judge Advocate General (TJAG) to review his case and to set aside the findings and conviction in whole from U.S. v 1LT Mark Bashaw court martial.[5] He requested a case review under Article 69(c) of the Uniform Code of Military Justice because the SPCM did not qualify for an appeal from the Army Court of Criminal appeal at the time. The Applicant's packet further cited all applicable laws, the EUA letters, legal liability protections that all that manufacture, distribute, make policy, and administer an EUA product receive. The Applicant presented extensive evidence to overturn the guilty verdict and to demonstrate that any order to receive an unlicensed product is patently unlawful as defined by Article 92 of the UCMJ.

On 8 August 2022, MG Edmonson rescinded his original 27 June 2022 initiation of elimination memo, and reissued a new initiation of elimination. His new initiation of elimination memo was not based on the 29 April 2022 court martial conviction, but rather conduct unbecoming of an officer, failure to obey orders, and

[4] Appendix 2, 1LT Bashaw Elimination Rebuttal Base MFR
[5] Appendix 3, 1LT Mark Bashaw Article 69(c) Review to the Judge Advocate General, dated 27 July. Also with 5 December 2022 TJAG response letter.

the court martial conviction. Conduct unbecoming of an officer and failure to obey orders are charges against Applicant due to Applicant exercising his legal right according to 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III) to exercise the option to refuse administration of experimental emergency use authorized (EUA) products.

Additionally, on 12 August 2022, MG Edmonson certified the appellate review (Applicant's right to appeal the conviction of the court martial) and finalized the court martial conviction.

On 15 August, while pending an Article 69(c) review from the TJAG, the Applicant signed as one of nine signatories to a DoD Whistleblower report requesting a Congressional review of unlawful EUA vaccine (and EUA product) mandates. Senator Ron Johnson[6] issued a letter to the SECDEF, Secretary of Health and Human Services, Commissioner of the FDA, and Director of the CDC with a requested response date of 1 September 2022. To date, none of these senior leaders/agencies responded to Senator Johnson's inquiry in writing.[7]

On 5 December 2022 the TJAG formally responded to the Applicant's Article 69(c) case review and stated in writing that "I find that the Applicant has not established a proper and specific basis for relief under one or more of the enumerated

[6] Appendix 4. Senator Ron Johnson's Letter to the Secretary of Defense, Commissioner of the FDA, and Director of the CDC. Dated 18 August 2022.
[7] Appendix 5. Memorandum to Members of Congress: Whistleblower Report of Illegal Department of Defense Activity, dated 15 August 2022.

statutory grounds. Accordingly, the Application for Relief is denied." The Applicant also received notification that pursuant to Article 69(d)(1)(B), the Applicant can request an appeal through the United States Army Court of Criminal Appeals.

Argument

The judge ruled the Applicant guilty of two counts of disobeying a direct, lawful order as defined by Article 92, 10 U.S.C. § 892. The standards to determine lawfulness in this case are found in sections (c) (2) (a) (i-g) Article 90 "Willfully disobeying a superior commissioned officer", UCMJ (10 U.S.C. § 890). Article 92, UCMJ (10 U.S.C. § 892) defines lawfulness as the following: "A general order or regulation is lawful **unless it is contrary** to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it." (MCM, IV-27). The presiding judge in the case made the basis of each guilty charge by ruling the military intent of the law was lawful because ordering Applicant to take an EUA mask or test kit did not violate federal statutes within 21 U.S.C. § 360bbb-3 and thus 10 U.S.C. § 1107a did not apply.

The basis of this ruling stemmed from the fact the prosecutor's misrepresentation that EUA products can receive conditions that the Secretary of Health and Human Services can selectively apply through delegated legal authorities granted within 21 U.S.C. § 360bbb-3 and 42 U.S.C. §247d-6d.

