IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	USCA Dkt. No. 14-0199/AR
Private (E-1) **Bryce Phillips,** United States Army, Appellant	)	Crim.App. Dkt. No. 20120585

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Issue Presented:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO DISOBEYING THE ORDER OF HIS COMMANDER IN VIOLATION OF ARTICLE 90, UCMJ, WHEN THE ULTIMATE OFFENSE AT ISSUE WAS THE MINOR OFFENSE OF BREAKING RESTRICTION DESCRIBED UNDER ARTICLE 134, UCMJ, AND THE RECORD DOES NOT REFLECT APPELLANT'S UNDERSTANDING THAT THE ORDER IMPOSING RESTRICTION WAS ISSUED WITH THE FULL AUTHORITY OF HIS COMMANDER'S OFFICE TO LIFT THE DUTY, IN THE PARLANCE OF THIS COURT'S EARLIER OPINION, "ABOVE THE COMMON RUCK."

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

Granted Issue

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO DISOBEYING THE ORDER OF HIS COMMANDER IN VIOLATION OF ARTICLE 90, UCMJ, WHEN THE ULTIMATE OFFENSE AT ISSUE WAS THE MINOR OFFENSE OF BREAKING RESTRICTION DESCRIBED UNDER ARTICLE 134, UCMJ, AND THE RECORD DOES NOT REFLECT APPELLANT'S UNDERSTANDING THAT THE ORDER IMPOSING RESTRICTION WAS ISSUED WITH THE FULL AUTHORITY OF HIS COMMANDER'S OFFICE TO LIFT THE DUTY, IN THE PARLANCE OF THIS COURT'S EARLIER OPINION, "ABOVE THE COMMON RUCK."

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.[2]

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[1] UCMJ, Art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, Art. 67(a)(3), 10 U.S.C. § 867(a)(3).

Statement of the Case

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas[3], of two specifications of absence without leave, one specification of willful disobedience of a superior commissioned officer, and one specification of wrongful use of cocaine, in violation of Articles 86, 90, and 112a, UCMJ.[4] The military judge sentenced appellant to nine months of confinement and a bad-conduct discharge.[5] The convening authority approved the adjudged sentence and credited appellant with 62 days of confinement against his sentence.[6]

On 23 September 2013, the Army Court set aside appellant's guilty plea to willful disobedience of a superior commissioned officer.[7] Subsequently, on 08 November 2013, the Army Court granted the government's motion for en banc reconsideration.[8] On 31 January 2014, the Army Court reversed its 23 September 2013 ruling, this time affirming appellant's guilty plea to willful

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[3] JA 022-023.
[4] 10 U.S.C. §§ 886, 890 and 912a (2008); JA 038. Pursuant to the government's motion to dismiss, the military judge dismissed Specification 1 of Charge II (possession of cocaine). JA 037.
[5] JA 039.
[6] JA 052 (Action).
[7] JA 001-003. (United States v. Phillips, 2013 WL 5402231 (Army Ct. Crim. App. September 23, 2013) (sum. op)).
[8] JA 004.

disobedience of a superior commissioned officer.[9] This Court granted appellant's petition for review of the Army Court's decision on 1 April 2014.

Statement of Facts

Appellant was a soldier assigned to the 4th Infantry Division at Fort Hood, Texas.[10] On or about 20 February 2008, appellant absented himself from his unit because "he wanted to have a good time."[11] Appellant was aware that, at the time of his absence, his unit was preparing to deploy.[12]

Approximately two years later, on 3 March 2010, appellant returned to his unit.[13] During his absence, the 4th Infantry Division had moved from Fort Hood, Texas to Fort Carson, Colorado.[14] On 9 April 2010, approximately one month after his return, appellant used cocaine in his barracks room on Fort Carson and tested positive for cocaine in a urinalysis.[15]

Charges were preferred and referred against appellant for desertion and wrongful use and possession of cocaine.[16] Appellant was arraigned on 6 October 2010 and was notified that

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[9] JA 005-009 (United States v. Phillips, 73 M.J. 572, 572-575 (Army Ct. Crim. App. 2014).
[10] JA 041; (R. at 33-34).
[11] JA 041; (R. at 34).
[12] JA 041
[13] JA 041, R. at 37
[14] JA 040
[15] JA 041, R. at 61-62
[16] JA 042; R. at 50

his court-martial would take place on 8 November 2010.[17] On the date of his court-martial, appellant again absented himself from his unit.[18] One reason why appellant absented himself was to "impede the[] criminal proceedings" he was facing.[19]

Appellant remained absent without leave for almost a year and a half.[20] During his absence, appellant was incarcerated by civilian authorities for criminal trespassing and exposing his genitals to a child.[21] Upon release from civilian confinement, appellant was returned to his unit at Fort Carson on 2 March 2012.[22]

On 14 March 2012, appellant's company commander, CPT PE, personally gave appellant a written order to remain on Fort Carson.[23] Appellant "had just returned from being absent from his unit and the unit needed to ensure that [he] would not leave his unit again, without authority, and would not avoid his legal proceedings."[24] On 11 April 2012, appellant "willfully disobeyed this lawful command of [CPT PE]" by leaving Fort Carson to visit his girlfriend's off-post residence.[25] In the stipulation of

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[17] JA 042.
[18] JA 043; SJA 007, 014-015.
[19] JA 043; SJA 010.
[20] JA 043; SJA 013.
[21] JA 043; SJA 009, 011-012.
[22] JA 042; SJA 013.
[23] JA 031-033, 043.
[24] JA 032, 043
[25] JA 034, 043

fact he signed, as well as during the providence inquiry, appellant admitted that he was actually "residing off post."[26]

Summary of Argument

Appellant waived any claim under the ultimate offense doctrine by indicating in his plea agreement an express desire to waive all waivable motions. Even if appellant did not waive his claim, the colloquy and stipulation of fact clearly show that appellant was provident to willfully disobeying a superior commissioned officer in violation of Article 90, UCMJ.

