IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES *Appellee*, v. Airman First Class (E-3) **RICHARD K. PRICE, JR.,** USAF, *Appellant.*	))))))))	**APPELLANT'S REPLY BRIEF** USCA Dkt. No. 16-0611/AF Crim. App. Dkt. No. S32330

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

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby replies to the government's answer, dated 16 November 2016.

Argument

The military judge abused his discretion by forcing Appellant, over objection, to provide aggravating information that was unnecessary to establish a provident plea. The government urges this Court to find that Appellant waived his right to challenge the military judge's actions by failing to withdraw from the plea, and that the military judge's questions were proper because they elicited facts related to the charged conduct vice uncharged misconduct. The government further argues that there is no error because the questioning occurred during findings, when Appellant waived

his privilege against self-incrimination. Should this Court adopt the government's rationale, there would be no limit to what a military judge may ask an accused during findings; any inquiry into aggravating matters arguably related to the charged offenses is fair game, regardless of whether an accused provides information sufficient for a provident plea. This rationale misconstrues military precedent and is contrary to the Supreme Court's determination that the privilege against self-incrimination requires the State to produce evidence necessary to both convict and punish.

A. *Appellant did not waive the granted issue and the timing of the military judge's questions is irrelevant.*

The government concedes that Appellant "resisted or objected to the questions from the military judge now at issue." Gov't Br. at 13. The government nevertheless argues that Appellant waived any challenge to the propriety of these questions when he "knowingly abandoned" his right to remain silent and continued with the military judge as his sentencing authority. *Id*. The government further asserts that there was no error because the military judge elicited the information during the providence inquiry rather than presentencing. Gov't Br. at 21. Both arguments are incorrect interpretations of the law and facts.

A waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)

(internal quotations omitted). With unconditional guilty pleas, this Court typically holds objections waived, whether or not raised at trial, that relate to factual issues of guilt. *See, e.g.*, *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011). Although Appellant entered an unconditional guilty plea in this case, he timely objected to the military judge's questions specifically because they did not relate to the factual issues of his guilt. JA 21, 28-29, 47, 59-60. Appellant articulated that he used and distributed drugs on multiple occasions. JA 19, 27, 45. He did not attempt to suppress evidence or challenge the factual basis of his guilt; rather, he objected to the military judge eliciting aggravating evidence that was not necessary to establish his guilt. JA 28. Under these circumstances, there was no waiver.

Appellant also never waived his privilege against self-incrimination with respect to sentencing. In *Estelle v. Smith*, 451 U.S. 454, 462-463 (1981), the Supreme Court held that the Fifth Amendment applies equally in both findings and sentencing, and that the State may not compel an individual to testify against his will at sentencing. Relying on *Smith*, this Court's precursor held that an accused who pled guilty waived his right against self-incrimination only as to findings, and that his rights against self-incrimination "remained extant in the presentencing phase of his trial." *United States v. Cowles*, 16 M.J. 467, 468 (C.M.A. 1983) (internal

quotations and footnotes omitted).

In this case, Appellant acknowledged that his admissions during findings "may be used" against him in sentencing (JA 14), but he only waived his privilege against self-incrimination "insofar as a plea of guilty [would] incriminate [him]" (JA 72, 122). He did not waive this privilege with respect to sentencing; in fact, he was reminded of his right to remain silent during presentencing (JA 79) and then exercised it by submitting an unsworn statement rather than testifying under oath (JA 98-102).

Appellant similarly tried to exercise this right by objecting to the military judge's elicitation of aggravating evidence during findings. To hold that he waived his self-incrimination privilege because he ultimately answered the military judge's questions and failed to withdraw from the guilty plea amounts to an end run around *Smith* and *Cowles*: a fact finder could compel an accused to provide information relevant only to punishment merely by asking questions during findings rather than presentencing. "The availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Smith*, 451 U.S. at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967)). Accordingly, there was no waiver and the timing of the military judge's questions is irrelevant.

B. *The military judge's questions exceeded the legal standard necessary to establish Appellant's guilt.*

The government cites *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988) (Gov't Br. at 16) and *United States v. Irwin*, 42 M.J. 479 (C.A.A.F. 1995) (Gov't Br. at 18) to support its argument that a military judge can ask an accused *any* question during the providence inquiry so long as it relates to a charged offense (Gov't Br. at 13-14). However, *Holt* and *Irwin* merely pertain "to the use in sentencing of admissions made during a plea inquiry" (Gov't Br. at 18); they do not give a military judge free reign to ask an accused *any* question related to the charged offenses.[1] Appellant respectfully requests that this Court decline the government's invitation to now establish such a sweeping rule.