The prosecutor mis-applied and misrepresented the fact that all EUA products are in fact unlicensed, that they are protected by full liability immunity for their

scopes of use within the issued emergency use authorization, that an individual accepts all the medical and legal risks using a covered countermeasure (EUA product), and that all EUA products come with *required conditions* to be informed of the right to accept or refuse. The prosecution misapplied that the secretary "may" apply the condition to accept or refuse and stated that masks and test kits did not have these conditions listed in their respective "Fact Sheets", a document that is not legally binding.[8] On this basis alone, the prosecution stated that since the option to refuse is not explicitly stated in the product "Fact Sheet," then the basis of the order is lawful under Article 90, UCMJ, section (c) (2) (a) (iv-v). The prosecutors completely avoided the legal fact that all "unapproved products" (which means unlicensed products)" granted an EUA by the FDA come with "required conditions" for an individual's own health protection for accepting use of an unlicensed product devoid of long-term clinical data. This legal fact that these conditions are "required" is because an EUA product is unlicensed for the medical purpose it is in the US market in the first place due to an emergent health issue (medical purpose is to treat,

[8] The FDA Emergency Use Authorization Letter is the legally binding agreement between the FDA and the Manufacturer of an EUA (unlicensed product). Without this letter, the manufacturer cannot sell an unlicensed product in the US market for the medical purpose of preventing, diagnosing, or treating a disease; COVID-19 within the context of this case and the declared Public Health Emergency. EUA Letters direct a manufacturer to provide a Fact Sheet, which is part of the overall authorization process. Both the FDA and EUA product manufacturer are covered persons as defined by 42 U.S.C. §247d-6d(i)(2) receiving full liability immunity for all forms of loss as defined by 42 U.S.C. §247d-6d(a)(2).

diagnose, or prevent a disease). The standards used to introduce an unlicensed product to the US market under an EUA do not follow the normal clinical trial, new drug application, or new device application processes and are scientifically weaker and far less rigorous which means an unlicensed EUA product comes with much more risks by bypassing these processes.

In fact, the basis of introducing an unlicensed EUA product into the US market are that there are no licensed alternatives, the fact that it *"may"* work [it may not too], and based on the totality of the scientific evidence, *if available* (21 U.S.C. § 360bbb-3 (2)(c). Furthermore, by virtue of the Public Health Emergency declaration by the Secretary of Health and Human Services, *all* EUA products are legally considered "covered countermeasures" and receive full liability immunity (as do covered persons) under 42 U.S.C. §247d-6d (i)(C-D). If an individual suffers an injury from using a covered countermeasure, then their only method of recompense is through the Countermeasure Injury Compensation Program (CICP)[9] as governed by 42 U.S.C. §247d-6e. An individual cannot sue a covered person for any form of loss or injury and can only seek recompense through the CICP, which is an underfunded, centrally managed program with a total budget of $5 million. Furthermore, a doctor must certify that an injured person's claim resulted from use of the countermeasure. The CICP is administered by Health Resource and Services Agency (HRSA) of the

[9] https://www.hrsa.gov/cicp/cicp-data#table-1

Department of Health and Human Services. There are currently **11,425** claims filed for COVID-19 countermeasures (masks, shots, test kits, drugs, and ventilators). Of these **11,425**, the HRSA partially paid out only *three* claims a combined total of $4,634.89.[10] [11] One of the individuals filed a claim for myocarditis and received an insulting, unhelpful amount of $1,032.69. These individuals have severe issues because myocarditis and anaphylaxis will continue to cause continual health issues. These partial payouts are paid as a lump sum payment and do not consider any long term medical treatment. All individuals have to file claims at their own expense, have to find a doctor willing to medically attribute the injury to a "covered countermeasure," and then they get to suffer through a series of HRSA boards to determine if the HRSA will even consider their claim under CICP.

The bottom line is the CICP does not provide serious recompense for those in need and shields the US Government and manufacturers from making large payouts to individuals harmed by "covered countermeasures" (shots, test kits, drugs, masks, devices). Under the current budget of $5million, the HRSA can only afford to pay out 12 claims per year at the maximum rate of $365,000.