Contrary to appellant's assertions, "lifting an order above the common ruck" is not an "element" of Article 90, UCMJ. It is well-settled that elements are created by statute, and no such element is found within 10 U.S.C. § 890. Instead, "lifting an order above the common ruck" is a factor to consider in whether an order is lawful or whether it was implemented solely to increase punishment. Rather than being an element in itself, the factor aids in the determination as to whether the first element of Article 92, UCMJ, was proved.

Even if this Court finds that appellant was improvident to Article 90, it may still find appellant guilty of Article 92, failure to obey an order or regulation. Finally, in the event this Court finds appellant improvident to Article 90 or even Article 92, appellant should not be granted sentence relief.

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[26] JA 031, 043.

Granted Issue

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO DISOBEYING THE ORDER OF HIS COMMANDER IN VIOLATION OF ARTICLE 90, UCMJ, WHEN THE ULTIMATE OFFENSE AT ISSUE WAS THE MINOR OFFENSE OF BREAKING RESTRICTION DESCRIBED UNDER ARTICLE 134, UCMJ, AND THE RECORD DOES NOT REFLECT APPELLANT'S UNDERSTANDING THAT THE ORDER IMPOSING RESTRICTION WAS ISSUED WITH THE FULL AUTHORITY OF HIS COMMANDER'S OFFICE TO LIFT THE DUTY, IN THE PARLANCE OF THIS COURT'S EARLIER OPINION, "ABOVE THE COMMON RUCK."

A. Appellant waived his ultimate offense doctrine claim by virtue of his unconditional guilty plea and the "waive all waivable motions" term in his pretrial agreement.

Additional Facts

Appellant unconditionally pled guilty to The Specification of the Additional Charge (willfully disobeying a superior commissioned officer in violation of Article 90, UCMJ).[27] Appellant also entered into a pretrial agreement whereupon he agreed to "waive all waivable motions."[28]

The military judge questioned appellant extensively as to whether he understood the meaning and consequences of the "waive all waivable motions" provision.[29] He even went so far as to inform appellant that "this term of your pretrial agreement means that you are giving up your right to make any waivable motions which by law are given up when you plead guilty," and

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[27] JA 022-023.
[28] SJA 027 (App. Ex. V).
[29] SJA 019-021.

also told appellant, "this term of your pretrial agreement precludes the court or any appellate court from having the opportunity to determine if you're entitled to any relief based upon these motions."[30] Appellant indicated without equivocation that he understood.[31] The military judge further asked appellant whether he "freely and voluntarily agree[d] to this term of the agreement in order to receive what [he] believe[d] to be a beneficial pretrial agreement."[32] Appellant answered in the affirmative.[33]

The military judge then asked defense counsel to state on the record which motions she would have raised but for the "waive all waivable motions" provision.[34] In her answer to the military judge, defense counsel did not raise any motions regarding the ultimate offense doctrine.[35] At no time during the court-martial hearing did defense counsel make an objection on the grounds that the ultimate offense doctrine precluded charging appellant under Article 90, UCMJ, or that appellant was improvident.

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[30] SJA 019-020
[31] SJA 020.
[32] SJA 020-021.
[33] SJA 021.
[34] SJA 018-019, 023.
[35] SJA 018-019, 023-024.

Standard of Review and Law

". . . [W]hether an issue is 'waived' by a party is a threshold issue that must be addressed before a court can consider the substantive issue being appealed."[36] This Court looks to the record to determine whether or not appellant affirmatively waived the assigned issue.[37]

Waiver is the "intentional relinquishment or abandonment of a known right."[38] It is "a deliberate decision [by appellant] not to present a ground for relief that might be available in the law."[39] "When an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal."[40] This Court also has said,

> R.C.M. 910(j) provides a bright-line rule – an unconditional guilty plea which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made. The point . . . is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.
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> Objections that do not relate to factual issues of guilt are not covered by this bright-line rule, but the general principle still applies: An unconditional guilty plea generally waives all defects which are

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[36] United States v. Clifton, 71 M.J. 489, 493 (C.A.A.F. 2013)).[36]
[37] Id.
[38] United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008) (quoting United States v. Olano, 507 U.S. 725, 732-33 (1993)).
[39] United States v. Campos, 67 M.J. 330, 331 (C.A.A.F. 2009)).
[40] United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009)

neither jurisdictional nor a deprivation of due process of law.[41, 42]

This Court held in United States v. Gladue that an appellant's "express waiver of any waivable motions" waived any claims of multiplicity and unreasonable multiplication of charges and "extinguished [appellant's] right to raise these issues on appeal."[43] As in this case, appellant in Gladue pled guilty and entered into a pretrial agreement in which he agreed to waive all waivable motions.[44] Although neither the defense counsel nor the military judge in Gladue specifically discussed motions relating to multiplicity and unreasonable multiplication of charges, the military judge "conducted a detailed, careful, and searching examination of appellant to ensure that he understood the effect of the PTA provision, [and] appellant explicitly indicated his understanding that he was giving up the

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[41] United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009) (internal citations and quotation marks omitted)
[42] See e.g., United States v. Bradley, 68 M.J. 279, 281 (C.A.A.F. 2010) ("An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings") (citations omitted); United States v. Soto, 69 M.J. 304, 306 (C.A.A.F. 2011) (quoting Boykin v. Alabama, 395 U.S. 238, 242-43 (1969)) ("A plea of guilty is more than an admission of guilt—it is the waiver of bedrock constitutional rights and privileges"); Gladue, 67 M.J. at 314 (quoting United States v. Mezzanatto, 513 U.S. 196, 201 (1995))("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution").
[43] Gladue, 67 M.J. at 314.
[44] Id. at 312-13

right 'to make any motion which by law is given up when [an accused] plead[s] guilty.'"[45]

Though not binding on this Court, the Air Force Court of Criminal Appeals held in United States v. Brock that an appellant waived his ultimate offense doctrine claim by virtue of his guilty plea.[46]

