IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Anthony P. BALLAN Machinist's Mate Second Class Petty Officer (E-5) U.S. Navy, Appellant.	REPLY BRIEF ON BEHALF OF APPELLANT Crim.App. No. 201000242 USCA Dkt. No. 11-0413/NA

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

The Government has sidestepped the specified issue of waiver in order to argue that no error occurred; however, the specified issue assumed error and invited arguments on "whether Appellant waived such irregularit[ies]."[1] In framing its version of the issue, the Government has urged this Court to adopt a new four-prong test for plain error, an argument specifically rejected by this Court——this year——in *United States v. Flores*.[2] This reply will discuss: (1) the Government's "no error" argument; (2) the Government's reliance on *United States v. Wilkins* for the proposition that the Convening Authority

[1] Specified Issue.
[2] *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011). *Contra id.* at 373 (Stucky, J., dissenting in part and concurring in the result).

properly referred charges to the court-martial through a pretrial agreement; and (3) whether the facts of this case satisfy the substantial-basis test.

1. The Government's "no error" argument is flawed.

The Government's argument that the Convening Authority properly referred the Article 134 offense to court-martial is flawed because it assumes that the Convening Authority "expressly changed the offense to a referred Article 134 charge."[3] The pretrial agreement states: "NOT GUILTY, but GUILTY to the LIO of indecent acts with a child."[4] This is not a referral of a new offense. If anything, it establishes that the Convening Authority was under the assumption that indecent acts with a child was an LIO to rape, which it is not.

Suppose MM2 Ballan was charged with murder but pled guilty to absence without leave as an LIO to murder. Clearly, if his plea was accepted, the conviction would be impermissible, and it would not survive appellate scrutiny. Likewise, MM2 Ballan was erroneously convicted of indecent acts with a child because: (1) he was convicted of an offense that was not an LIO of the offense charged; and (2) he was not properly notified of the convicted offense.

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[3] Appellee's Brief of Sep. 12, 2011, at 13.
[4] Joint Appendix at 8.

2. *United States v. Wilkins*

The Government relies on *United States v. Wilkins*[5] for the proposition that the Convening Authority properly amended the charge by means of the pretrial agreement.[6] *Wilkins* is easily distinguishable from this case, however.[7] In *Wilkins* the military judge conducted an in-depth inquiry to establish that Wilkins understood that he was entering a plea to an offense that was not before the court. The military judge specifically asked the appellant whether "it [wa]s the conscious decision of the defense to enter a plea as to an offense to which the government has not entered a pleading and which is . . . not a lesser included offense?"[8] Concerned with the plea, the military judge again verified: "So, it's the intent of the defense to enter a plea to an offense for which the accused is not even standing trial as reflected by the charge sheet?"[9] Here, the record does not establish that MM2 Ballan understood that he was pleading guilty to a charge not properly before the court. Thus, this case is much different than *Wilkins*.

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[5] 29 M.J. 421 (C.M.A. 1990).
[6] Appellee's Brief at 10, 12-14.
[7] *See* Appellant's Brief at 12-14.
[8] *Wilkins*, 29 M.J. at 422.
[9] *Id.*

3. Substantial-basis test.

Lastly, if this Court find that the plain error test was not met in this case, the Court must then apply the substantial-basis test to the trial judge's acceptance of the plea (i.e., does the record as a whole show a substantial basis in law or fact for questioning the plea).[10] Rejection of a plea is required if there is a substantial basis to question either the legal or factual predicate for the plea.[11] Questions of law arising from the acceptance of the plea are reviewed *de novo*.[12]

A plea of guilty must be knowingly and voluntarily entered into in order to satisfy the requirements of due process.[13] This record fails to demonstrate that MM2 Ballan understood and voluntarily pled guilty to a charge not before the court because he and all the courtroom participants were unaware that the Article 134 offense was not referred to court-martial; however, the record does establish that MM2 Ballan did not understand the law when he pled guilty.

Additionally, MM2 Ballan was never provided fair notice of the terminal elements; thus, he did not know what offense and

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[10] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).
[11] *Id.*
[12] *Id.*
[13] *United States v. Perron*, 58 M.J. 78, 81 (C.A.A.F. 2003); *United States v. Care*, 40 C.M.R. 247, 250 (C.M.A. 1969).

what legal theory he was pleading guilty too.[14] "Where a plea is not knowing and voluntary, 'it has been obtained in violation of due process and is therefore void.'"[15]

4. Conclusion.

This Court should set aside the findings on the Sole Specification of Charge I because: (1) MM2 Ballan was erroneously convicted of an offense that is not an LIO of the offense charged and failed to state an offense; and (2) the record of trial fails to show that MM2 Ballan intentionally relinquished his known due process rights.

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[14] *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008).
[15] *Perron*, 58 M.J. at 81 (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on September 22, 2011. I also certify that this reply was electronically served on appellate government counsel, CAPT Samuel Moore, USMC, also on September 22, 2011.

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