Under the government's proposition, a military judge – *sua sponte* or at the request of trial counsel – will have the unfettered authority to elicit solely aggravating facts during plea inquiries, regardless of whether such information is necessary to establish a provident plea, so long as his/her questions relate to a charged offense. Such a power would contravene the nature of the military's bifurcated trial system, as well as the government's

[1] In *Irwin*, it appears the accused provided aggravating evidence on his accord: "[his] recollection of the events was so vivid at two places during the providence inquiry that he spoke without interruption or prompting by the military judge for three and six pages, respectively, in the record of trial." 42 M.J. at 481.

sole responsibility to present aggravating evidence under Rules for Courts-Martial 1001(a).[2] It would also be contrary to the underlying rationale of *Smith* and *Cowles*: "that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers. . . ." *Smith*, 451 U.S. at 462 (internal citations omitted).

Appellant requests that this Court tailor its ruling to the particular facts of this case. Namely, that the military judge abused his discretion by forcing Appellant – over his objections – to admit to the specific number of times he used and distributed drugs, and that he sold codeine rather than give it away.

Appellant was charged with using and distributing drugs "on divers occasions." The military judge informed Appellant that "divers" meant "on more than one occasion." JA 17, 25, 43. Appellant consequently admitted his guilt by confessing to using cocaine "multiple times" (JA 19), using Alprazolam "multiple times" (JA 27), and distributing cocaine "at least two times" (JA 45). Contrary to the government's assertions, these admissions were not "generic" and "non-specific." Gov't Br. at 23. "Multiple" and "at least two times" are both factual assertions that mean more than once and

[2] The Government often utilizes a stipulation of fact to establish aggravating facts in guilty pleas. Pursuant to the pretrial agreement (JA 121), Appellant agreed to enter into a stipulation of fact but the government elected not to use one (JA 66).

thus satisfy the legal definition of "on divers occasions." Appellant also used the phrase "each time" to describe his offenses, further indicating the acts occurred more than once. JA 19, 27, 45.

Similarly, after the military judge informed Appellant that "distribute means to deliver to the possession of another" and that "proof of a commercial transaction is not required" (JA 43-44), Appellant confessed to providing another airman codeine upon the airman's request (JA 58). Once again, the military judge appeared unsatisfied with the legal definition of "distribution"[3] and asked Appellant – over defense objection – whether he sold the codeine or "just" gave it away; the latter phrase evincing that the military judge believed the selling of drugs more egregious. JA 59-60.

The government attempts to justify these questions as the military judge fulfilling his duty to elicit adequate facts to support the plea. Gov't Br. at 14-16. The government cites *United States v. Chancelor*, 36 C.M.R. 453 (C.M.A. 1996) and its progeny as requiring judges to conduct thorough and detailed plea inquiries. *Id*. Notably, these cases and the rules that followed were established to ensure an accused's guilty plea was truly

[3] The Uniform Code of Military Justice defines "distribute" as delivery to the possession of another; it does not require proof of sale. Manual for Courts Martial, Part IV, para. 37(c)(3).

voluntary (*see, e.g., United States v. Care*, 18 U.S.C.M.A. 535 , 538-539 (C.M.A. 1969)); they do not provide military judges *carte blanche* to elicit any information arguably related to the charged offenses after an accused has satisfied the legal elements.

The government's other citations, which discuss the scope of guilty pleas in greater detail, are similarly unavailing. For example, *United States v. Nance*, 67 M.J. 362 (C.A.A.F. 2009) (Gov't Br. at 11) and *United States v. Jordan*, 57 M.J. 236 (C.A.A.F 2002) (Gov't Br. at 16, 19, 24), primarily involve leading questions or those which elicit legal conclusions. *United States v. Weeks*, 71 M.J. 44 (C.A.A.F. 2012) (Gov't Br. at 20) and *United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004) (Gov't Br. at 16, 20, 24) both address whether an accused's conduct satisfied specific elements of the charged offenses. This case is different.

Appellant did not merely answer "yes" or "no," or give conclusory responses to the military judge's questions. He established his guilt by admitting facts that satisfied the legal definitions of "on divers occasions" and "distribution," respectively. By forcing Appellant to provide additional specificity, the military judge applied an incorrect standard of law and elicited purely aggravating information. Under these facts, Appellant respectfully requests this Court find the military judge abused his discretion.

C. *The aggravating facts improperly elicited by the military judge played a factor during sentencing.*

Appellant recognizes that the military judge's sentence matched the confinement limitation in his pretrial agreement. JA 118, 125. But this fact does not somehow make his punishment more reasonable. Gov't Br. at 32. The military judge viewed Appellant's sale of codeine as more egregious than "just" giving it away. JA 59-60. Trial counsel also believed the improperly elicited facts were important, referencing Appellant's specific number of drug uses in his recommendation that Appellant receive a Bad Conduct Discharge; the most severe sentence an accused can receive at a special court-martial. JA 103-104. Accordingly, Appellant was prejudiced.

WHEREFORE, Appellant respectfully requests that this Court remand his case for a new sentencing hearing.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 28 November 2016.

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