Argument

Even though appellant attempts to couch his ultimate offense doctrine claim in terms of providence, this Court should find that his claim is waived. As in Gladue, appellant entered into a pretrial agreement whereupon he agreed to "waive all waivable motions."[47] Moreover, like Gladue, the military judge conducted a probing inquiry with appellant in order to determine whether he understood the waiver terminology in his pretrial agreement and whether he agreed to be bound by it in exchange for the benefits of pleading guilty.[48]

Because appellant negotiated for and obtained the benefit of a pretrial agreement, the government had no reason to enter into evidence the actual written counseling statement CPT PE issued to appellant. The counseling statement could have showed (and likely would have showed) that CPT PE lifted his order

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[45] Id. at 314.
[46] United States v. Brock, 2005 WL 2129508, at *3 (A.F. Ct. Crim. App. 8 Aug. 2005); see R.C.M. 910(j).
[47] SJA 003, 027 (App. Ex. V); Gladue, 67 M.J. at 314.
[48] SJA 018-021; Gladue, 67 M.J. at 314.

above the common ruck. Also, the government had no reason to call to the stand witnesses who were intimately familiar with the details of appellant's criminal conduct. As this Court previously noted, a guilty plea inevitably will have a less-developed factual record.[49] Appellant therefore should not be permitted to have it both ways - he should not be entitled to the benefits of a pretrial agreement (reduced sentence, special court-martial) *and also have* the facts of his case reconsidered by this Court when he specifically indicated that those facts were true and correct. Otherwise, the document to which appellant affixed his signature and agreed to be bound is rendered meaningless. Also, this Court will risk a flood of future appellants who break their promise to waive all waivable motions after reaping the benefits of having made that promise. This Court should not be compelled to conduct a factual analysis when appellant's promise resulted in a limited record.

When the military judge asked whether additional questioning was necessary, the defense counsel responded with a succinct, "No, sir."[50] Since the defense counsel had just witnessed her client freely and knowingly admit each element of willfully disobeying a superior commissioned officer, she could not now in good faith assert that he was improvident.

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[49] United States v. Barton, 60 M.J. 62, 65-66 (C.A.A.F. 2004).
[50] JA 035.

Due to appellant's unconditional guilty plea and his pretrial agreement to "waive all waivable motions," appellant made a knowing and intentional relinquishment of his right to raise on appeal any argument based on the ultimate offense doctrine. In the same way this Court found in Gladue that the appellant waived any claims of multiplicity or unreasonable multiplication of charges, this Court should also find that appellant waived his ultimate offense doctrine claim and grant him no relief.

B. Even if this Court finds that appellant did not waive his claim, appellant was provident to violating Article 90, UCMJ, willful disobedience of a superior commissioned officer, and there is no substantial basis in law or fact to question appellant's guilty plea.

Standard of Review

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion."[51] "Once a military judge has accepted an accused's guilty pleas and entered findings of guilty, [an appellate] court will not set them aside unless [it] find[s] a substantial basis in law or fact for questioning the

[51] United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996)).

plea."[52] Appellant bears the burden of establishing this "substantial basis."[53]

Law

1. The ultimate offense doctrine.

In United States v. Quarles, the Court of Military Appeals (CMA) summarized the ultimate offense doctrine:

> It is true that this Court has had occasion to engage in the exercise of discerning the true "ultimate offense" involved in an alleged violation of an order laid under Articles 90 or 91. The rationale is that "an order to obey the law can have no validity beyond the limit of the ultimate offense committed."
>
> However, our concern in this area is that the giving of an order, and the subsequent disobedience of same, not be permitted thereby to escalate the punishment to which an accused otherwise would be subject for the ultimate offense involved.[54]

More recently, this Court expressed the same concern: "Military law has long held that minor offenses may not be escalated in severity by charging them as violations of orders or the willful disobedience of superiors."[55]

Article 90, UCMJ, also addresses the ultimate offense doctrine: "Disobedience of an order . . . which is given for the

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[52] United States v. Goodman, 70 M.J. 396, 399 (C.A.A.F. 2011) (quoting Schweitzer, 68 M.J. at 137) (citing Inabinette, 66 M.J. at 322; Article 45(a), UCMJ, 10 U.S.C. § 845(a) (2006)).
[53] United States v. Negron, 60 M.J. 136, 141 (C.A.A.F. 2004) (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A 1991)).
[54] United States v. Quarles, 1 M.J. 231, 232 (C.M.A. 1975) (quoting United States v. Bratcher, 18 U.S.C.M.A. 125, 128, 39 C.M.R. 125, 128 (1969)).
[55] United States v. Hargrove, 51 M.J. 408 (C.A.A.F. 1999) (citing United States v. Loos, 4 U.S.C.M.A. 478, 16 C.M.R. 52 (1954)).

sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under [Article 90]."[56] Moreover, "the President has continued this principle" in a note referenced under Article 92, UCMJ, in the edition of the Manual for Courts-Martial under which appellant was charged.[57] The Article 92 note states:

> . . . [T]he punishment set out does not apply in the following cases: if in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.[58]

The ultimate offense doctrine was developed to address the concern that the government would charge an offense as a violation of an order solely to increase the maximum punishment for that offense. However, as recognized by this Court, its predecessor, and the service courts, "a superior officer may, by

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[56] Manual for Courts-Martial, United States (2008 ed.) [hereinafter MCM], Part IV, para. 14.c.(2)(a)(iv).

[57] See Hargrove, 51 M.J. at 408 (citing MCM, Part IV, para. 16.e.(2)(Note)).

