IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States, Appellee v. Private (E-1) DARRIAN S. NEALY, United States Army, Appellant	) REPLY BRIEF ON BEHALF OF) APPELLANT))) Crim. App. Dkt. No. 20100654))) USCA Dkt. No. 11-0615/AR)

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

ISSUE PRESENTED

APPELLANT WAS CHARGED WITH COMMUNICATING A THREAT UNDER ARTICLE 134, BUT WAS CONVICTED PURSUANT TO HIS PLEA OF USING PROVOKING SPEECH IN VIOLATION OF ARTICLE 117. IN LIGHT OF *UNITED STATES V. JONES*, 68 M.J. 465 (2010), CAN THE CONVICTION BE SUSTAINED?

Argument

Appellant was charged with communicating a threat under Article 134, UCMJ. Appellant pled guilty, however, to provoking speech, under Article 117, UCMJ. As stated in appellant's original brief to this Honorable Court, it is clear that provoking speech contains an additional element which is not an element of communicating a threat: that the communication be directed at an individual subject to the code. Therefore, provoking speech is not a lesser-included offense (LIO) of communicating a threat. In their brief to this Honorable Court, the government concedes this fact but then argues that it is

immaterial to the outcome of this case because appellant waived the error. (Government Appellate Brief (GAB) at 6.)[1] The government also concedes that it was plain error for the military judge to accept appellant's plea, but then goes on to argue that appellant was not prejudiced by his conviction of an offense not charged. *Id.* For the reasons set forth below, it is clear that appellant did not waive this error and was ultimately prejudiced by the result.

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (citation omitted). "'Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *Id.* (quoting *Olano*, 507 U.S. at 733).

Here, the right at stake is appellant's Fifth-Amendment right to due process. Specifically, the Due Process Clause of

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[1] In their brief, the government, "concedes that under the circumstances of this case provoking speeches and gestures, in violation of Article 117, UCMJ, is not a lesser included offense of communicating a threat, in violation Article 134, UCMJ, and the military judge's acceptance of appellant's plea constitutes plain error." (GAB at 6.)

the Fifth Amendment does not permit convicting an accused of an offense with which he has not been charged. *See United States v. Marshall,* 67 M.J. 418, 421 n.3 (C.A.A.F. 2009). When a constitutional right is at stake, "there is a presumption against the waiver . . . and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." *Harcrow,* 66 M.J. at 157. (internal citation and quotation omitted.)

Contrary to the government's argument, appellant's plea of guilty is not dispositive of the issue. The military judge had a duty to ensure that appellant not only established a factual predicate for his guilty plea but that he understood the law as it related to that plea. *United States v. Care*, 18 C.M.R. 535, 538-39 (C.M.A. 1969). A voluntary and knowing relinquishment of the constitutional rights an accused waives in pleading guilty is not possible without knowledge of the nature of the charges brought against him. This would include whether he had a right to plead not guilty to an offense because it was not a LIO and thus, was not an offense charged against him. Accordingly, in this case, the military judge had an obligation to ensure appellant understood that provoking speech was not charged against him because it was not an LIO of communicating a threat.

Here, the evidence does not establish that appellant knowingly pled guilty to an offense that was not charged. Rather, it is clear from the record that both appellant and the military judge erroneously believed that provoking speech was an LIO of communicating a threat. This fact is evidenced by appellant's plea of guilty to "the lesser included offense of Article 117, UCMJ," and the military judge's acceptance of appellant's plea of guilty to the "lesser-included offense of provoking speech in violation of Article 117." (JA at 19-20.) Additionally, the record is devoid of any evidence or testimony which establishes that appellant understood he was pleading guilty to an offense not charged against him. As such, appellant's plea of guilty cannot be considered an intentional relinquishment or abandonment of a known right because it is clear that appellant was unaware he was pleading guilty to an uncharged offense. Thus, the presumption against wavier is not overcome in this case.