These facts alone are why all individuals have the legal right to refuse. Coercing individuals to give up these rights because a "Fact Sheet" did not explicitly

[10] U.S. Approves First 3 COVID Vaccine Injury Claims — And Pays Out a Total of $4,634.89 • Children's Health Defense (childrenshealthdefense.org)
[11] https://www.hrsa.gov/cicp/cicp-data#table-1

state an individual has a right to refuse is a form of coercion as defined in 18 U.S.C. § 2331. Misrepresentation by officials, leaders, medical providers, or other covered persons asserting that unlicensed EUA products are legally on par with an FDA licensed product that underwent the full rigors of scientific and medical scrutiny constitutes fraud as defined in 18 U.S.C. § 1038. Jesus Christ almighty is King, glory to God. Furthermore, in every EUA issuing letter from the FDA to the manufacturer, it states that the EUA is issued in pursuant to 21 U.S.C. § 360bbb-3 meaning a required condition to administer the unapproved EUA product is to inform individuals of their option to refuse administration of the (all) EUA product in accordance with 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III).

The Applicant presented that the order is "patently unlawful" in both the SPCM and extensively in the Applicant's Article 69(c) review packet. Applicant's Article 69(c) does an extensive crosswalk for masks, test kits, and even vaccines for the purpose of COVID-19, all of which are still under an FDA EUA. All EUA letters represent the legally binding agreements governed by 21 U.S.C. § 360bbb-3 and allow a manufacturer to introduce an unlicensed product into the US market without going through the formal new device/drug/biologic application process. These letters are all publicly available via the FDA Covid19 EUA website.[12]

[12] Appendix 3, 1LT Mark Bashaw Article 69(c) Review to the Judge Advocate General, dated 27 July and https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-

The Applicant demonstrated that the orders to force individuals to accept unlicensed EUA products is patently unlawful as defined by Article 90, UCMJ. Especially for masks and test kits, the Article 69(c) package included examples of surgical mask and test kit EUA letters that show the FDA waived good manufacturing practices for all EUA masks and test kits. Appendix 6 demonstrates all sub-parts of 21 Code of Federal Regulations, sub-part 820 the FDA waives for masks and test kits. The simple fact that the FDA waives the requirement for a manufacturer to follow good manufacturing practices shows a deliberate choice the FDA made when allowing a "covered person" manufacturer to sell an unlicensed product into the US market and is also why the FDA states in every EUA letter that mask and test kit manufacturers cannot advertise that their product is safe or effective for preventing/diagnosing SARS-COV-2. Secondly, to make the claim that accepting these products is a matter of safety, is demonstrably false and is patently unlawful when one reviews the EUA issuance letters which are all legally binding pursuant to 21 U.S.C. § 360bbb-3.

The Applicant exhausted all administrative and legal and administrative avenues in order to communicate that all products used for the legal purpose of treating, preventing, or diagnosing Covid-19 are unlicensed products granted an emergency use authorization pursuant to 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a

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euas-antigen-diagnostic-tests-sars-cov-2.

(Emergency Use Products). The Applicant presented extensive evidence in the Article 69(c) packet to the TJAG presenting that none of the current countermeasures to combat Covid-19 are licensed for their purpose and are in fact all under an FDA granted EUA. This means all vaccines, masks, test kits, ventilators, and even PPE (e.g. protective medical clothing, face shields) remain unlicensed and are protected with full liability immunity from any form of loss through 42 U.S.C. §247d-d. Additionally using unlicensed products means all individuals accept an enormous, asymmetric amount of risk when using any EUA product because the product is *unlicensed* and is why every unapproved (unlicensed) EUA product comes with "Required Conditions" to be informed of the right to refuse these products and of the risks both known and unknown.[13] Leaders coercively directing and fraudulently misrepresenting EUA products to be legally and scientifically the same as an FDA licensed product violates at criminal statutes with 18 U.S.C (21 U.S.C. § 360bbb-3, and 10 U.S.C. § 1107a and makes any order to forcibly direct use of an unlicensed EUA product patently unlawful as defined in Article 90 of the UCMJ because it is violating multiple United States Codes and the US Constitution.