[58] This note is derived from "Footnote 5" to the Table of Maximum Punishments in the 1951 and 1969 Manuals for Courts-Martial, United States, which stated: "The punishment for this offense does not apply in those cases wherein the accused is found guilty of an offense which, although involving a failure to obey a lawful order, is specifically listed in this table." Curiously, this note does not appear in the 2012 edition of the MCM, though likely this is a misprint.

supporting a routine duty with the full authority of his office, lift it above the common ruck – and thus remove the failure to perform it from within the ambit of [a lesser offense]."[59] Also,

> In determining whether there was a willful disobedience of an order, we will look at the nature of the order; the source and content of the order; and the nature of the disobedience, i.e., intentional defiance of authority."[60]

Moreover, "in determining the 'ultimate offense' involved, the environment in which the order was given must also be duly considered in order to decide whether the order was given only to improperly escalate punishment."[61]

2. Determining whether an accused is provident.

To reiterate, a military judge must first "determin[e] whether there is an adequate basis in law and fact to support [a guilty] plea...."[62] If a military judge fails to elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea," then the military judge has

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[59] United States v. Pettersen, 17 M.J. 69, 71-72 (C.M.A. 1983) (quoting Loos, 4 U.S.C.M.A. at 480-81, 16 C.M.R. at 54-55); *see, e.g.* Hargrove, 51 M.J. at 408.
[60] United States v. Henderson, 44 M.J. 232, 233 (C.A.A.F. 1996)(internal citations omitted).
[61] United States v. Landwehr, 18 M.J. 355, 356 (C.M.A. 1984).
[62] Inabinette, 66 M.J. at 321-22.

abused his discretion.[63] "[I]t is not enough to elicit legal conclusions."[64] Rather,

> [t]he record of trial must reflect not only that the elements of each offense have been explained to the accused, but also 'make clear the basis for a determination by the military judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.'[65]

Appellate courts "afford significant deference" to the trial court's fact-finding during an accused's providence inquiry.[66] If a military judge accepts the accused's guilty plea and enters a finding of guilty, courts of appeal will not set it aside unless, after viewing "the record as a whole,"[67] they "find a substantial basis in law or fact for questioning the plea."[68]

For a guilty plea to be knowing and voluntary, the record of trial must indicate that the military judge explained to the accused the elements of each offense charged.[69] However, "rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to

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[63] United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980)).
[64] Jordan, 57 M.J. at 238.
[65] Id. (quoting United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (C.M.A. 1969)).
[66] Inabinette, 66 M.J. at 322.
[67] Id.
[68] United States v. Goodman, 70 M.J. 396, 399 (C.A.A.F. 2011) (quoting Schweitzer, 68 M.J. at 137; citing Inabinette, 66 M.J. at 322; Article 45(a), UCMJ, 10 U.S.C. § 845(a) (2006)).
[69] Care, 18 C.M.A. at 541. See Art. 45(a), UCMJ, 10 U.S.C. § 845(a) (2002); R.C.M. 910(c)(1).

determine whether an accused is aware of the elements, either explicitly or inferentially."[70]

"In determining whether a guilty plea is provident, the military judge may consider the facts contained in the stipulation [of fact] along with the inquiry of appellant on the record."[71]

Argument

Appellant has failed to meet his burden by showing a substantial basis in law or fact to question his plea of guilty to willfully disobeying a superior commissioned officer in violation of Article 90, UCMJ. The record contains an adequate factual basis, as revealed during the colloquy and by the stipulation of fact, to show CPT PE placed the full authority of his office behind the order restricting appellant to post; that the order was given in an environment of defiance; and that CPT PE gave the order for reasons other than to increase the maximum punishment. Ultimately, appellant was provident to willfully disobeying a superior commissioned officer.

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[70] United States v. Redlinski, 58 M.J. 117, 119 (C.A.A.F. 2003); citing United States v. Jones, 34 M.J. 270, 272 (C.M.A.1992); United States v. Pretlow, 13 M.J. 85, 88 (C.M.A.1982); United States v. Kilgore, 21 C.M.A. 35, 37, 44 C.M.R. 89 (1971).

[71] United States v. Hines, 73 M.J. 119, 124 (C.A.A.F. 2014) (quoting United States v. Whitaker, 72 M.J. 292, 293 (C.A.A.F. 2013).

The military judge explained to appellant the four elements comprising the charge.[72] He also defined the term "willful disobedience" and explained what constitutes a "superior commissioned officer" and a "lawful command."[73] Appellant indicated his understanding of the elements and definitions, and that they correctly described the nature of his crime.[74]

Next, the military judge asked appellant why he was guilty of willfully disobeying a superior commissioned officer. The appellant responded, "Because I was residing off post when I was *clearly* given a command to stay on post and not break restriction."[75] Appellant's unprompted use of the descriptor "clearly" indicates that there was nothing ambiguous about the order he received from CPT PE, and that he was provident to the fact that CPT PE used the full weight of his office when he issued the order. Appellant further admitted that he received the command from CPT PE, someone he knew to be his superior commissioned officer, and that he intentionally disobeyed that order.[76] Appellant also confirmed that he knew "the command was coming from [CPT PE]" and that CPT PE "personally conveyed [the command] to him" "through a [written] counseling statement."[77]

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[72] JA 029-030.
[73] JA 030.
[74] JA 031.
[75] JA 031 (emphasis added).
[76] JA 032-034.
[77] JA 032-033, 043.