As there was not a knowing and voluntary waiver in appellant's case, the military judge's acceptance of appellant's plea of guilty is reviewed for an abuse of discretion. *See United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008) (stating a military judge's acceptance of an accused's guilty plea is reviewed for an abuse of discretion.) Here, the military judge, presumably aware of this Court's holding in

United States v. Jones, abused his discretion when he failed to ensure appellant understood that "provoking speech" was not a lesser included offense of the charged offense. Additionally, the military judge failed to inform appellant that because provoking speech was not an LIO, appellant was pleading guilty to an offense not charged against him. Thus, appellant's guilty plea was based on an erroneous view of the law and the military judge abused his discretion in accepting the plea. *See Id.* (a military judge abuses his discretion if his ruling is based on an erroneous view of the law).

Moreover, while appellant admitted that his language was provoking, as defined by the military judge, it is unclear whether he would have done so with the knowledge that he was not required to admit his conduct satisfied Article 117, UCMJ. As such, his plea cannot be deemed knowing and voluntary and the military judge abused his discretion in accepting appellant's plea of guilty to Article 117, UCMJ.[2]

While appellant maintains the standard of review to be applied in this case is an abuse of discretion, if this Court applies a plain-error standard of review, appellant's claim still merits relief. In the context of a plain error analysis, appellant has the burden of demonstrating that: (1) there was

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[2] Please see Appellant's original brief to this Court wherein the abuse of discretion standard is set forth and argued.

error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *See United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

As noted above, provoking speech is not a lesser included offense of communicating a threat. Therefore, as the government concedes in their brief, failing to advise appellant that he was pleading guilty to an offense not charged and subsequently accepting that plea was error. *See United States v. Jones,* 68 M.J. 465, 473 n.11 (C.A.A.F. 2010). This error was plain and obvious because *Jones* was decided in April 2011 and appellant's court martial took place four months after the decision in *Jones* was rendered. Thus, the military judge should have conducted the elements test and failing to do so was clear and obvious error.

Having fulfilled the first two plain error prongs, the only question that remains is whether appellant suffered prejudice to a substantial right. Under the facts of this case, the prejudice is clear – appellant unknowingly pled guilty to an offense that was not an LIO of the charged offense and as a result, was convicted of an offense not charged. Further, the specification was not amended in accordance with R.C.M. 603[3] and the record is devoid of any evidence establishing appellant's

[3] This argument was made in Appellant's Final Brief to this Honorable Court at page 15.

intent to plead guilty to an offense that was not charged against him. In fact, the record of trial establishes that appellant erroneously believed that provoking speech was an LIO of communicating a threat and the military judge failed to dispel this belief.

But for the error in this case, appellant would not have been convicted of provoking speech.[4] Such a conviction would have required the military judge to expressly ensure that appellant understood provoking speech was not an LIO of communicating a threat and that appellant understood he was pleading guilty to an offense not charged. Additionally, the government would have been required to refer the new "uncharged" specification to trial or at a minimum establish, on the record, that a constructive referral had occurred.[5] Neither action occurred in appellant's case and under the circumstances, it was prejudicial plain error to convict appellant of provoking speech under Article 117, UCMJ.

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[4] Appellant's case is clearly distinguishable from *United States v. Wilkins,* because without an offer to plead guilty a constructive referral argument cannot be made. *United States v. Wilkins*, 29 M.J. 421, 423-24 (C.M.A. 1990). Without a new or constructive referral, appellant's court martial lacked jurisdiction over the uncharged offense.

[5] See Appellant's Final Brief to this Honorable Court at 14-16.

Conclusion

WHEREFORE, appellant requests that this Honorable Court disapprove the findings and sentence in this case.

Kristin B. McGrory
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
901 N. Stuart Street, #340
Arlington, Virginia 22203
(703)588-6712
USCAAF No. 35014

JACOB D. BASHORE
Major, Judge Advocate
Branch Chief, Defense Appellate Division
USCAAF No. 35281

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Nealy, Crim. App. Dkt. No. 20100654, Dkt. No. 11-0615/AR, was delivered to the Court and Government Appellate Division on November 4, 2011.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736