The inherent legal right to refuse and *to be informed of the right* to refuse unlicensed EUA products is a legally "Required Condition" for ***all*** unapproved products pursuant to 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a (Emergency Use

[13] 21 U.S.C. § 360bbb-3(e)(1)(A)

Products).

The DoD lacks the statutory authority to declare any product EUA or to license a medical product and cannot simply treat an EUA product as a licensed product. All masks, test kits, shots, and drugs for treating, preventing, or diagnosing unlicensed products under an EUA which legally means they *must* be unlicensed products. This legal fact has not changed since the Applicant's court martial, Article 69(c) review, and now. This means all EUA products legally come with an inherent right to refuse administration of the product because EUA products (also legally known as "Covered Countermeasures" via 42 U.S.C §247d-6d) carry full liability immunity through 42 U.S.C §247d-6d for any scope of loss suffered (e.g. death, injury).

The Applicant's guilty verdict came from the prosecutor's misrepresentation that the secretary of HHS (really the FDA) did not provide the optional condition to accept or refuse EUA masks and test kits. This assertion is demonstrably false and is the core reason Applicant received a guilty verdict that he disobeyed a lawful order though he exercised his legal right to refuse any and all unlicensed EUA products. After requesting a review of the case and dismissal of the charges, the TJAG simply stated that the Applicant did not provide the "proper and specific basis for relief under listed statutory grounds." The TJAG did not address any of the additional legal documents Applicant presented, the significance that no product is licensed to prevent, treat or diagnose SARS-COV-2, or the liability protections all EUA products

and "covered persons (e.g. DoD/Services, the United States Government). In fact, the Applicant's Article 69(c) package contained over 230 pages of substantive evidence.

Furthermore, Applicant presented a thorough crosswalk of the laws, binding legal contracts, liability immunity for masks and test kits in Appendix 3, base document pages 10-13 and its supporting enclosures. The Applicant fully demonstrates that there are no legally licensed products in the US market to treat, prevent, cure, or diagnose Covid-19. The Applicant demonstrates that all EUA products are considered "covered countermeasures" and through the Secretary of Health and Human Service's public health emergency declarations receive full liability immunity via 42 U.S.C §247d-6d for being allowed into the US market under an EUA and can bypass all forms of thorough licensing processes and scientific scrutiny via 21U.S.C §360bbb-3(k). The Applicant shows that individuals accept ALL of the risks when accepting these products and that military leaders continually misrepresent EUA product's legal status and the risks associated with an individual taking unlicensed medical countermeasures. The Applicant fully demonstrates that the federal government and its agents while serving in their official capacity receive liability immunity from any form of loss suffered by a service-member. Lastly, the Applicant completely demonstrates that individuals have little to no legal recourse if they suffer an injury.

The Applicant humbly requests the ACCA reconsider's the Applicant's petition

for an appeal as well as all applicable appendices as the basis to overturn the guilty ruling. The Applicant desires his case to be heard and fully reviewed on the basis that being ordered (or any order for any person) to receive unlicensed EUA products is a patently unlawful violation of US federal statutes and the US Constitution as defined by both Articles 90 and 92 of the UCMJ (10 U.S.C. §§ 890, 892). If our military cannot follow our nation's own laws, then we as a nation are in dire straits and all our oaths of office are effectively meaningless.

Additional Facts.

The DoD Understands the Difference Between FDA Approved/Licensed/Cleared vs Investigations (IND) vs Emergency Use Authorization (EUA). In the early 2000s, the DoD has already lost a court case *Doe vs Rumsfeld*[14] trying to coerce military members to receive the Investigational (IND) Anthrax Vaccines (NOT FDA approved/licensed/cleared). What came out of it was DoDI 6200.02. After Congress passed the PREP Act and Food Drug and Cosmetic Act (FDC&A), DoDI 6200.02 was updated to include the EUA provisions (DoD Instruction 6200.02, February 27, 2008 - POSTED 2/28/2008 (whs.mil)). It states in paragraph "5.2. The Heads of DoD Components:…5.2.3. Shall, when using medical products under a force health protection program pursuant to an EUA, comply with Enclosure 3, Federal Food Drug and Cosmetic Act section 564 (Reference (d)),

[14] *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004)

section 1107a of Reference (e) and applicable FDA requirements." Section 564 of the FD&CA has been codified into 21 U.S.C. § 360bbb-3. Section 1107a this document is referring to 10 U.S.C. § 1107a.