Moreover, appellant admitted that CPT PE went so far as to have him sign his written order.[78] Overall, appellant demonstrated his understanding that CPT PE was attempting to impress upon him the importance of being "present for his duties with his unit and his legal proceedings."[79]

Appellant also was provident to the fact that the order was issued within an "environment of defiance."[80] When the military judge asked appellant what compelled CPT PE to issue his command, appellant demonstrated that he understood the extraordinary context in which the command was given: "I had just returned from AWOL, sir."[81] In the stipulation of fact personally signed by appellant and his counsel, appellant acknowledged that the reason why CPT PE gave the command was because appellant "had just returned from being absent from his unit and the unit needed to ensure that [he] would not leave his unit again, without authority, and would not avoid his legal proceedings."[82] Indeed, appellant once before had fled on the very day he was to be court-martialed, and remained absent for a

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[78] JA 043.
[79] JA 043; See United States v. Traxler, 39 M.J. 476, 479 (C.M.A. 1994) (within an environment of defiance, commander "delivered the order personally to appellant under circumstances that bore all the indicia of a formal command."); See also Pettersen, 17 M.J. at 72 (The accused's express defiance of the orders and his intention to remain in unauthorized absence status amounts to "a direct attack on the integrity of any military system.").
[80] United States v. Peaches, 25 M.J. 364, 366 (C.M.A. 1987).
[81] JA 032.
[82] JA 043.

year and a half.[83] Appellant also admitted in the stipulation of fact that one of the reasons why he absented himself was to "impede the[] criminal proceedings" he was facing.[84] Appellant admitted to the same during the colloquy.[85]

Not only did Appellant admit that CPT PE issued the order within an environment of defiance, he was also provident to the fact that CPT PE established a new requirement by virtue of his written order - that is, CPT PE was not merely reiterating a standing or routine duty.[86]

With the revelation that he was actually "resid[ing]" off post, appellant admitted to willfully engaging in a course of conduct far more insubordinate than a mere one-time breaking of restriction. It is no exaggeration to say that appellant showed contempt for CPT PE's authority by living at his girlfriend's off-post apartment after CPT PE ordered him to remain on Fort Carson.

Appellant's violation of CPT PE's order was willful, repeated, and flagrant. Said this Court's predecessor in United States v. Pettersen, "While we must insure that the use of orders is not improperly designed to increase punishment in a given instance, we also must not erode the command structure

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[83] JA 042-043.
[84] JA 043.
[85] SJA 010-011.
[86] JA 032.

upon which the military organization is based."[87] When considering the full breadth of appellant's disobedience and the environment of sustained defiance, there is no question that the ultimate offense is willfully disobeying a superior commissioned officer.

Although the military judge did not specifically ask appellant whether CPT PE lifted his order above the common ruck, the record is clear that appellant was provident to the fact that CPT PE had done so. Also, there is no evidence that CPT PE gave the order simply to expose appellant to a potential greater maximum sentence. Rather, the facts elicited from appellant show that CPT PE, when faced with a soldier who repeatedly absented himself from his unit, attempted to ensure compliance with his order by placing the "full authority of his office" behind the order to lift it above the "common ruck."[88] More accurately, however, this was no routine duty or standing order that appellant violated; rather, CPT PE established a new duty by virtue of the written order he personally gave to appellant. Not only had appellant has been AWOL twice for years at a time, after appellant absented himself for the second time (to impede

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[87] 17 M.J. at 72.

[88] See Traxler, 39 M.J. at 479 ("the order was formulated and issued by [appellant's commander] with a view to adding the full authority of his position and rank to ensure the accused's compliance with the directive. It was not formulated for the purpose of enhancing the punitive consequences of a possible violation").

a court-martial) he was convicted for exposing his genitals to a child.[89] By no means was CPT PE issuing a routine order to just another soldier.

Since defiance of military authority was the ultimate offense, it was proper to charge appellant under Article 90 as opposed to Article 134.[90] Moreover, appellant was provident to the charge. This Court therefore should affirm appellant's conviction for willfully disobeying an order from his superior commissioned officer.

C. Contrary to appellant's assertion, "lifting an order above the common ruck" is not an "element" of the offense[91]; rather, it is a judicially-rendered factor this Court uses to determine whether an order is lawful (i.e., whether the first element of the Article 90 is met).

Argument

Nowhere in his brief does appellant allege that CPT PE failed to lift his order above the common ruck or that CPT PE's sole purpose in giving the order was to increase appellant's punishment. Rather, appellant uses the ultimate offense doctrine to allege that he was not provident to willfully disobeying a superior commissioned officer.[92]

Appellant writes, "The Army Court erred by applying a legal sufficiency analysis to what should have been a providence

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[89] JA 043, 046-052.
[90] Landwehr, 18 M.J. at 356 (citing Petterson, 17 M.J. 69).
[91] Appellant's Br. 11.
[92] Appellant's Br. 10.

review."[93] Appellant justifies his assertion by arguing that (1) whether commander lifted his order above the common ruck is an element of the offense; and (2) all elements of an offense must be proved beyond a reasonable doubt before an accused may be found guilty.[94] Although (2) is a requirement of the Due Process Clause of the 5th Amendment[95], appellant bases (1) on a misapplication of precedent established both by this Court and the Supreme Court.

1. "Lifting an order above the common ruck" is merely one factor this Court uses to flesh out the Article 90, UCMJ, "lawfulness" element and is not in itself an element.

Contrary to appellant's assertion,[96] the ultimate offense doctrine does not add elements to Article 90, UCMJ. Rather, the ultimate offense doctrine consists of factors that aid in the determination of whether an order is lawful.

This Court's rulings regarding the ultimate offense doctrine all pertain to the following guidance found in Article 90, UCMJ, under heading "lawfulness of the order": "Disobedience of an order which . . . is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article."[97] So long as the government proves beyond a reasonable doubt that

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[93] Appellant's Br. 13.
[94] Appellant's Br. 11.
[95] U.S. CONST., amend. V.
[96] Appellant's Br. 11.
[97] MCM, Pt. IV, para. 14.c.(2)(a)(iv).

there was another permissible reason for the order in question, the government has fulfilled the first (or "lawfulness") element of Article 90, UCMJ.

There can be no violation of Article 90, UCMJ, when there is nothing more than a preexisting duty to obey, since this would amount to an improper attempt at increasing punishment.[98] Hence, this Court developed the factors comprising the ultimate offense doctrine to help determine if, in fact, an order is lawful. Whether a commander infuses an order with the full weight of his office and lifts an otherwise routine duty "above the common ruck" is one such factor this Court uses.[99] Also, "In determining whether there was a willful disobedience of an order, we will look at the nature of the order; the source and content of the order; and the nature of the disobedience, i.e., intentional defiance of authority."[100,101]

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[98] Id.; Peaches, 25 M.J. at 364.
[99] Pettersen, 17 M.J. at 72.
[100] Henderson, 44 M.J. at 233 (C.A.A.F. 1996)(internal citations omitted).
[101] See, e.g., Traxler, 39 M.J. at 478 (Due to the nature of the order, proper to charge Article 90, UCMJ, when accused violates his company commander's order to abide by preexisting duty to deploy in support of Desert Storm: "First, it is not simply the existence of a preexisting duty to do that which was the subject of the order that is material; rather, it is the nature of that preexisting duty."); United States v. Brownlow, 39 M.J. 484, 485 (C.M.A. 1994) (citing Traxler) (Proper to charge Article 90, UCMJ, for failure to obey order to abide by preexisting duty to deploy in support of Desert Storm when "[t]he gravamen of appellant's disobedience of that order was a flagrant defiance

Appellant therefore is mistaken when he asserts that the requirements of the ultimate offense doctrine are elements unto themselves to which an accused must be provident.[102] "Lawfulness" is the element[103]; lifting a routine order above the common ruck merely is one way by which this Court determines whether, in fact, an order is lawful.

Because appellant indicated his understanding of the military judge's explanation as to what constitutes a lawful order, the accused was provident to the Article 90, UCMJ, specification. The military judge discussed what is meant by "a lawful command."[104] Borrowing almost verbatim from MCM, Pt. IV, para. 14.c.(2)(a)(iv), the military judge explained, "The command is illegal if . . . it is given for the sole purpose of increasing the punishment for an offense which is expected you may commit."[105] Next, the military judge asked appellant whether he understood "the elements and definitions as [he] read them to [him]." Appellant responded "Yes, Sir."[106] Soon after, appellant explained the lawful reason why CPT PE issued the order: "I had just returned from being AWOL, sir."[107] In

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of the office of [a superior commissioned officer], and it is chargeable and punishable as such.").

[102] Appellant's Br. 11.

[103] MCM, Pt. IV, para. 14.b.(2)(a).

[104] JA 030.

[105] JA 030.

[106] JA 031.

[107] JA 032.

addition, the stipulation of fact signed by appellant states that the order was lawful because it was reasonably necessary to "ensure that the [appellant] would not leave his unit again, without authority, and would not avoid his legal proceedings."[108]

After being told that a lawful order cannot be issued solely to increase punishment, appellant told the judge that the order was issued for a legitimate reason that had nothing to do with increasing punishment. The stipulation of fact signed by appellant also acknowledges a lawful reason for the order. Because the military judge explained the elements and appellant indicated his understanding, appellant is provident.[109]

It must also be noted that Captain PE did not *have* to lift his order above the common ruck because there was nothing routine about the context in which he gave the order. Appellant did not willfully disobey a preexisting order restricting him to post; rather, but for CPT PE's order, there would have been no restriction for appellant to break. When CPT PE issued the order, there was probable cause for him to believe that appellant twice had been AWOL for years at a time, and that the reason appellant had absented himself the second time was to

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[108] JA 043.

[109] United States v. Schell, 72 M.J. 339, 345 (C.A.A.F. 2013); Redlinski, 58 M.J. 119; Care, 18 C.M.A. at 541, 40 C.M.R. at 253; R.C.M. 910(e).

avoid court-martial proceedings.[110] It therefore follows that CPT PE gave his order within an environment of sustained defiance. Also, to the extent that the order was "routine," CPT PE impressed upon appellant that he was using the full weight of his office to lift the order above the common ruck when he personally issued him a written counseling statement detailing the terms of his restriction. Appellant demonstrated that he was provident to this ("I was *clearly* given a command . . .").[111]

b. The "elements" of a crime are established by statute.

Appellant writes, "The United States Supreme Court has stated [in Alleyne v. United States], '[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.'"[112] In asserting that lifting an order above the common ruck is an "element" of the crime, appellant overlooks the two most important words found in the above-referenced quote: "by law." Nowhere in the text of the Article 90 statute is lifting an order above the common ruck an element of the offense.[113] Alleyne, which pertained to the burden of proof required for

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[110] A more-developed factual record could show that another reason why CPT PE issued his order was because appellant now had a conviction for exposing his genitals to a child. Needless to say, this too is out of the ordinary.
[111] JA 031 (emphasis added); see also JA 043 (""The [appellant] intention[ally] disobeyed the authority . . . of [CPT PE]").
[112] Appellant's Br. 7, citing Alleyne v. United States, 133 S.Ct. 2151, 2155 (2013).
[113] See 18 U.S.C. § 890.

raising a minimum sentence, quoted one nineteenth century commentator as follows:

> *Where a statute* annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence . . . must expressly charge it. . . . [2 M. Hale, Pleas of the Crown *170]. Archbold 51 (15th ed. 1862).[114]

Although appellant selects compelling quotes from Alleyne and a related case, New Jersey v. Apprendi,[115] it must not be forgotten that the sentence enhancers at issue in both were rooted firmly in statute.

It is well-settled that an element cannot exist without legislative enactment. "'The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely the creatures of statute.'"[116]

Said this Court in United States v. Medina, within the context of comparing offenses to one another to determine whether one is a lesser included of the other, "*Since offenses are statutorily defined*, that comparison is appropriately

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[114] Alleyne, 133 S.Ct. at 2159-2160.
[115] 530 U.S. 466, 120 S.Ct. 2348 (2000).
[116] United States v. Castellano, 72 M.J. 217, 221 (C.A.A.F. 2013)(quoting Liparota v. United States, 471 U.S. 419 (1985), 424, 105 S.Ct. 2084.

conducted by reference to the *statutory elements* of the offenses in question."[117]

In United States v. Blockburger, which undergirds so many of this Court's multiplicity rulings, the Supreme Court looked to statute in order to determine the elements of a crime:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[118,119]

The ultimate offense doctrine is just that: a doctrine or an analytical aid. What appellant asks this Court to do is akin to asserting that an accused must be provident as to why various charged offenses arising from the same transaction are not multiplicious. Needless to say, the MCM does not compel such questioning during a providence inquiry.