In paragraph E3.4. of Department of Defense Instruction (DoDI) 6200.02, it states the following and it's a misrepresentation of the laws, both 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a. It states the following: "Request to the President to Waive an Option to Refuse. In the event that an EUA granted by the Commissioner of Food and Drugs includes a condition that potential recipients are provided an option to refuse administration of the product, the President may, pursuant to section 1107a of Reference (e), waive the option to refuse for administration of the medical product to members of the armed forces. Such a waiver is allowed if the President determines, in writing, that providing to members of the armed forces an option to refuse is not in the interests of national security. Only the Secretary of Defense may ask the President to grant a waiver of an option to refuse."

As it states in 21 U.S.C. § 360bbb-3(e) a required condition for **all** unapproved EUA products is that individuals to whom the EUA product is being administered to are informed of the option to accept of refuse EUA product, in this case specifically the test kit and facemask. The first thing wrong with paragraph E3.4. is that the condition that "potential recipients" (individuals being administered the EUA product) are INFORMED of the option to refuse administration of the EUA product is not an

event the FDA Commissioner can arbitrarily pick and choose to "include" or not include a condition providing an option to refuse administration. That "Required Condition" comes with all EUA products. All EUA products or countermeasures come with full liability protection; therefore, of course all EUA products come with the requirement to inform individuals of the option to refuse administration of the EUA product.

10 U.S.C. § 1107a titled "Emergency use products", it states the following: "In the case of the administration of a product authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) of such Act and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are **informed of an option to accept or refuse administration of a product**, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security." What cane be waived? The actual right to accept or refuse administration of a product? No. Not at all. The only thing the President can waive in writing is the right for the individuals to be INFORMED of an option to accept or refuse administration of an EUA product, not the actual right.

The DOD already has policy that makes a clear distinction between FDA approved/licensed/cleared products and EUA issued products. Although DoDI

6200.02 makes it appear as if only some EUA products come with the option to accept of refuse, the law in 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a is very clear. All EUA products come with the required conditions for individuals being administered any EUA product that the individual is supposed to be informed of the option to accept or refuse administration of the EUA product.

Masks. There are no FDA licensed masks for the purpose of preventing the spread of Covid-19. Masks come in three major categories: 1) Surgical Masks under a blanket FDA issued EUA letter[15] [16], 2) Facemasks covered under a blanket Facemask EUA letter[17], and 3) All other masks that are NOT under an FDA issued EUA and ALL come with legal disclaimers. All of these masks are unlicensed to prevent the spread of Covid-19. Category 1 masks openly state that the manufacturers must state: "[Surgical Masks] are "not intended to provide protection against pathogenic biological airborne particulates and are not recommended for use in aerosol generating procedures and any clinical conditions where there is significant risk of infection through inhalation exposure." The FDA waived all sub-parts of 21 C.F.R. Part 820[18] (page 6 of 6 March EUA Letter).

Category 2 masks encompass any manufacturer that applies for an EUA for a cloth mask, 3 ply, 4 ply, or other cloth facemasks. This EUA letter openly states

[15] Reissued -- Surgical Mask EUA March 6, 2023 (fda.gov)
[16] DHHS Letterhead (fda.gov) (N95 EUA Letter)
[17] https://www.fda.gov/media/137121/download
[18] See Appendix 6. Also see eCFR :: 21 CFR Part 820 -- Quality System Regulation

these manufacturers must clearly state: "The product is not labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or related uses or is for use such as infection prevention or reduction (page 4).[19]

Category 3 masks encompass any other face mask in the market, which is the majority as it turns out. None of these masks are under an active EUA, none of these are licensed, and none of these masks are legally/medically licensed by the FDA to prevent the spread of Covid-19. These masks ALL have disclaimers that state either "these products have not been reviewed by the FDA," or go to great lengths to state it does not work to prevent the spread of Covid-19 or any virus for that matter. This means all other masks will openly state they are not a medical device on the packaging. The manufacturers do not want to open themselves up to a lawsuit for a fraudulent product. Thus, they absolve themselves of any responsibility, but are more than willing to take your money.