There is a narrow exception to this rule. In United States v. Castellano, this Court held that, when consensual sodomy is charged under Article 125, UCMJ, the trier of fact must consider the "judicially created standards" established by United States v. Marcum because such standards "distinguish criminal conduct

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[117] Medina, 66 M.J. 21, 25-26 (C.A.A.F. 2008) (quoting Schmuck v. United States, 489 U.S. 705, 716-717 109 S.Ct. 1443 (1989))(emphasis added).
[118] 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932).
[119] See also Schmuck, 489 U.S. at 720, (". . . the elements approach involves a textual comparison of criminal statutes . . .").

from that which is constitutionally protected in different contexts."[120] Two years earlier, in United States v. Hartman, this Court required that an accused entering a guilty plea be provident to the Marcum factors.[121] However, CPT PE's order did not affect appellant's constitutionally-protected privacy interests. Moreover, appellant admitted that CPT PE's order was lawful and was provident thereto. Also, unlike Marcum, Castellano, and Hartman, appellant's disobedience still would have been criminal even if we were to assume either that CPT PE *hadn't* lifted his order above the common ruck or the sole reason why CPT PE gave the order was to increase appellant's punitive exposure (the only difference is that the government would not be able to prosecute appellant under Article 90, UCMJ). In any event, this Court plainly stated that "none of the *Marcum* factors are statutory elements."[122] If the Marcum factors are not "elements," then, contrary to appellant's assertion, neither is raising an order above the common ruck.

Appellant also confuses prosecutorial discretion with sentence enhancement. The two Supreme Court cases appellant relies upon, Alleyne and Apprendi, stand for the proposition

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[120] 72 M.J. 217, 222 (C.A.A.F. 2013) (citing Marcum, 60 M.J. 198 (C.A.A.F. 2004)). See also, Castellano, 72 M.J. at 221 ("We agree that none of the *Marcum* factors are statutory elements of Article 125, UCMJ.").
[121] 69 M.J. 467, 468 (C.A.A.F. 2011) (citing Marcum, 60 M.J. 198 (C.A.A.F. 2004)).
[122] Castellano, 72 M.J. at 221.

that any fact used to raise a minimum sentence or extend a sentence past its statutory maximum must be proved beyond a reasonable doubt. However, both cases are inapposite. Appellant was not sentenced above the maximum punishment for violating Article 90, UCMJ, nor was there a mandatory minimum that was raised. The government, in its discretion, simply charged appellant with a more serious crime that was supported by the facts. The government may charge desertion instead of AWOL, or even rape as opposed to simple assault, to the extent the facts genuinely support such a charging decision in a given case. Appellant's reliance upon Alleyne and Apprendi would have merit if, for instance, appellant had pled guilty to stealing military property of a value greater than $100, was not questioned by the military judge with respect to the value of the property or whether it belonged to the military, yet received a sentence surpassing the statutory maximum for theft of property worth less than $100.[123] In this example, the value of the property and ownership are statutory elements to which an accused must be provident before a military judge can accept a plea of guilty. In contrast, the ultimate offense doctrine is a analytical tool this Court uses to flesh out the lawfulness element; it is not a sentence aggravator.

[123] See Alleyne, 133 S.Ct. at 2159.

Appellant is mistaken when he writes, "[w]hether CPT PE's order 'rose above the common ruck' is an essential element or ingredient of the charged offense that must be understood by the appellant during the providence inquiry."[124] Lifting an order above the common ruck is not an "element" because nowhere does the statute require any such thing to be proved beyond a reasonable doubt. Rather, it is a "principal" [125] used to determine whether the first element of Article 90, UCMJ, has been proved or if the command merely sought to heighten punitive exposure. Regardless, as explained earlier appellant was provident to the fact that CPT PE lifted his order above the common ruck.

Finally, because the military judge properly listed and explained the elements of the offense and appellant demonstrated that he was provident, appellant waives this inquiry into "the factual issue of [his] guilt."[126]

D. If this Court finds that there is a substantial basis in law and fact to reject appellant's plea to the Article 90, UCMJ, offense, this court should affirm a lesser included offense of Article 92 (2), UCMJ (failure to obey other lawful order).

Law

Article 92(2), UCMJ, (failure to obey other lawful order) is a lesser-included offense of Article 90, UCMJ (willfully

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[124] Appellant's Br. 11.
[125] Hargrove, 51 M.J. at 408.
[126] R.C.M. 910(j).

disobeying superior commissioned officer). The elements of Article 92(2), UCMJ, are:

> (a) That a member of the armed forces issued a certain lawful order;
>
> (b) That the accused had knowledge of the order;
>
> (c) That the accused had a duty to obey the order; and
>
> (d) That the accused failed to obey the order.[127]

The maximum punishment for a violation of Article 92(2) normally would be confinement for 6 months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a bad-conduct discharge.[128] However, "if in the absence of the order . . . which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order . . . the maximum punishment is that specifically prescribed elsewhere for that particular offense."[129] The maximum punishment for a violation of Article 134, UCMJ (Restriction, Breaking) is confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.[130]

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[127] MCM, pt. IV, para. 16.b.(2).
[128] MCM, pt. IV, para. 16.e(2); R.C.M. 1003(b)(4).
[129] MCM, pt. IV, para. 16(e)(2) (Note).
[130] MCM, pt. IV, para. 102.e.

Argument

If this Court finds there is a substantial basis in law or fact as to whether appellant's commanding officer placed the full weight of his office behind his order to restrict appellant to post, this Court may nonetheless find appellant guilty of the lesser included offense of a violation of Article 92(2), UCMJ (violation of another lawful order).