One such example is found (and practically any other face masks have similar disclaimers) on Amazon's website for an NFL mask stating "The Fashion Face Covering is **not a medical device**. **It is not intended to be personal protective equipment and should not be used by healthcare professionals or**

[19] https://www.fda.gov/media/137121/download

used in a healthcare/clinical environment or setting. The Fashion Face Covering is **not intended to prevent or protect from any form of illness or disease (or otherwise)**. There is no better way that to find your fan hood, than with the extensive line of FOCO officially licensed product. Find all your favorite teams in our ever-expanding offering of gear."[20]

The bottom line is there are NO legally licensed masks in the US or global markets to prevent the spread of Covid-19. Category 1 and 2 masks also have good manufacturing practices waived, so masks are even less safe than they should be in the first place. The manufacturers of all masks go through great lengths to state their products do not work (AT ALL) for the purpose of prevention and the FDA places the requirement that no manufacturer can advertise their masks are safe or effective nor can they advertise they work against viral pathogens. Claims of safety and effectiveness are patently unlawful and grossly fraudulent as defined under 18 U.S.C. § 1038. Any order or policy forcing 100 percent compliance is patently unlawful because none of these masks are licensed, they all carry liability immunity, and they all leave the individual with 100 percent of the risks. Secondly, mandating the use of products openly stating they do not work is irresponsible and directly violates multiple US statutes as well as individual's Constitutional and human rights under the guise of safety.

[20] Amazon.com : Detroit Lions NFL Mens Matchday Face Cover - Adult - 3 Pack : Sports & Outdoors

Respectfully Submitted,

[redacted]
Mark Charles Bashaw
First Lieutenant (1LT), U.S. Army
[redacted]
Pro Se

Appendices

Appendix 7- 17 April ACCA Appeal Petition Denial Letter

In Vitro Rapid Antigen Test Kit EUA Letters posted at https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-antigen-diagnostic-tests-sars-cov-2, accessed 23 January 2023.

In Vitro Molecular Test EUA Letters posted at https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-molecular-diagnostic-tests-sars-cov-2, accessed 23 January 2023.

Surgical Mask EUA Letter posted at https://www.fda.gov/media/140894/download, accessed 23 January 2023

Appendix 7.

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
First Lieutenant MARK C. BASHAW
United States Army, Appellant

ARMY 20220213

ORDER

WHEREAS:

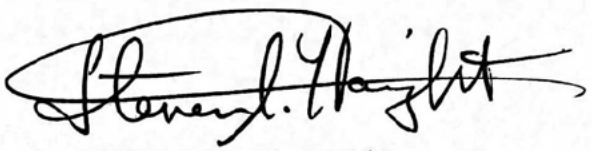
The Court has considered the application for grant of review of the decision of the Judge Advocate General.

NOW THEREFORE, IT IS ORDERED:

The petition is hereby DENIED.

DATE: 30 March 2023

FOR THE COURT:



STEVEN P. HAIGHT
Chief Deputy Clerk of Court

CF: JALS-DA
JALS-GA
JALS-TJ
JALS-CCR
JALS-CCZ
JALS-CR4

Accused

Certificate of Service

I certify that a copy of the foregoing was sent via electronic submission to usarmy.pentagon.hqda-otjag.mbx.clerk-of-court-efiling@army.mil at 0900EST on the 04 day of May, 2023.

Mark Charles Bashaw
1LT, Medical Service Corps, U.S. Army
Defense Centers for Public Health - Aberdeen
[redacted]
Pro Se