Appellant is provident to the Article 92(2), UCMJ, violation. In both the stipulation of fact and the providence inquiry, appellant admitted facts to support all of the elements of the lesser included offense of failure to obey a lawful order. Appellant told the military judge he was "clearly given a command to stay on post and not break restriction";[131] that it was his superior commissioned officer who gave him the command;[132] that he believed it was a lawful command and that he understood the command;[133] and that appellant nonetheless repeatedly violated the order by leaving Fort Carson to reside at his girlfriend's off-post apartment.[134]

As previously discussed), Article 92 is a lesser-included offense of Article 90. To this end, the CMA stated United States v. Quarles:

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[131] JA 031-032.
[132] JA 031-033.
[133] JA 033.
[134] JA 031, 034, 043.

> Thus, footnote 5 acts to safeguard an accused charged with disobeying an order in violation of Article 92 from a sentence in excess of the lesser one otherwise imposable for a violation of a specific proscription which in reality constitutes the gravamen of his crime. But this provision clearly contemplates that offenses involving violation of orders may be charged and successfully prosecuted under Article 92 even where the facts would support another offense, lesser punishable, in the absence of the order. The conviction for violating Article 92 remains firm and may not be dismissed; only the sentence potentially is affected.[135]

Therefore, this Court may affirm the lesser included offense of Article 92(2), UCMJ (failure to obey other lawful order) and affirm the approved sentence under Sales and Winckelmann.

E. Even if this court dismisses The Specification of The Additional Charge (Article 90, UCMJ), this Court may affirm the approved sentence pursuant to Sales and Winckelmann.

Law

If a military court is convinced that, absent any error, "the accused's sentence would have been at least of a certain magnitude," then the court "need not order a rehearing on sentence, but instead may itself reassess the sentence."[136] In the event this Court determines that the Article 92 conviction should be dismissed, this Court should find that appellant is not entitled to any sentence relief and should affirm his conviction on the remaining charges.

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[135] Quarles, 1 M.J. at 233 (citing Loos, 4 U.S.C.M.A. 478, 16 C.M.R. 52).

[136] United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986).

In determining whether to reassess appellant's sentence, this court should thoroughly analyze "the totality of the circumstances."[137] When doing so, the following factors are significant: (1) whether there are changes in the penalty landscape; (2) whether appellant was sentenced by members or by a military judge alone; (3) whether the nature of the remaining offenses capture the gravamen of the criminal conduct included within the original offenses; and (4) "whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial."[138]

First, the "penalty landscape" would not change with the dismissal of the single Article 90, UCMJ, specification. The appellant also pled guilty to cocaine use and two AWOLs lasting for more than a year, one of which was terminated by apprehension.[139] The maximum punishment for using cocaine is five years' confinement.[140] The maximum punishment for an AWOL lasting for more than 30 days is 1 years' confinement and a dishonorable discharge.[141] The maximum punishment for an AWOL lasting for more than 30 days and terminated by apprehension is

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[137] United States v. Winckelmann, 73 M.J. 11 (C.A.A.F. 2013).
[138] Id. at 15-16.
[139] JA 022-023.
[140] MCM, pt. IV, para. 37.e.(1)(a).
[141] MCM, pt. IV, para. 10.e.(2)(c).

18 months' confinement and a dishonorable discharge.[142] As previously discussed, the maximum punishment for Article 90(2) is 5 years' confinement and a dishonorable discharge.[143] Despite the 12 year and 6 months maximum appellant could have faced if tried by a general court-martial, appellant received only 9 months' confinement and a bad-conduct discharge at a special court-martial. In addition to being curtailed by the inherent limits of a special court-martial, appellant's maximum sentence to confinement was further limited to 10 months by the quantum portion of his pretrial agreement.[144]

Second, appellant was sentenced by a military judge alone.[145] "As a matter of logic, judges of the Courts of Criminal Appeals are more likely to be certain of what a military judge alone would have done than what a panel of members would have done."[146]

Next, the remaining offenses for which appellant was found guilty make up the gravamen of appellant's conduct. Appellant absented himself twice for a combined period of approximately three and a half years.[147] Within two weeks of returning from his first absence, appellant wrongfully used cocaine in his

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[142] MCM, pt. IV, para. 10.e.(2)(d).
[143] MCM, pt. IV, para. 14.e.(2).
[144] JA 039; SJA 030.
[145] SJA 001-002, 026(App. Ex. IV).
[146] United States v. Moffeit, 63 M.J. 40, 44 (C.A.A.F. 2006) (Baker, J. concurring).
[147] JA 041, 043.

barracks room at Fort Carson and subsequently tested positive at a urinalysis.[148] After charges of desertion and wrongful use of a controlled substance were preferred and referred, and appellant was arraigned, appellant absented himself a second time on the date of his court-martial.[149] During his second absence appellant was incarcerated by civilian authorities for exposing his genitalia to a child.[150] After appellant was released from jail by civilian authorities, appellant again returned to his unit.[151] During sentencing, appellant's former first-sergeant testified that appellant's actions in going AWOL caused his unit to expend several man hours by four or five non-commissioned officers who searched for appellant.[152]

Finally, appellant's remaining offenses lend themselves to reassessment since AWOL and drug use fall under the rubric of "offenses . . . that a Court of Criminal Appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial by the military judges."[153] Undeniably, they are "offenses [that] fit within a particular normative range based on repetition and scale within

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[148] JA 041.
[149] JA 043.
[150] JA 043.
[151] JA 043.
[152] SJA 024-025.
[153] Moffeit, 63 M.J. at 44 (Baker, J. concurring).

a construct of individualized sentencing based on individual offenses."[154]

Based on the totality of the circumstances, appellant should not be granted any sentence relief. This Court should instead recognize that the military judge would have sentenced appellant to no less than the adjudged sentence of nine months' confinement and a bad-conduct discharge in the event appellant had been convicted on only the remaining two AWOL charges and the single charge of wrongful use of cocaine.[155]

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[154] Id.
[155] JA 039.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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July 18, 2014

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I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on July 18, 2014.

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